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Volume 25

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in the
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DISTRICT COURTS OF APPEAL
APPELLATE DEPARTMENT SUPERIOR COURT

ST. PAUL, MINN.
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1963

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David Blomgren	Deputy Clerk	Los Angeles
Robert A. Johnson	Deputy Clerk	Los Angeles

Attorney General

STANLEY MOSK	Los Angeles

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[1] Retired Oct. 31, 1962.

[2] Appointed to Supreme Court, took office Dec. 12, 1962.

DISTRICT COURTS OF APPEAL

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DISTRICT COURTS OF APPEAL—Continued

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LEONARD M. FRIEDMAN[5] .... Sacramento

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WILFRIED J. KRAMER	Deputy Clerk	Sacramento

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[3] Appointed to Supreme Court, took office Dec. 12, 1962.
[4] Became Presiding Justice Dec. 18, 1962.
[5] Took office Dec. 27, 1962.

DISTRICT COURTS OF APPEAL—Continued

FOURTH DISTRICT

San Diego—San Bernardino

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DONALD K. QUAYLE	Oakland

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Presiding Judge

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Judges

NORMAN A. GREGG	Martinez
WAKEFIELD TAYLOR	Martinez

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EDWARD L. KELLAS	Fresno

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MATT GOLDSTEIN	Fresno
MILO POPOVICH	Fresno

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[6] Retired Jan. 15, 1963.

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HAROLD UNDERWOOD	Trinity

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ROY GARGANO	Bakersfield

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JUDGES

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EDWARD L. BRADY	San Benito

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JUDGES

PHILIP B. LYNCH	Fairfield
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CALIFORNIA REPORTER
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G. M. RUSSELL, R. W. Russell and E. F. Chambers, Plaintiffs, Appellants and Respondents,

v.

UNITED PACIFIC INSURANCE COMPANY, the Travelers Indemnity Company, J. R. Holman, Andrew J. Thickstun and Alta Mae Thickstun, Defendants, Respondents and Appellants,

Jack M. James and Lavonna James, Defendants and Respondents.

Ernest W. BUTLER, Executor of the Last Will of Aaron Burr Butler, deceased, Plaintiff, Appellant and Respondent,

v.

UNITED PACIFIC INSURANCE COMPANY et al., Defendants, Respondents and Appellants,

Jack M. James et al., Defendants and Respondents.*

Civ. 39.

District Court of Appeal, Fifth District, California.

Oct. 5, 1962.

Rehearing Granted Oct. 30, 1962.

Actions for an accounting, damages and for recovery on injunction bonds. The Superior Court, Fresno County, Milo Popovich, J., entered judgment unsatisfactory to certain parties and appeals were taken. The District Court of Appeal, Brown, J., held that damages for value of ore mined by party securing preliminary injunction could not be recovered in an action against surety on injunction bond where such damages were not proximately caused by reason of the injunction.

Judgment modified in accordance with opinion, and as modified affirmed.

1. Appeal and Error ⇨773(2)

Appeals of parties who filed notices of appeal but who failed to file or join in filing an opening brief had to be dismissed. Cal. Rules of Court, rule 17(a).

2. Injunction ⇨243

Where it is necessary to defend on the merits in order to defeat a preliminary injunction, judgment after full trial against party who obtained the preliminary injunction, is, in effect, tantamount to an adjudication that he was not entitled to any injunctive relief at any time, and thereupon a right of action upon an injunction bond, if any, accrues in favor of the party enjoined.

3. Injunction ⇨235

A judgment on the merits against party who secured a preliminary injunction constituted a "final decision" that such parties were not entitled to the preliminary injunction within injunction bond conditioned on final decision that parties were not entitled to injunctive relief.

See publication Words and Phrases for other judicial constructions and definitions.

4. Injunction ⇨261

Recovery of damages because of grant of an injunction ultimately set aside is founded on equitable principles, and only

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* Opinion vacated 29 Cal.Rptr. 346.

such damages as were the actual, necessary, and proximate result of an injunction during time it was operative should be allowed.

5. Principal and Surety ⚷66(1)

While a court should be zealous in imposing liability for a hazard surety assumes under a bond, it should be equally zealous in protecting surety's right to be free from liability for damages not occurring within scope of the surety's contractual obligations.

6. Injunction ⚷252(4)

Damages for value of ore mined by party securing a preliminary injunction could not be recovered in an action against surety on the bond where such damages were not proximately caused by reason of the injunction.

7. Injunction ⚷252(8)

Reasonable counsel fees and expenses incurred in successfully procuring a final decision dissolving a preliminary injunction were recoverable as "damages" within condition of an injunction bond, to extent fees were for services that related to such dissolution.

See publication Words and Phrases for other judicial constructions and definitions.

8. Appeal and Error ⚷984(5)
Injunction ⚷252(8)

Fixing of a reasonable attorney fee for securing dissolution of a preliminary injunction covered by an injunction bond is discretionary, and appellate court would not disturb ruling thereon unless sum allowed was so exorbitant that its allowance constituted an abuse of discretion.

9. Injunction ⚷252(8)

Counsel fees reasonably paid to secure a dissolution of a preliminary injunction are chargeable against an injunction bond even though other matters are heard at the same time.

10. Injunction ⚷252(8)

Parties successful in securing dissolution of a preliminary injunction were not entitled to interest on money judgment for counsel fees payable as damages under injunction bond where it was only through judicial determination that a specific sum was deemed to be value of services performed by plaintiffs' counsel for which defendant was ultimately found liable.

◆

Rowell, Lamberson & Thomas and Breckinridge Thomas, Fresno, for plaintiffs, appellants and respondents G. M. Russell, R. W. Russell and E. F. Chambers.

Irvine P. Aten and Hayhurst & Quinlisk, Fresno, for plaintiff, appellant and respondent Ernest W. Butler, as executor of the last will of Aaron Burr Butler, deceased.

McCormick, Barstow, Sheppard & Coyle and Robert E. Coyle, Fresno, for defendant, respondent and appellant United Pacific Ins. Co.

Aubrey H. Seed, Fresno, for defendants, respondents and appellants The Travelers Indemnity Co., J. R. Holman, Andrew J. Thickstun and Alta Mae Thickstun.

No appearance for defendants and respondents Jack M. James and Lavonna James.

BROWN, Justice.

These two actions find their source in a prior action (Butler v. Holman, 146 Cal. App.2d 22, 303 P.2d 573 cert. den., 353 U.S. 930, 77 S.Ct. 718, 1 L.Ed.2d 723).

The estate of Aaron B. Butler, deceased, owned a parcel of unimproved realty near Coalinga, California. Jack M. James, Andrew J. Thickstun, and their respective wives, located the "Mistake Lode Mining Claim" on a lode deposit of chrome ore on the Butler property under the erroneous belief that the land was a part of the public domain. In October 1952 the locators leased to J. R. Holman, who entered into possession, developed the mine and commenced mining operations.

On June 24, 1955, the executors of the Butler estate, hereinafter referred to as "Butler," sued Holman, Thickstun and James, hereinafter referred to as "Holman group," for recovery of the land, an accounting, damages and injunctive relief.

A few days later, on July 1, 1955, Butler leased the mine to G. M. Russell, R. W. Russell and E. F. Chambers, hereinafter designated as "Russell-Chambers."

On July 5, 1955, the Holman group cross-complained against Butler to quiet title to the land and for injunctive relief, bringing in Russell-Chambers as cross-defendants, and obtained an ex parte temporary order restraining all cross-defendants from entering upon or interfering with the mine, upon filing a $5,000 bond issued by The Travelers Indemnity Company.

On July 22, 1955, after a vigorously contested hearing, the injunction sought by Butler was denied, and the Holman group obtained the preliminary injunction based on their cross-complaint, enjoining Butler and Russell-Chambers from entering upon or interfering with the mine and filed a $100,000 bond issued by United Pacific Insurance Company.

Upon a nonjury trial, there was a judgment for Butler against the Holman group for damages to October 3, 1955; the right was reserved to Butler to file an additional suit for damages and an accounting for an unknown quantity of ore mined subsequent to October 3, 1955, and either stockpiled in Holman's possession or sold by him. Judgment was rendered November 22, 1955, and entered December 13, 1955.

Upon being advised of rendition of the judgment the Holman group on November 23, 1955, surrendered possession of the property and mine to Butler but refused to deliver up the stockpiled ore. Holman subsequently milled and sold the stockpiled ore and retained the proceeds thereof.

The two actions here involved followed. Russell-Chambers sued in three counts, the first against Holman, Thickstun and James, seeking damages for ore converted, an accounting, attorneys' fees, and other incidental expenses not pertinent here; the second against United Pacific, seeking to recover $100,000; and the third against Travelers, seeking to recover $5,000.

Butler sued the same individual and corporate defendants, seeking to recover damages for ore converted, interest, attorneys' fees and an accounting from the individual defendants and the face amount of their respective bonds from the corporate defendants.

These two actions, consolidated for trial, were tried to the court sitting without a jury. Following trial, the court found that the temporary restraining order and preliminary injunction were valid in form, and the only method by which they could be terminated was trial on the merits; that defendants Holman, Thickstun and James were not entitled to the preliminary injunction; that Butler was entitled to $12,500 attorneys' fees, allocable $1,500 to the restraining order and $11,000 to the preliminary injunction, and damages of $8,536.22, being 7 per cent royalty reserved under the Butler to Russell-Chambers lease calculated on Holman's profit after October 3, 1955; that Russell-Chambers were entitled to attorneys' fees of $2,500, allocable $900 to the temporary order and $1,600 to the preliminary injunction; $2,165 surveyors' fees, allocable $663.50 to the temporary injunction and $1,501.50 to the preliminary injunction, and $45,255.89 principal.

Butler had judgment against all of the individual defendants for $8,536.22 principal and $12,500 attorneys' fees; against Travelers for $1,500 and against United Pacific for $19,536.22 ($8,536.22 principal and $11,000 attorneys' fees), the judgments on the bonds, if paid, to be set off against the individual judgments.

Russell-Chambers had judgment against all of the individual defendants for $45,255.89, attorneys' fees of $2,500 and surveyors' fees of $2,165; against Travelers for $1,563.50 ($663.50 surveyors' fees and $900 attorneys' fees); and against United Pacific for $48,357.39 ($45,255.89 principal, $1,600 Attorneys' fees and $1,501.50 surveyors' fees), with a similar set-off provision.

No interest prior to the date of the judgment was allowed.

[1] All parties, with the exception of Jack M. James and Lavonna James, filed notices of appeal. Travelers, Holman, Thickstun and Thickstun failed to file or join in filing an opening brief, and their appeals must be dismissed. (Cal. Rules of Court, rule 17(a).) Butler and Russell-Chambers presented joint briefs. The net result for our consideration is an appeal by defendant United Pacific as to the judgments against it, with plaintiffs Butler-Russell-Chambers resisting, and a cross-appeal by Butler-Russell-Chambers, with United Pacific resisting. For convenience, we shall refer to United Pacific as defendant, and to Butler-Russell-Chambers as plaintiffs.

Appeal of United Pacific

By the terms of the bond which supported the preliminary injunction, defendant undertook to pay to the plaintiffs in this action, who were cross-defendants in the injunction suit, such damages, not exceeding the sum of $100,000, "* * * as said parties may sustain by reason of the said injunction if the court finally decides that the cross-complainants be not entitled thereto." The statutory language of section 529 of the Code of Civil Procedure, providing for an undertaking upon the granting of an injunction, is substantially similar.

Defendant's first group of contentions and arguments require a determination of whether, in the light of the particular facts here present, judgment on the merits constitutes a "final decision" within the meaning of the terms of the bond.

Many of the cases to which we have been referred require but brief comment. They are not determinative of our problem. For example, Asevado v. Orr, 100 Cal. 293, 34 P. 777, involved a voluntary dismissal by the plaintiff which the court deemed to be a confession that he was not entitled to the injunction and permitted recovery. In Fowler v. Frisbie, 37 Cal. 34, an order dissolving an injunction was held to be a prima facie adjudication that there was no foundation for the injunction, and recovery was allowed. In Wilshire Mortgage Corp. v. O. A. Graybeal Co., 41 Cal.App.2d 1, 105 P.2d 996, a dismissal entered by stipulation of the parties was deemed to be neither a confession nor an adjudication that the injunction was wrongfully issued, and the court properly denied recovery. In none of those cases was judgment on the merits considered.

Defendant cites and relies upon the case of Curtiss v. Bachman, 110 Cal. 433, 42 P. 910. There the court held that a successful motion to dissolve an injunction obtained ex parte, or a successful appeal from an order granting an injunction, after notice and hearing, gives rise to liability on the bond for damages, but if the defendant, instead of attempting to rid himself of the restriction, seeks to prevent the issuance of a permanent injunction or elects to defend the action on the merits, the expense of counsel fees thus incurred is an incident of suit and not recoverable as damages sustained by reason of the injunction. (See also Bustamente v. Stewart, 55 Cal. 115; Lambert v. Haskell, 80 Cal. 611, 22 P. 327.)

However, in the later case of Reachi v. National Auto. & Cas. Co., 37 Cal.2d 808, 236 P.2d 151, the California Supreme Court recognized and restated the general rule that expenses incurred in the defense of a prior attachment suit are not recoverable in a subsequent action on the bond, if the attachment might have been vacated on proper motion without incurring such expenses, but held that such expenses are recoverable items of damages in an action on the bond where the attachment is not subject to a motion to vacate or dissolve it, being valid and regular on its face, and it is necessary to defend the main action in order to defeat the attachment. Defendant's arguments that the Reachi rule, laid down in an action on an attachment undertaking, is inapplicable to this case arising on an injunction bond are without merit. With respect to allowances for incidental expenses incurred by reason of a wrongful levy of attachment or wrongful issuance of an injunction, the courts of this state have applied the same principles. Cases arising on injunction bonds and cases arising on attachment bonds are cited without any distinction being made (Reachi v. National Auto. & Cas. Co., supra; Le Fave v. Dimond (dicta), 46 Cal.2d 868, 871, 299 P.2d 858, 60 A.L.R.2d 939; Ideal Heating Corp. v. Royal Indem. Co., 107 Cal.App.2d 662, 237 P.2d 521). Neither logic nor public policy would be served by a determination that recovery will be permitted a plaintiff in an action on an attachment undertaking and denied a plaintiff in an action on an injunction bond where, in each case, it was necessary to defend on the merits in order to rid the plaintiff of the wrongful attachment or preliminary injunction.

[2] We paraphrase the Reachi rule: Where it is necessary to defend on the merits in order to defeat a preliminary injunction, judgment after full trial against the party who obtained the preliminary injunction is, in effect, tantamount to an adjudication that he was not entitled to any injunctive relief at any time, and that thereupon a right of action upon the injunction bond accrues in favor of the party enjoined. (See also Robinson v. Fidelity & Deposit Co., 5 Cal.App.2d 241, 42 P.2d 653; Rice v. Cook, 92 Cal. 144, 147, 28 P. 219; 27 Cal. Jur.2d, Injunctions, § 108, p. 233.) As to the accrual of liability and right of action on the bond, there is no distinction "* * * whether the single relief of injunction is sought and a temporary injunction secured pending the disposition of the case, or whether the temporary injunction is merely ancillary to a different remedy." (28 Am.Jur., Injunctions, § 388, p. 853.)

[3] In our case the order for issuance of the preliminary injunction was granted after a full and contested hearing; the injunction was valid and regular on its face; and an appeal from the order obviously would have been futile. There was no method provided by law whereby plaintiffs could have been relieved of the restraint save by trial on the merits. It is clear that this case falls squarely within the rule of Reachi. We conclude that judgment after trial on the merits in the injunction suit constituted a "final decision" that the Holman group was not entitled to the preliminary injunction.

Defendant next contends that the direct damages, i. e., damages for the value of ore mined by Holman during the life of the bond and subsequently sold by him, may not be recovered in an action against it on the bond for the reason that such damages were not *proximately caused by reason of the injunction.* In support of its contention, defendant argues that a showing that damages occurred during the period of the bond is not sufficient to cause liability to attach; the proof must disclose that such damages occurred by reason of the injunction and bond. This contention is sound and requires modification of the judgment.

[4–6] The recovery of damages is founded on equitable principles, and only such damages as were the "actual, necessary, and proximate result of the injunction during the time it was operative" (43 C.J.S. Injunctions § 309, p. 1091) should be allowed. While a court should be zealous in imposing liability for a hazard the surety assumes, it should be equally zealous in protecting the surety's right to be free from liability for damages not occurring within the scope of the surety's contractual obligation. As has often been said:

> "* * * a surety on an official bond undertakes no liability for anything which is not within the letter of his contract. The obligation is *strictissimi juris*; that is, he has consented to be bound only within the express terms of his contract and his liability must be found within that contract or not at all." (Krebs v. Travelers Indem. Co., 192 Cal.App.2d 83, 85, 13 Cal.Rptr. 352, 353; Bank of America v. Dowdy, 186 Cal.App.2d 690, 692, 9 Cal.Rptr. 779.)

With these principles in mind, we turn again to the record.

It must be remembered that Holman had been continuously in actual possession of and conducting mining operations upon the land, under a good faith but mistaken claim of right, for more than two years prior to the filing of suit by Butler and prior to the time defendant issued the bond. The principal issue at the hearing on the applications of both sides for a preliminary injunction and the principal issue at trial on the merits was the establishment of a boundary line, the location of which had been lost with the passing years. This is not the typical case of an owner with clear title to land having well-defined and well-known boundary lines who might lawfully have ousted a trespasser but for the injunctive restraint. Rather, it is a case where the claimed right to possession and ownership of Butler-Chambers and the same right claimed by the Helman group depended upon the position in which the court in the injunction suit, after lengthy trial, the taking of expert testimony and the consideration of conflicting surveys, placed the southern boundary line of the real property in dispute. We cannot hold that one of two persons, each claiming a bona fide ownership interest in land, which claims are of such a nature that they can be determined only by a judicial decree may, prior to that determination, be permitted and encouraged by the law to wage a deadly combat, if necessary, to gain entry to the claimed land.

What we have here said applies with equal force to Butler's lessees. The lease whereby their interest in the land was acquired conferred upon them no greater right to obtain actual possession than was enjoyed by Butler at the time the lease was made.

We shall not unduly lengthen this opinion by discussing the various cases to which plaintiffs have referred us for the purpose of showing, as it may thus be shown, that they are inapposite when applied to the facts of this case. In each there was a showing that the party enjoined sustained damages because the injunction either ousted him from the possession of property or restrained him from utilizing property in his possession. Our case does not fit within the mold cast by decisions dealing with either of those situations.

Nor do the cases of Walker v. Chanslor, 153 Cal. 118, 126, 94 P. 606, 17 L.R.A., N.S., 455; McCarty v. Fremont, 23 Cal. 196, 198; and Maher v. Wilson, 139 Cal. 514, 518, 73 P. 418, aid plaintiffs. In each of those cases actions for damages for assault and battery or false imprisonment were brought against the owners of property. Recoveries were denied on the theory that the plaintiff's injuries were shown to have been sustained at the hands of an owner exercising a right to possession of his property, using necessary force to regain possession. Injunctive relief was not involved.

We do not decide that under no circumstances can an owner out of possession sustain damage by reason of an injunction of restraint. We do decide as a matter of law that, for the reasons which we have stated, the plaintiffs in this case did not sustain any direct damages which they would not have sustained had there been no injunction.

[7–9] Defendant next contends that there is insufficient evidence to support the award of attorneys' fees and surveyors' fees which were allocated to dissolution of the preliminary injunction. It is now well settled that reasonable counsel fees and expenses incurred in successfully procuring a final decision dissolving the injunction are recoverable as "damages" within the meaning of the language of the undertaking, to the extent that those fees are for services that relate to such dissolution (Reachie v. National Auto. & Cas. Co., supra, 37 Cal.2d 808, 236 P.2d 151; Soule v. United States F. & G. Co., 82 Cal.App. 572, 255 P. 886). The fixing of a reasonable fee rests in the discretion of the trial judge and an appellate court will not disturb the ruling unless "the sum allowed is so exorbitant that its allowance constitutes a palpable and plain abuse of discretion." (Mountain View Union High School District v. Ormonde, 195 Cal.App.2d 89, 96, 15 Cal.Rptr. 461, 465; State ex rel. State Public Works Board of California v. Westover Co., 140 Cal.App.2d 447, 450, 295

P.2d 96.) Counsel fees reasonably paid to secure a dissolution of the injunction are chargeable against the bond, even though other matters were heard at the same time (Mason v. U. S. Fid. & Guar. Co., 60 Cal.App.2d 587, 141 P.2d 475). In such a case it is for the trial court, in its discretion, to make a proper allocation. A trial judge is necessarily familiar with the value of an attorney's services, and when the nature and extent of such services is made known to the court, its own experience qualifies it to fix their value. (Spencer v. Collins, 156 Cal. 298, 104 P. 320.)

In our case there was necessarily involved in the single trial two actions, i. e., the action brought by Butler and the cross-action interposed by the Holman group. As has been mentioned, Holman's cross-complaint formed the basis for issuance of the injunction. It seems clear that counsel fees incurred in the prosecution of Butler's action cannot be ascribed to the injunction. It is equally clear that plaintiffs are entitled to recover as damages such counsel fees and necessary expense as are properly allocable to defense of the cross-complaint. It would serve no useful purpose for this court to enter upon an exercise in mathematics by summarizing the extensive testimony relating to counsel fees. Suffice it to say that counsel for plaintiffs testified as to the nature and extent of their services. Their total fees covering all services in the principal suit, commencing with a time prior to the filing of the Butler complaint and terminating with the final decision on appeal, amounted to $46,156.78. Of this amount the trial court allocated $12,600 to necessary legal services rendered in procuring a dissolution of the preliminary injunction. We cannot say that such allowance constitutes an abuse of discretion.

Mr. Ross, a surveyor engaged by Russell-Chambers, testified in detail as to the services which he performed. The reasonableness of his fee of $2,165 is not questioned. The record discloses that he segregated and billed separately for the value of services performed during the life of the restraining order and those performed during the period the preliminary injunction was operative. Defendant argues that, by the terms of the Butler to Russell-Chambers lease, the lessees undertook to establish the boundary line at their own expense and the surveyor's fees, being a necessary part of that expense, were incurred by reason of their contractual obligation and not by reason of the injunction. But the Holman group, at whose instance the bond was issued, brought Russell-Chambers into the action as new parties cross-defendant, and Russell-Chambers were thereby required to cause a survey to be made and incur expenses therefor in order to establish the boundary line and thus defend against the cross-complaint. In the exercise of its discretion, the trial court obviously determined that the knowledge gained by the survey was an important factor in defeating the cross-complaint and the injunction with it, and it was immaterial that that knowledge also operated to resolve the same issue involved in the action brought by Butler. We find no abuse of discretion and leave the expense of the survey where the trial court laid it.

Plaintiffs' Appeal

[10] Plaintiffs contend that the court erred in refusing to allow interest on the money judgments for direct damages and counsel fees. No contention is made that they are entitled to interest on the allowance of surveyor's fees. Our decision herein that plaintiffs are not entitled to recover from defendant surety damages for the value of the ore eliminates the question of interest on those amounts.

Plaintiffs cite and rely upon the case of Painter v. National Surety Co., 36 Cal.App. 44, 47, 171 P. 803, in which a judgment providing for interest on the allowances for counsel fees and expenses incidental and necessary to the plaintiff's successful endeavor to secure the dissolution of an injunction was held to be proper. However, in that case the court pointed out that no contention was made that the amounts found to have been expended by the plaintiff were uncertain or incapable of being made certain by calculation, and the interest was therefore allowed under the authority of section 3287 of the Civil Code. In our case, such contention is convincingly made by defendant. It was only through judicial determination that a specific sum was deemed to be the value of services performed by plaintiffs' counsel for which defendant was liable. It was first necessary for the probate court to fix and approve the amount to be allowed for extraordinary services rendered in behalf of the Butler estate in the injunction suit. In turn, the court below had the task of determining in this action the reasonable value of services actually rendered in procuring dissolution of the injunction. It was only through that final legal adjudication that the amount for which defendant was liable was made certain. We are of the opinion that the court properly decided that plaintiffs are not entitled to interest on the allowance for attorneys' fees which it ultimately found to be due from defendant for any period of time preceding the judgment.

The unperfected appeal of J. R. Holman, Andrew J. Thickstun, Alta Mae Thickstun and the Travelers Indemnity Company is dismissed.

The cause is remanded to the superior court and that court is directed to modify the judgment by deleting from that portion which authorizes a recovery in favor of Ernest W. Butler, as executor, and against defendant United Pacific Insurance Company the sum of $8,536.22, and by deleting from that portion which authorizes a recovery in favor of G. M. Russell, R. W. Russell and E. F. Chambers and against United Pacific Insurance Company the sum of $45,255.89. As so modified the judgment is affirmed. No appellant shall recover costs on appeal.

STONE, Acting P. J., concurs.

CONLEY, P. J., deeming himself disqualified, did not participate.

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208 Cal.App.2d 52

CUPERTINO SANITARY DISTRICT OF SANTA CLARA COUNTY, Plaintiff and Appellant, v. BOARD OF SUPERVISORS OF SANTA CLARA COUNTY, Paul R. Teilh and G. E. Tarlton, Defendants and Respondents. 52

Civ. 20065.

District Court of Appeal, First District,
Division 2, California.
Oct. 1, 1962.

Rehearing Denied Oct. 18, 1962.
Hearing Denied Nov. 28, 1962.

Action by county sanitary district against county board of supervisors and others for declaratory judgment determining whether county or the sanitary district was required to accept filing of a petition for recall of all of directors of sanitary district and to bear cost of conducting the recall election. From an adverse judgment of the Superior Court, Santa Clara County, Byrl R. Salsman, J., the sanitary district appealed. The District Court of Appeal, Agee, J., held that county sanitary district and not the county was required to accept the petition for recall and to bear the cost of conducting the recall election.

Judgment affirmed.

Counties ⟹67

County sanitary district and not the county itself was required to accept a petition for recall of each member of board of directors of sanitary district and to bear cost of conducting recall election. West's Ann.Health & Safety Code, §§ 6400, 6401, 6489.5, 6563; West's Ann.Elections Code, §§ 27200–27216, 27201, 27202.

Sam J. Anderson, Saratoga, Robert W. Harrison, San Francisco, for appellant.

Spencer M. Williams, County Counsel, John R. Kennedy, Asst. County Counsel, San Jose, for respondents.

AGEE, Justice. 54

Plaintiff Cupertino Sanitary District brought this action for declaratory relief against the Board of Supervisors of Santa Clara County, the county clerk, and the county registrar of voters. The complaint alleged that an actual controversy had arisen between the parties as to the proper interpretation of section 6489.5 of the Health and Safety Code and section 11052 of the Elections Code.[1] Plaintiff accordingly prayed for a judicial construction of these statutes and for a determination of whether defendant county or plaintiff sanitary district was required to accept filing of a certain recall petition and bear the costs of conducting the recall election.

The cause was submitted for decision upon stipulation by the parties to the following facts: That one John Ashley attempted to serve a petition calling for a recall election of each member of the board of directors of plaintiff sanitary district upon the county clerk and the county registrar of voters; that upon the advice of the county counsel, service of the petition was refused; that John Ashley then attempted to make service upon the secretary of plaintiff sanitary district; that plaintiff's board of directors passed a minute order instructing the secretary to refuse service of the petition; that by agreement of county counsel and district counsel and without prejudice to the legal rights of either party, the county registrar of voters checked the petition and reported that there were valid signatures in excess of the required 20 per cent of the votes cast in the last general election of the district. The matter was submitted upon the foregoing stipulation and the points and authorities of counsel.

The trial court found that plaintiff sanitary district was required to accept the recall petition for filing, to conduct the recall election, and to bear the cost of the election. From the judgment so declaring, plaintiff now appeals.

Reserving all legal rights and objections, the board of directors of the sanitary district, on March 1, 1961, ordered a ⊥55 special election to be held on May 9, 1961. The recall was defeated two to one, and the validity of the recall election is not involved on this appeal. The only "unfinished business" in connection with this particular matter is whether the district or the county should bear the costs of the election.

The sole question raised by this appeal is whether the lower court was correct in its construction of the statutes governing the recall of appellant's directors. The key provision, section 6489.5 of the Health and Safety Code, reads as follows: "Every member of the board [of a sanitary district][2], whether elected or appointed, may be recalled by the voters in accordance with the recall provisions of Chapter 2 of Division 13 of the Elections Code applicable to officers of counties." Chapter 2 of Division 13 of the Elections Code (encompassing sections 11050–11066), as it read at all times here relevant, set forth the procedure to be followed in the recall of county officers.[3] Pursuant to section 11051,[4] "the holder of any elective office of any county or of any district,[5] who has held his office at least six months, may be recalled at any time by the voters, by means of the recall procedure set forth in this chapter." Section 11052[6] sets forth the following procedure: "A petition demanding the election of a successor to the person sought to be recalled shall be filed with the county clerk. The petition shall be signed by voters equal in number to at least 20 percent of the entire vote last cast within the county for all candidates for the office which the incumbent, sought to be removed, occupies. * * *"

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[1] It may be noted that the Elections Code has since been recodified by the Legislature, effective September 15, 1961. (Stats.1961, ch. 23.) Former sections 11052 of the Elections Code and 4021a of the Political Code have been combined and retitled section 27202 of the Elections Code. Throughout this opinion, however, all references are to the code sections as they were numbered prior to the 1961 changes.

[2] See Health and Safety Code, sections 6400 and 6401.

[3] Sections 11050–11066 of Chapter 2, Division 13 of the Elections Code have since been recodified as sections 27200–27216 of Chapter 2, Division 14 of the Elections Code. (See Stats.1961, Ch. 23.)

[4] Stats.1953, Ch. 821, p. 2135; now Elections Code, section 27201.

[5] "District" as used in this section does not refer to sanitary districts but only to supervisorial and judicial districts. (See Elec.Code, § 11050, Stats.1953, Ch. 821, p. 2135, now § 27200.) Sections 11051 et seq. therefore become applicable to sanitary districts only by virtue of Health and Safety Code, section 6489.5.

Section 11055[7] required the county clerk, within 10 days from the date of the filing of the petition, to ascertain whether or not the petition was signed by the requisite number of voters. Section 11057[8] provided that if the petition were ⌊56 found to be sufficient, the county clerk should then submit it to the county board of supervisors. The board was then required to order a special election for the purpose of determining whether the voters would recall the officer.

The entire controversy between appellant and respondents hinges on the wording of Health and Safety Code, section 6489.5 that the directors of a sanitary district may be recalled "in accordance with" the recall provisions applicable to county officers. It is appellant's position that the reference in section 6489.5 was designed to incorporate the *literal* wording of the relevant sections of the Elections Code. Pursuant to Elections Code, sections 11052, 11055, and 11057, the recall petition must therefore be filed with the county clerk and the recall election conducted and paid for by the county. Respondents, on the other hand, contend that Health and Safety Code, section 6489.5 was intended to incorporate only the "mechanics" of the recall procedure applicable to county officers. Respondents therefore assert that the relevant Election Code sections ought to be read in such a manner as to substitute "district secretary" for "county clerk" in sections 11052, 11055, and 11057, and "district board of directors" for "board of supervisors" in section 11057.

Research discloses no appellate court decision bearing upon the question raised by this appeal. In Wallace v. Ansill, etc. et al. (No. 72023, May 16, 1957), the Superior Court of Orange County was called upon to interpret the same code sections. The trial court found that section 6489.5 of the Health and Safety Code was designed to incorporate the literal wording of the applicable sections of the Elections Code. It accordingly rendered a declaratory judgment requiring the county rather than the sanitary district to "accept and process" a petition to recall three sanitary district directors.

Opposed to this view is an opinion of the Attorney General of California construing a Public Utilities Code section analogous to Health and Safety Code, section 6489.5. (See 31 Attorney General's Opinions, p. 207, May 20, 1958.) Section 16004 of the Public Utilities Code provides that every elective officer of a public utility district "is subject to recall by the voters of the district, pursuant to general law with reference to recall of county officers." The questions presented for consideration by the Attorney General were (1) whether such a recall proceeding was within the province of the district itself or the county board of supervisors, and (2) if the matter ⌊57 were within the province of the district, whether the county clerk or the district clerk and ex-officio secretary was charged with the duty of examining and certifying the recall petition. The Attorney General concluded that recall of a district officer was within the province of the district and that the duty of examining and certifying recall petitions was one to be performed by the district secretary. In so concluding, the Attorney General noted that the district board of directors, pursuant to the Public

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[6] Stats.1953, Ch. 821. p. 2135; now Elections Code, section 27202.

[7] Stats.1939, ch. 26, p. 300; now Elections Code, section 27205.

[8] Stats.1955, ch. 100, p. 566; now Elections Code, section 27207.

Utilities Code, was empowered to call elections to elect board members, elections to acquire public utility works, bond elections, and annexation elections. The only elections which were required to be called by the county board of supervisors were those to determine whether a public utility district should be formed, to elect its first board of directors, and to determine if it should be disincorporated. The Attorney General then stated: "The general pattern is to place the calling of elections which are held in the due course of the administration of a public utility district within the province of the board of directors of the district, the county board of supervisors being involved only in elections concerning formation and dissolution of a district. Consistent with this general pattern, we believe that the Legislature, by incorporating the general law provisions of the Elections Code by reference in section 16004, did not intend to disturb this pattern, but merely intended to incorporate *the mechanics* of the recall procedure, leaving the responsibility for calling and administering the election with the district board of directors. * * *

"In summary, we conclude that when a recall election is to be held in a public utilities district, the provisions of the Elections Code as to recall of county officers apply with the qualification that wherever that Code reads 'board of supervisors' that it be deemed to read 'board of directors,' and wherever it reads 'county clerk' it be deemed to read 'clerk and ex-officio secretary.'" (Attorney General's Opinions, supra, pp. 208–209.)

In the case at bar, the lower court chose to apply a similar construction to Health and Safety Code, section 6489.5. In its memorandum decision, the court referred with approval to the above-quoted opinion of the Attorney General. The court then when on to state that public utility districts and sanitary districts were both entities which, in general, conducted their own affairs and held their own elections. It was therefore ⌊58 logical to assume that the Legislature did not intend to interfere with this general pattern of holding elections but had intended merely to incorporate the mechanics of the recall procedure, leaving the responsibility for calling and administering elections within the districts to their respective boards of directors. The court also pointed out that a sanitary district, as a political entity entirely separate and apart from the county, has its own funds and its own means of financing its activities through taxes and bonds. To require the county to pay for the cost of conducting the proposed recall election would be to impose upon county taxpayers an item of expense arising from the administration of a district over which the vast majority of county taxpayers have no control and from which they receive no benefit. The court accordingly concluded that Health and Safety Code section 6489.5 was not designated to relieve appellant sanitary district from the duty of conducting its own recall elections.

Appellant's primary argument in contending that the judgment should be reversed is that the court was without power to ignore the express wording of the applicable Elections Code sections requiring the "county clerk" and the county "board of supervisors" to administer and finance an election to recall the directors of a sanitary district. Appellant thus asserts that the lower court in effect rewrote the applicable provisions of the Elections Code and thereby substituted its own views for those of the Legislature.

Appellant, in so contending, overlooks the fact that the relevant sections of the Elections Code become applicable to sanitary districts solely by virtue of Health and Safety Code, section 6489.5. In order to determine whether the Legislature intended the *literal wording* of the provisions of the Elections Code to apply to sanitary districts, it is first necessary to construe the language of section 6489.5 of the Health and Safety Code. Since that section provides only that the directors of sanitary districts may be recalled "in accordance with," instead of "as provided by," the recall provisions applicable to county officers, it is certainly open to question whether the Legislature intended to incorporate the literal wording or only the procedure therein prescribed.

The word "accordance" has been defined to mean in "agreement; harmony; concord; conformity." (See City and County of S. F. v. Boyd, [1943] 22 Cal.2d 685, 690, 140 P.2d 666.) In determining the precise meaning of the word ⌊59 "accordance," as used in section 6489.5, the lower court looked to the related Health and Safety Code sections which empower a sanitary district to conduct its own elections and to levy and collect taxes for the payment of its expenses. In concluding that the Legislature did not intend to incorporate the literal wording of the pertinent provisions of the Elections Code, the court was not "rewriting" these statutes but was merely construing the broad language of section 6489.5 in such a manner as to render it consistent with other legislation delineating the powers and duties of sanitary districts.

Appellant next asserts that the Legislature must have intended the Elections Code sections to be applied literally for the reason that the county clerk (or county registrar of voters, if there be one) is the custodian of the register of voters and thus has access to the records necessary to check the validity of a recall provision (Elections Code, §§ 17, 19). This argument is wholly without merit. Pursuant to section 6563 of the Health and Safety Code, a sanitary district, when conducting elections, is specifically directed to consult the great register of the county. As the Attorney General aptly pointed out in his above-mentioned opinion, "the fact that the county clerk is custodian of the Great Register is immaterial in determining who shall verify signatures and certify the sufficiency of the recall petition." (31 Attorney General's Opinions, p. 209.)

Appellant's next argument similarly sheds little light on the legislative intent behind the enactment of Health and Safety Code, section 6489.5. Appellant asserts that the Legislature, by providing that elections to recall the officers of supervisorial and judicial districts, as well as of counties, were to be conducted and paid for by the county (Elections Code, sections 11050 and 11051[9]), thereby indicated that it did not intend for separate districts, such as appellant, to pay the cost of conducting recall elections out of their own funds. Appellant contends that the lower court thus erred in concluding that it was furthering the legislative purpose by construing Health and Safety Code, section 6489.5 in such a manner as to shift the expense of a sanitary district recall election from the county taxpayers as a whole to the taxpayers within the district itself. Appellant overlooks the fact that supervisorial and judicial districts are not independent entities possessing ⌊60 separate funds with which to finance their activities. A supervisorial district serves no other purpose than to divide the county into geographic units, each of which shall elect one member to the county board of supervisors. (Gov.Code, §§ 25000, 25001, 25040.) A judicial district is similarly a geographic division of the county created for the purpose of electing judges and other officers of municipal and justice courts (Gov.Code, § 71040). Since neither district possesses any authority to conduct its own elections or to maintain its own separate funds, it would indeed be surprising had the Legislature required it to bear the cost of conducting an election to recall its officers.

A sanitary district, such as appellant, presents an entirely different situation. Since it is empowered to conduct and finance all elections arising during the due course of its administration, it would be unreasonable to assume that the Legislature intended to apply a different rule to recall elections. Furthermore, a recent enactment affirmatively indicates a legislative intent to require districts *with separate fund raising powers* to finance their own recall elections. In establishing Small Craft Harbor Districts in 1959, the Legislature provided that district directors might be recalled "in the same manner as officers of counties" under Chapter 2 of Division 13 of the Elections Code, except that the term "county" should mean "district," the term "board of supervisors" should mean "board," and the term "county clerk" should mean "secretary." (Harbors and Navigation Code, §§ 7120, 7122.)

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[9] Now sections 27200 and 27201

Appellant's final argument is that the Legislature could not have intended to authorize the directors of a sanitary district to conduct an election for their own recall and, in particular, to authorize the district secretary, who is also a director, to verify the signatures on a petition for his own recall. This argument is predicated upon Elections Code, section 11058,[10] which requires that when the county clerk is the officer sought to be recalled, his duties shall be performed by some other person designated by the board of supervisors.

The point has merit but we believe it to be unsound. Health and Safety Code, section 6489.5 incorporates by reference all of the provisions of Chapter 2 of Division 13 of the Elections Code. Since section 11058 is included within Chapter 2, the Legislature obviously intended it to apply to elections to recall the directors of a sanitary district. Accordingly, if the ⌊61 terms "secretary" and "district board of directors" are substituted for "county clerk" and "board of supervisors," it becomes apparent that the district board, pursuant to section 11058, must appoint another to perform the secretary's duties in connection with a petition seeking to recall the secretary. Appellant fails to show, however, that the decision of the lower court was in any manner contradictory to this interpretation of section 11058. The sole duty which the county clerk or district secretary is required to perform in connection with a recall petition is to ascertain whether or not the petition was signed by the requisite number of voters in accordance with section 11055. In the case at bar, the cause was submitted for decision upon the express stipulation of the parties that the county registrar of voters, by agreement of counsel, had checked the petition and reported valid signatures in excess of the required 20 per cent of the votes cast in the last general election of the district. It thus remained only for the trial court to direct appellant district to accept filing of the petition and conduct and finance the required election.

Judgment affirmed.

KAUFMAN, P. J., and SHOEMAKER, J., concur.

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208 Cal.App.2d 31

⌊31 **CONSTRUCTION MACHINERY CO., a corporation, Plaintiff and Respondent,**

v.

WILLARD & RODMAN, INC., a corporation, et al., Defendants and Appellants.

Civ. 6776.

District Court of Appeal, Fourth District, California.

Sept. 28, 1962.

Rehearing Denied Oct. 23, 1962.

Seller's action against buyer who had purchased truck crane under conditional sales contract and against buyer's guarantor, together with action on open book account for amounts due on a tractor also sold buyer. The Superior Court, San Diego County, Byron F. Lindsley, J., gave judgment for seller for the alleged deficiency in the terminated conditional sale, and gave judgment on the alleged open book account, and the defendants appealed. The District Court of Appeal, Shepard, J., held that seller could not be deemed to have elected to treat the sale as complete, nor could deficiency judgment be entered where trial disclosed no notice or sale of repossessed truck crane even up to time of trial, but that evidence sustained judgment on the open book account.

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[10] Stats.1939, Ch. 26, p. 301; now Elections Code, section 27208.

Deficiency judgment reversed but judgment on open book account affirmed.

1. Appeal and Error 🔑171(1)

An appellant cannot, on appeal, press an entirely new theory completely foreign to the issues presented to the trial court.

2. Appeal and Error 🔑173(2)

It could not be contended on appeal by buyer and buyer's guarantor from judgment for seller of truck crane which seller had later repossessed that seller's action for full unpaid balance of purchase price constituted an election to treat contract as one of absolute sale where entire defense at trial had been conducted on theory that repossession had served to waive seller's right to sue on the purchase price.

3. Sales 🔑479(1)

Seller under conditional sales contract could, in absence of contractual provisions, treat sale as complete upon buyer's default, rest title in buyers, and sue for purchase price, or repossess, terminate contract because of breach, and retain both amounts paid and item purchased.

4. Sales 🔑479(14)

Where, in addition to remedies ordinarily afforded seller under conditional sales contract, contract provided for sale by seller after five-day notice, mailed or delivered, of intent to sell, with proceeds applied to unpaid balance and with buyer remaining liable for deficiency, such additional remedy was limited by the terms of the contract.

5. Sales 🔑479(11)

For purposes of action by seller of truck crane under conditional sales contract against buyer and buyer's guarantor, seller would not be deemed to have elected to treat sale as complete even though seller's pleading, if pursued to its ultimate, would have compelled such conclusion, where neither pretrial order nor trial disclosing repossession permitted trial court to so hold.

6. Sales 🔑479(14)

Court could not rewrite conditional sales contract so as to permit repossessing seller to hold buyer liable for total unpaid balance of purchase price where no notice of intention to sell for buyer's account as provided in conditional sales contract had been given to buyer.

7. Sales 🔑479(14)

In action by seller of truck crane under conditional sales contract against buyer and buyer's guarantor, court had no power to render deficiency judgment against the defendants where evidence failed to disclose that repossessed truck crane had been sold within a reasonable time or had, in fact, been sold at all even at time of trial.

8. Sales 🔑479(14)

Right to recover deficiency judgment by repossessing seller under conditional sales contract depends upon sale of repossessed goods within a reasonable time.

9. Appeal and Error 🔑1011(1)

Trial court's conclusion on conflicting evidence is binding upon reviewing court on appeal.

10. Account, Action on 🔑22

Evidence sustained judgment on open book account on repairs to defendant's tractor originally purchased from plaintiff.

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Vernal G. Humpherys, Vista, and Harold F. Pettee, Jr., Pasadena, for appellants.

McInnis, Focht & Fitzgerald, William T. Fitzgerald, San Diego, for respondent.

⊥SHEPARD, Justice. ⊥33

This is an appeal by defendants from a judgment for plaintiffs in the amount of $8,908.68 on account of alleged deficiency on a terminated conditional sale, and $2,919.01 on alleged open book account.

FACTS: COUNTS ONE AND THREE

On July 19, 1959, plaintiff sold to defendant Willard & Rodman, Inc., a corporation dba Tri-City Construction Co., hereinafter called Willard, on a conditional sales contract, a self-propelled Heco truck crane with equipment, at the price of $24,648. Defendant Coast Photo Service, a corporation, hereinafter called Coast, guaranteed the buyer's performance of the contract. By the contract it was, inter alia, agreed that seller might, upon default by buyer, retake possession of the crane, retain all payments as partial compensation for its use and at any time after five days' notice to buyer of seller's intent to sell, seller might sell the crane either to others or itself, credit the net proceeds of such sale on the unpaid contract price and sue for the balance remaining unpaid. Buyer agreed to pay, as liquidated damages for breach of contract, whatever balance might then remain. (See note 1 below for exact wording of deficiency clause.)

On September 29, 1959, Willard, with plaintiff's written consent, transferred its interest in the crane contract to Empire Construction Co., a corporation, hereinafter called Empire. Empire assumed the obligation to make the payments on the contract but the transfer provided that Willard was not released in any way and that plaintiff might elect any remedy for breach, if payments on the contract were not made. Empire went into bankruptcy.

In January 1960, plaintiff repossessed the crane and equipment. On February 17, 1960, plaintiff filed its claim in Empire's bankruptcy for the sum of $924.35 for money owed on open account, but made no mention of a deficiency on the crane contract. Defendants asked plaintiff to retain 34 possession of the crane and to attempt to sell it. In trying to sell the crane for the account of defendants, plaintiff on one or two occasions sent the machine to a job location for demonstration and charged a rental in an attempt to partially defray the cost to plaintiff of the demonstration. Such charge was in accordance with plaintiff's established custom, but was not pursuant to any oral or written agreement with either the prospective buyer or any of these defendants. The rental received was recorded on plaintiff's books as plaintiff's income.

After making the original sales contract, plaintiff assigned its interest therein, with recourse, to C.I.T. Corporation. When the contract payments were defaulted, C.I.T. Corporation was, on its demand, repaid by plaintiff, and in March 1960 the contract was physically returned to plaintiff but no formal reassignment was executed in writing. Within ten days after such reassignment plaintiff registered the crane with the California Motor Vehicle Department, naming plaintiff as both registered and legal owner. At the time of retaking possession, plaintiff made an entry in its account books regarding said crane: "Loss on repossession * * * $8,908.68," which was computed by deducting the then estimated retail value (less 13 per cent cost of resale) from the total unpaid balance on the contract. Service charges for hauling and repair of the crane while in plaintiff's possession were recorded on plaintiff's books as charged to plaintiff, and no ownership in defendants or charge against defendants was noted on plaintiff's books. Plaintiff did not make any written demand on defendants for delinquent payments and gave no written notice of repossession. Plaintiff did not give defendants any written notice of intention to resell for defendants' account.

Plaintiff's witnesses testified to conversations with defendants' representatives;

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1. "* * * and at any time not less than five (5) days after notice of intent to sell chattel shall have been mailed or delivered to the persons named in Item 10 above, chattel may be sold with or without further notice at private sale or at public sale, with or without having chattel at the sale, at which you or assigns may purchase, and the proceeds thereof, less expenses of retaking, repairing, holding, reselling and reasonable attorney's fees (15% of the unpaid balance if permitted by law), credited upon the amount unpaid and I or we will pay the balance forthwith as liquidated damages for the breach of this contract, any surplus, however, to be paid to me or us."

that therein defendants were fully apprised of repossession, of defendants' legal liability for deficiency after sale, and defendants requested plaintiffs to sell or rent the crane. Testimony was further adduced to the effect that motor vehicle registration was necessary to facilitate resale and that the book entry of loss on repossession was done for tax purposes in case plaintiff was unable to recover the deficiency from defendants. At the time of trial the crane had not been resold by plaintiff. Plaintiffs produced further testimony that the market for this type of crane was so depressed during the period of plaintiff's possession that any sale that could have been made would have been inequitable to defendants.

⊥35 ⊥On March 24, 1961, the trial was completed and the cause submitted. On April 17, 1961, the trial judge filed a memorandum decision finding that plaintiff did repossess for the purpose of resale and to pursue its remedy against defendants for a deficiency; that no resale had been made; that plaintiff had, in good faith, attempted resale; that it was not fair to either party to compel a resale at a price below the reasonable value and that the rights of the parties would be best served by determining the reasonable value of the crane for the purpose of fixing the obligation of defendants to plaintiff for breach of contract. The court then, of its own motion, granted plaintiff leave to amend and allege reasonable value in keeping with the court finding. Such an amendment was filed in the form of a third cause of action, additional evidence was adduced as to the fair value of the crane and the court rendered judgment for plaintiff thereon in the amount of $8,908.68.

THE PLEADING: COUNTS ONE AND THREE

The first cause of action pleaded the corporate existence of plaintiff, Willard and Coast, the guaranty of contract performance by Coast and Shores, the contract, delivery to defendant Willard, sale by Willard to Empire, Empire's default and bankruptcy, request for payment from Coast and Shores and their failure to pay, and balance due and owing. The prayer was for judgment for the full alleged balance of $25,408.68. The answer admits the contract, denies guaranty, denies debt and sets up special defenses of fraud, representations of release on transfer to Empire and no consideration. The same allegations of special defense are set forth more extensively by way of cross-complaint. The matters covered by special defense and cross-complaint are not the subject of points on this appeal and will not be further discussed. The pretrial order, respecting those matters in controversy on this appeal recites the issues, in essence, to be: (3) a determination of the rights and obligations of the parties under the conditional sales contract; (4) whether the circumstances of the retaking of the crane constituted a release of further obligation by defendants; (9) if plaintiff is entitled to recover, what is the amount. No objection or motion to amend the pretrial order was made. It was stipulated, at trial, that a judgment against any defendant would be entered against all, thus eliminating special problems of guaranty and alter ego.

⊥The third cause of action, filed over objection of defendants some five weeks after completion of trial on the original complaint, repleads the essential charging portions of the first cause and adds that the crane was repossessed by plaintiffs; that attempts were made to sell it; that a fair price could not be obtained because of a depressed market; that no market at an equitable price is available; that defendants are indebted to plaintiffs for the difference between the fair market value and the balance of the purchase price; and ask judgment for that amount. By stipulation a general denial was deemed made. Under the issues presented by pretrial and by the parties during trial, we think this is not a new cause of action. ⊥36

ACTION FOR FULL PRICE

[1,2] Defendants first contend that plaintiff's action for the full unpaid balance of the purchase price was an election by plaintiff to consider the contract an abso-

lute sale, transferring full title to the crane to defendants. However, defendants do not point to any place in the trial transcript where this defense was ever presented to the trial court nor made an issue in the case. It is not referred to in the pretrial order as an issue. In fact, at the opening of the trial defense, counsel stated,

> "Our defense is the election primarily, the election of the plaintiff to treat this equipment as their own, which is inconsistent—"

and at a later time said,

> "* * * And he [plaintiff] made an election by repossessing and by his acts of ownership over the Heco Crane and therefore waived his right to sue on the purchase price. The contract provides, however, under a repossession and a resale that they may bring an action for a deficiency. This is not an action for a deficiency of a sale.
>
> * * * * * *
>
> "That is our defense to the first cause of action."

This defense was developed by evidence and argument as the case proceeded and we have searched the record without success for any contention to the trial court that plaintiff had elected to transfer complete title to defendants. Defendants have pointed to none. The entire trial was conducted on a different issue. Appellant cannot be allowed, on appeal, to press an entirely new theory completely foreign to the issues presented to the trial court. (Ernst v. Searle, 218 Cal. 233, 240 [7], 22 P.2d 715; City of Buena Park v. Boyar, 186 Cal.App.2d 61, 66 [5a], 8 Cal.Rptr. 674; People ex rel. City ⊥37 of Torrance v. City of Gardena, 192 Cal.App.2d 686, 691 [1], 13 Cal.Rptr. 742.)

ELECTION OF REMEDY

Defendants next contend that the evidence of plaintiff shows, without dispute, that plaintiff elected to repossess the crane and treat it as its own property; that it was an election of remedy and that plaintiff cannot now claim a deficiency. This contention was, of course, the primary theory of the defense throughout the trial and the one to which the bulk of the evidence and argument was addressed. There can be no question that the evidence was ample to support it. The only real question in this respect is whether or not the evidence was such as to compel this conclusion as a matter of law in relation first, to the motion for nonsuit, and second, on final judgment.

[3] It is, of course, true that plaintiff's remedies, in the absence of contractual provision, were twofold. First, it could treat the sale as complete, rest title in the defendants and sue for the purchase price. Second, it might repossess, terminate the contract because of the breach, and retain the amounts paid and the crane itself. (Johnson v. Kaeser, 196 Cal. 686, 694 [2], 239 P. 324; Ghirardelli v. Peninsula Properties Co., 16 Cal.2d 494, 498 [2], 107 P.2d 41; Beaudry v. Peterson, 50 Cal.App.2d 478, 482 [1], 123 P.2d 108, 124 P.2d 637; Sims v. Crowley, 20 Cal.App.2d 598, 601 [2], 67 P.2d 745.)

[4] In the case at bar a third remedy is afforded plaintiffs by the provisions of the contract itself. That remedy is that after 5-day notice, mailed or delivered, of intent to sell, plaintiff could sell, apply the proceeds thereof to the unpaid balance, and sue defendants for the deficiency. This remedy is, of course, limited by the terms of the contract. (James v. Allen, 23 Cal.App.2d 205, 72 P.2d 570.) As was said in Budget Finance Plan v. Sav-On Food Club, 44 Cal.2d 565, 568 [2], 283 P.2d 694, 697,

> "Similarly here it is the contract between plaintiff and defendant * * which must be looked to in deciding the remedies which plaintiff can pursue against defendant."

See also Ravizza v. Budd & Quinn, Inc., 19 Cal.2d 289, 293 [1], 120 P.2d 865; Goldberg v. List, 11 Cal.2d 389, 394 [4], 79 P.2d 1087, 116 A.L.R. 900.

[5] Here, the case was completely tried and submitted under a pleading that, if

pursued to its ultimate, would have compelled the conclusion that plaintiff had elected to pass title and hold defendants for the total balance of the purchase price. ⌊38 However, the pretrial order, not objected to, presented other issues and the trial court concluded that the plaintiff had, in truth, mistaken its remedy, had not intended to pass title, but had, instead, repossessed with intent to sell and hold the defendants for such deficiency as appeared after subtracting the amount of the sale proceeds. The court then proceeded to permit plaintiff to plead a third cause of action in accord with the trial court's conception of what the evidence showed, and to take evidence on the new cause of action. Had the point of election to transfer title and sue for the unpaid balance been originally urged, the trial court might well have found it difficult to avoid holding that plaintiff had elected to pass title and demand judgment for the total balance. But this was not the theory of the pretrial order or the theory on which either party or the court tried the case. Defendant simply contended that the actions of the plaintiff irrevocably showed an election to repossess for its own use, thereby terminating the contract and absolving defendants from further liability. Defendants' contention was that, under the evidence, plaintiff could not hope to recover on its first cause of action, as pleaded, since it had elected to repossess and sell. This the trial court recognized when it granted permission to amend to conform to proof. At all times defendants made appropriate objections. They moved for nonsuit at the close of plaintiff's case. They objected to the filing of the third cause of action.

[6] No notice of intention to sell appears to have ever been given by plaintiffs to defendants. The crane was never sold. The trial court cannot rewrite the contract.

> "It is not the province of the court to alter a contract by construction, or to make a new contract for the parties, nor can the court rewrite the clear terms of a lawful contract." (Nourse v. Kovacevich, 42 Cal.App.2d 769, 772 [5], 109 P.2d 999, 1001.)

See also Vierra v. Shaffer, 113 Cal.App.2d 768, 772 [2], 248 P.2d 992; Mills v. Vista Pools, Inc., 184 Cal.App.2d 668, 673 [6], 7 Cal.Rptr. 545; Piazzini v. Jessup, 153 Cal.App.2d 58, 62 [6], 314 P.2d 196.

[7] Plaintiff contends that Civil Code sections 1783 or 1784 authorize a judgment for the difference between fair market value and balance unpaid. But those sections have no application. Under section 1783, paragraph (1) provides a straight action for purchase price. Paragraphs (2) and (3) and section 1784 relate to undelivered or rejected goods. Here the plaintiff pleads *delivery*, breach and *repossession*, and ⌊39 there is nothing to the contrary. Plaintiff cites no authority for its position that section 1783 and section 1784 apply, and we have found none. Even assuming that section 1812.2 et seq. of the Civil Code were applicable, none of the provisions of those sections regarding notice of sale or sale were complied with.

Since the cause was not tried on the theory set forth in the first cause of action, and none of the evidence or arguments were addressed to that theory, the court was correct in rejecting it as a basis for judgment. The evidence was in conflict as to whether plaintiffs, by their acts, were holding the property for resale at the oral request of defendants. Strong as the evidence was in support of defendant's theory, we cannot say as a matter of law that plaintiff's acts under the circumstances amounted to an election to repossess and relieve defendants of further obligation. The explanations of plaintiff's witnesses, although inconsistent in many respects with inferences based on admitted physical facts, nevertheless created a conflict.

[8] However, the right to recover a deficiency depended on sale of the goods within a reasonable time. Under the facts, there could not be and there was not, any finding on such subject. No right to recover a deficiency under the sale terms of

the contract had crystallized even at the time of trial. Under the contract, pleadings and the evidence, the court had no power to render a deficiency judgment against defendants.

THE PLEADING: COUNT TWO

Plaintiff's second cause of action was on an open book account with Willard for $2,919.01 with demand for and refusal of payment. The answer was a general denial with a special defense that this open account related to the alleged misrepresentation of the condition of a Diesel tractor purchased by defendants from plaintiffs.

FACTS: COUNT TWO

[9, 10] Plaintiff sold to defendants a G.M.C. HD 19 used Diesel tractor. During use of the tractor by defendants, expensive repairs became necessary. Most of the repairs were done in plaintiff's shops on work orders from defendants. During trial the principal defense was that the tractor was not, at the time of sale, in as good working condition as plaintiff's salesman had represented it to be. There was some dispute as to whether the figures, in some cases, included proper ⊥40 credits. All of these documents, as well as two accounting sheets that have the appearance of normal loose leaf ledger sheets from an account book were received in evidence without objection. Frequent references were made by the witnesses to the "book account." There is some indication that certain witnesses from time to time referred to some kind of book record present in the courtroom. Plaintiff's counsel asserted this during argument. The statement was not refuted. We cannot determine what books were in the courtroom. During the taking of evidence defense counsel at no time made any suggestion that the pages from the ledger book were not being presented. The whole burden of the questioning and arguments during presentation of evidence related to the propriety of the various charges, the correctness of some of the reconciliation figures transmitted between defendants' accountant and plaintiff's accountant, and questions relating to the condition of the tractor at time of sale. Even the disagreement between accountants was small. On conflicting evidence all these matters were resolved against defendants. Under such conditions we cannot say that the trial court was not, as a matter of law, justified in the decision reached. Its conclusion, on conflicting evidence, is binding on this court on appeal. (Brewer v. Simpson, 53 Cal.2d 567, 583 [1–2], 2 Cal.Rptr. 609, 349 P.2d 289.)

The judgment for plaintiffs on Count Two of the complaint, for $2,919.01, is affirmed. The judgment for plaintiff on Counts One and Three of plaintiff's complaint in the amount of $8,908.68 is reversed. Each party will bear his own costs on appeal.

GRIFFIN, P. J., and COUGHLIN, J., concur.

Luther DANIELS, in a representative capacity for and on behalf of Service and Maintenance Employees Union Local 399, Building Service International Union, AFL–CIO, Plaintiffs and Appellants,

v.

SANITARIUM ASSOCIATION, INC., a corporation, Geraldine B. Hadrell, Donald W. Gormly, Robert H. Brown, and Joy M. Rowse, Respondents,

Sanitarium Association, Inc., a corporation, Robert H. Brown, et al., . . . (and ten other persons), Defendants.

Civ. 25731.

District Court of Appeal, Second District, Division 1, California.

Oct. 1, 1962.

For Opinion on Hearing, see 30 Cal.Rptr. 828, 381 P.2d 652.

Libel action. Libel action by president of union in representative capacity for and on behalf of union, which was unincorporated association. The Superior Court of Los Angeles County, Frank S. Balthis, J., entered judgment of dismissal, and plaintiff appealed. The District Court of Appeal, Wood, P. J., held that action was in effect a suit by the union for an alleged tort against itself, and could not be maintained where the union itself could not have maintained it.

Affirmed.

1. Libel and Slander ⚷73

Labor union, an unincorporated association, could not maintain libel action in its own name. West's Ann.Code Civ. Proc. § 388.

2. Libel and Slander ⚷82

Complaint failed to state cause of action for libel of any of the numerous individual members of union, an unincorporated association, where complaint did not identify or name any ascertainable persons who allegedly were libeled.

3. Libel and Slander ⚷73

Action for libel on behalf of union, an unincorporated association only, was in effect a suit by the union for an alleged tort against itself and could not be maintained where the union itself could not have maintained it. West's Ann.Code Civ. Proc. §§ 382, 388.

◆

Levy, Russell, DeRoy & Geffner and Leo Geffner, Los Angeles, for appellants.

Paul, Hastings, Janofsky & Walker, Leonard S. Janofsky, Oliver F. Green, Jr., and Dennis H. Vaughn, Los Angeles, for respondents.

WOOD, Presiding Justice.

In this action for damages for libel, the plaintiff appeals from a judgment of dismissal, entered after general demurrers to the complaint had been sustained with leave to amend and plaintiff had declined to amend.

In the complaint it was stated that Luther Daniels, in a representative capacity for and on behalf of Service and Maintenance Employees Union Local 399, Building Service International Union, AFL–CIO, alleges as follows: The defendants at all times acted with full knowledge of the libelous nature of the publication hereinafter alleged, and participated and conspired with each other to publish said letter. Plaintiff Daniels is the president of said Local Union 399, which is an unincorporated association representing approximately 7,000 members in the Los Angeles County area, and is a labor union affiliated with the Building Service International Union, AFL–CIO. For many years and presently said Local 399 has represented employees of hospitals and sanitariums, and has negotiated collective bargaining agreements with hospitals and sanitariums in the Los Angeles County area. Said agreements provide for wages, hours, working conditions, and other benefits for employees of hospitals and sanitariums. By reason of such representation and agreements, said Local 399, its officers, members, and representatives have built up an excellent reputation in labor-management relations and in the community in general in California and in Los Angeles County. The publication hereinafter alleged held said union (399), its officers, members, and representatives up to public hatred, ridicule, and contempt, and has greatly injured them in their reputation, business, and credit in the community. The issues stated herein and the questions to be litigated are of common and general interest to all the members of said union in exactly the same manner as this plaintiff is affected, and the members are so numerous, amounting to thousands of members, that it is impractical to bring all of said members before the court as individual plaintiffs; and therefore plaintiff sues for the benefit of said officers, members, and representatives, and on behalf of said Local Union 399. About September 23, 1960, the defendants caused to be printed and published a letter on the stationery, containing the names of the defendants, and distributed, published, and circulated said letter to approximately fifty sanitariums, hospitals, and nursing homes within the State of California, and many within Los Angeles County. The said institutions received said letter and recognized it as intended to apply to plaintiff, the Local Union 399, its officers, members, and representatives. A copy of said letter is attached to the complaint and incorporated in the complaint by reference. (The letter is long, consisting of six pages of single-spaced typewriting. It will not be necessary to copy the letter herein, in view of the determination to be made of this appeal. Statements by counsel for the respective parties, however, are set forth in a footnote [1] as a general indication of the nature of the letter.) The said letter contained libelous, false, and defamatory statements, and among other items contained the following libelous, false, and defamatory matter. (Twenty-five excerpts from the letter are set forth at this place in the complaint but, for the same reason that the letter is not copied herein, the excerpts will not be copied.) The letter and publication were made by defendants with the purpose, design, and intent of injuring, disgracing, and defaming the said Local Union 399, its officers, members, and representatives. The said publication was made by defendants with hatred, ill will, and malice to said Union, its officers, members, and representatives, and said publication was false and known by defendants to be false at the time it was made, and defendants did not have probable or any cause for believing said statements to be true. That by means of the publication, the Union, its officers, members, and representatives have been exposed to hatred, contempt, ridicule, and obloquy, and they have been shunned and avoided, and have suffered injury in their business, standing, and reputation in the sum of $300,000. That said publication was made by defendants for "the malicious purpose, intent, and design to injure the reputation and credit" of said Union, its officers, members, and representatives, and to bring the Union into disrepute as the collective bargaining representative of employees, and into public contempt and ridicule, and was published with ill will, hatred, and malice to them, and by reason thereof plaintiffs demand punitive damages in the sum of $200,000.

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[1] The letter is addressed: "Dear Hospital, Sanitarium, Rest Home or Nursing Home Administrator."

Appellant (plaintiff) states that: "A natural and fair construction of the publication would lead the persons reading the letter to believe that the Union committed acts, and had the policy of abandoning critically ill patients, were more interested in collecting dues than helping employees or patients; committed many acts of violence; engaged upon a deliberate drive to destroy the profits of any employer that hires Union members. The letter further states: that the Union is corrupt and more interested in private enrichment and collecting dues, than helping employees; that the Union officials spend dues for their own private benefit; that the Union officials tap private telephone lines; that the Union conducts its activities at night in order to terrify persons; that the Union causes violence to employees and many other acts and conduct which are too numerous to repeat in this brief."

Respondents state: "The letter is divided into three separate and distinct parts. The first part entitled 'I. What Has Happened?', refers initially to the attempted organization of the employees of Edgemont Hospital by both Local Union 399 and by United Mine Workers Local No. 50. The remainder of Part I goes on to relate certain happenings and events in the course of an effort by Local Union 399 to organize the employees of Lincoln Park Retreat, another mental institution.

"The second part of the publication is headed 'II. What Does All This Mean To Me As Administrator of This Institution?'. Here are pointed out certain possible consequences of union organization of such institutions, such as the effect on profits, costs and control of operations. There is no reference whatsoever in Part II to Local Union 399 or any of its officers, representatives or members. Indeed, all references are to unions in general.

"In the third part, entitled 'III. What Action Should I Take?', the purpose of the letter is acknowledged. The question posed in the heading is answered in the very first sentence as follows: 'Join an association of your choice which can help and guide you.' Suggestions follow with respect to the benefits which might be obtained from association membership and the steps that should be taken by such institutions to prepare for attempts at union organization. Toward the end the purpose is again emphasized by the statement that 'the above remarks have been sent to you, not to acquaint you fully with the situation as it exists today since it would be impossible to put all this information in one letter but primarily to impress upon you the desirability of joining an association, and to attend its meetings, and pay its dues.' Again, there is no reference in Part III to Local Union 399, its officers, representatives or members and no reference to any other particular union, the obvious intent being to speak of unions in general."

In the minute order sustaining the demurrers, it was stated: "Demurrers sustained 15 days to amend. (An unincorporated association can not sue; and insofar as this is a suit on behalf of the association, an unincorporated association does not have a cause of action for libel.)"

[1] Appellant contends that a labor union, even though it is an unincorporated association, should be recognized as a legally existing entity, separate from its members, and capable of maintaining an action for libel. He argues that under modern conditions and development of labor unions, a labor union, as an unincorporated association, is a special type of organization that functions in a manner similar to a corporation and, in order to exist and work for its objectives, it should be regarded as similar to a corporation and as entitled to equal protection of the law; and just as a corporation can be libeled as an entity, a labor union can be so libeled. He also states that several of the text books on libel and the Restatement of Torts indicate that the California law is that an unincorporated association, including a labor union, does not have a cause of action for libel of the organization as a separate entity; that the texts state that the rule is otherwise in various other states; that the authority frequently cited for that general statement is Noral v. Hearst Publications. Inc., 40 Cal.App.2d 348, 104 P.2d 860, but that case did not decide the question involved here as to whether the organization (union) as a separate entity could be libeled. (In that case the plaintiff, as president of the Workers' Alliance, sued in his own behalf and claimed that the alleged libelous publication referred to him individually;—the court held, however, that the publication was directed to the Alliance only and since the association consisted of a large group of persons, it could not be concluded that the alleged libel referred to the individual plaintiff.)

Appellant cites California cases wherein it has been held that an unincorporated labor union may enter into a contract (McCarroll v. Los Angeles County etc. Carpenters, 49 Cal.2d 45, 315 P.2d 322; Alpha Beta Food Markets v. Retail Clerks, 45 Cal.2d 764, 291 P.2d 433); may be held responsible in damages for tort (Garmon v. San Diego Bldg. Trades Council, 49 Cal.2d 595, 320 P.2d 473); and may be held in contempt of court (Oil Workers Intl. Union v. Superior Court, 103 Cal.App.2d 512, 230 P.2d 71). Those California cases pertained to proceedings against unincorporated unions—they were not actions by the unions. Section 388 of the Code of Civil Procedure provides that persons associated in business under a common name *may be sued* under such name. Appellant also cites New York, Pennsylvania, and Wisconsin cases wherein it has been held that such a union may maintain an action for damages for libel. He quotes at length from Kirkman v. Westchester Newspapers, 287 N.Y. 383, 39 N.E.2d 919.) It is to be noted, however, that a basis for maintaining the Kirkman case was a statute of New York known as the General Associations Law. Section 12 of that statute provided: "An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association to recover any property, or upon any cause of action, for or upon which all of the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. * * *" The Pennsylvania cases, so referred to, are based upon statutes which provide in substance that unincorporated associations may sue and be sued in their own names. The Wisconsin case, so referred to, was a circuit court case (Foundry Workers v. Whitewater Mfg. Co., 47 Labor Relations Reference Manual 2636), and it seems that under Wisconsin law unincorporated associations are recognized, for certain purposes, as entities and are allowed to sue and to be sued.

In California, as above stated, there is a statute (Code of Civil Procedure, § 388) to the effect that persons associated in business under a common name may be sued under that name. That section does not provide that such persons may sue under the common name. Said section 388 of the Code of Civil Procedure provides: "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name * *; and the judgment * * * shall bind the joint property of all the associates * * * in the same manner as if all had been named defendants and had been sued upon their joint liability."

In Juneau etc. Corp. v. Intl. Longshoremen, 37 Cal.2d 760, 235 P.2d 607, the motion of the defendant union, an unincorporated association, for a change of venue was denied, and on appeal the union contended that its rights to a change of venue should be determined by the rules of law applicable to a corporation. In that case it was said (p. 763, 235 P.2d p. 609): "In this state an unincorporated association is not recognized as a jural entity for all procedural purposes. The general rule is that the entity theory is rejected except where specifically provided for by statute. For example, persons associated in business under a common name may be sued under that name. Code Civ.Proc., § 388; Jardine v. Superior Court, 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291. However, it does not follow that the association may be regarded as an entity for all other purposes. '* * this statutory relaxation of the common law applies only to associated defendants. Associated plaintiffs still must sue in their individual names.' * * * Case v. Kadota Fig Assn., 35 Cal.2d 596, 602, 220 P.2d 912, 916."

In the Juneau case, just referred to, the court said further (37 Cal.2d p. 764, 235 P.2d p. 609): "In Sperry Products v. Association of American R. R., 2 Cir., 132 F.2d 408, 411, 145 A.L.R. 694, the court said: 'Thus, for most purposes the law still looks at such associations as mere aggregations of individuals. Since, however, for the purpose of suit it has come to regard them as jural entities, we can see no reason why that doctrine should not be applied consistently to other procedural incidents than service of process, and venue is one of such incidents. Certainly that promotes simplicity * * *.' The discussion in the Sperry case, as argued by the I.L.W.U., is persuasive, but persuasive only for legislative or constitutional change. Contrary to the existing law in California, the Federal Rules of Civil Procedure, 28 U.S.C.A., permit a partnership or unincorporated association to sue as well as be sued in its common name Rule 17(b), and process may be served in the same manner as upon a corporation. Rule 4(d) (3). Under section 388 of the Code of Civil Procedure process in an action against an association sued in its common name must be served on 'one or more of the associates'. The different procedures in the two jurisdictions are too great to regard the Sperry case as being other than a rational argument for a change in the existing law embodied in our statutes and Constitution."

It thus appears that the union could not maintain this action in its own name.

Recent cases in which an unincorporated association has been regarded as an entity are Marshall v. International Longshoremen's & Warehousemen's Union, 57 A.C. 829, 22 Cal.Rptr. 211, 371 P.2d 987; and

Inglis v. Operating Engineers Local Union No. 12, 58 A.C. 272, 23 Cal.Rptr. 403, 373 P.2d 467.) Those cases are distinguishable from the present case in that they are actions against the unions—not actions by the unions. The plaintiff in each of those cases was a member of the defendant union and was suing for damages for a negligent or intentional wrong.

[2] Appellant (Mr. Daniels) asserts, however, in substance that although said section 388 of the Code of Civil Procedure "does not provide for such an entity to bring suit in its common name * * *, the technique of the representative suit has been developed to fill the need and prevent a legal injustice." He cites Alpha Beta Food Markets v. Retail Clerks, 45 Cal.2d 764, 291 P.2d 433, wherein there was an appeal from a declaratory judgment holding valid an arbitration award relative to a wage agreement. In that case an officer and member of the defendant union filed an amended cross-complaint on his own behalf and on behalf of all the officers and members of the union. It was said therein (pp. 773 and 774, 291 P.2d p. 438): "However, since an unincorporated association cannot sue, a representative or class suit may be brought on its behalf by one of its officers." As above stated, that action was on behalf of the said officer and all the members of the union—it was not alleged to be on behalf of the union itself. The officer who filed the cross-complaint had been made a party defendant, and thereby it was indicated that plaintiffs believed that he had an interest in the litigation. The plaintiffs therein were seeking declaratory relief pertaining to the terms, conditions, and rates of pay for many employees who were union members. The statement therein regarding a representative suit, under the cross-complaint, was limited in its application, of course, to the circumstances in that particular case—a representative suit on behalf of numerous persons. In the present case the appellant asserts that the action was brought in a representative capacity on behalf of the union; and that his position, as presented to the trial judge and on this appeal, is that the theory of the complaint is not that any individual officer or representative of the union was libeled but that the union was libeled. (It appears, however, that there are several allegations in the complaint indicating that plaintiff was purporting to state causes of action for libel as to the members of the union—some of those allegations are that the publication held up to public hatred, ridicule, and contempt not only the union but its members, officers, and representatives; that the publication was made with malice and intent to injure and defame not only the union but the members, officers, and representatives.) In any event, the publication did not contain the name of plaintiff nor any of the 7,000 members of the union. (One McDermott was named in the publication, but there is no allegation that he is a member or officer of the union.) It thus appears that the complaint did not identify or name any ascertainable persons who allegedly were libeled, and therefore no cause of action for libel was stated as to any of the numerous individual members of the union. (See Noral v. Hearst Publications, Inc., supra, 40 Cal.App.2d 348, 350–351, 104 P.2d 860.) In view of appellant's assertion that he is proceeding in a representative capacity on behalf of the union, and is not proceeding on the theory that any officer or representative of the union was libeled, the result is that he is purporting to maintain a representative suit on behalf of one alleged entity, i. e., the union—and not on behalf of numerous persons.

[3] A representative suit has developed as a substitute for suits by numerous persons in their own names, and the purpose of such development has been the convenience to the numerous persons and the avoidance of multiplicity of actions. Section 382 of the Code of Civil Procedure provides in part: "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may

sue or defend for the benefit of all." That section "permits an action to be brought by one or more parties on behalf of others when the parties are numerous. This is a statutory provision based upon the common law theory of convenience to the parties when one or more fairly represent the rights of others similarly situated who could be designated in the controversy." (Price v. Communications Workers of Amer., 167 Cal.App.2d 524, 528, 334 P.2d 632.) "A representative suit is proper only to conserve a common fund or property in which all of those represented have an interest." (Ibid.) Since appellant has limited his complaint to one asserted cause of action, namely, an action for libel on behalf of the union only, a fundamental requisite for maintaining a representative suit is lacking, that is, that the parties with similar rights of action are so numerous that it would be impracticable to bring them all before the court. In effect, the appellant is seeking to maintain a representative suit wherein he represents one alleged litigant, and not numerous litigants or persons. Such a representative suit as that which is contemplated herein is in effect a suit by an unincorporated association for damages for an alleged tort against itself. Such a proceeding is not a representative suit. Since the unincorporated association herein cannot maintain the suit in its own name, the asserted representative suit herein, if maintained, would in effect be doing indirectly that which the association could not do directly.

Whether or not there should be a change of public policy with respect to an unincorporated association maintaining an action is a matter for determination by the Legislature.

In view of the above conclusions, it is not necessary to discuss other contentions of respondents to the effect that a cause of action was not stated. Some of those contentions are that the alleged defamatory letter is not libelous per se, was made in the course of a labor dispute, and as a result thereof a conditional privilege existed; that there was no allegation that plaintiff was a member of the union (only an allegation that he was president); and that there was no allegation that he was authorized to commence the action in a representative capacity.

The judgment is affirmed.

LILLIE, J., concurs.

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207 Cal.App.2d 872

Bertha M. REGUS and Robert Regus, Plaintiffs and Appellants, 872

v.

GLADSTONE HOLMES, INC., Matt Patritti, Charles N. Bell, Sam Vitale, Mary Sobieski, and Doris Heil, Defendants and Respondents.

Civ. 25925.

District Court of Appeal, Second District, Division 4, California.

Sept. 27, 1962.

Rehearing Denied Oct. 16, 1962.

Hearing Denied Nov. 21, 1962.

Action for fraud in connection with land exchange contract. From an adverse judgment of the Superior Court, Los Angeles County, A. K. Wylie, J., the plaintiffs appealed. The District Court of Appeal, Burke, P. J., held that alleged oral fraudulent representation that plaintiffs were to receive 370 feet of frontage as result of real property exchange was directly at variance with subsequently integrated written agreement providing for 345 feet of frontage, and even if the parol representation was fraudulent, jury was properly instructed to disregard it if they found that there was a novation.

Judgment affirmed.

1. Evidence ⇐397(1)

Extrinsic evidence is admissible to vary the terms of an integrated written instrument.

2. Evidence 🔑434(8)

Parol evidence of fraud is admissible to establish invalidity of a written instrument when such evidence tends to establish some independent fact or representation or some fraud in procurement of the instrument or some breach of confidence concerning its use, but parol evidence is inadmissible when the alleged fraud concerns a promise or representation directly at variance with the terms of the written instrument.

3. Evidence 🔑434(11)
Novation 🔑13

Alleged oral fraudulent representation that plaintiffs were to receive 370 feet of frontage as result of real property exchange was directly at variance with subsequently integrated written agreement providing for 345 feet of frontage, and even if the parol representation was fraudulent, jury was properly instructed to disregard it if they found that there was a novation. West's Ann.Civ.Code, § 1625.

4. Contracts 🔑169

Statute providing that circumstances under which instrument was made, including situation of the subject of the instrument and of the parties, may be shown for proper construction of the instrument is intended to guide judge in arriving at a conclusion of law as to legal meaning of the instrument. West's Ann.Code Civ.Proc. § 1860.

5. Contracts 🔑176(1)

Jury should not be left with interpretation of the legal effect of a contract.

6. Contracts 🔑176(3)

Question of meaning of contract is for jury when it is uncertain or ambiguous and parol evidence has been introduced in aid of its interpretation.

7. Appeal and Error 🔑1062(4)

Submission to jury of a question of law does not constitute reversible error when the jurors have followed correct instructions applicable to the issues.

8. Appeal and Error 🔑1064(2)

Giving of instruction that circumstances under which contract was made, including situation of subject of contract, and of the parties could be shown so that jury would be placed in position of those whose language it was to interpret did not result in a miscarriage of justice, even if instruction was subject to criticism on ground that interpretation of legal effect of contract was improperly left to jury. West's Ann. Code Civ.Proc. § 1860.

9. Fraud 🔑64(1)

Whether charge of fraud in connection with execution of a contract is waived by novation is commonly a question of fact for jury.

10. Fraud 🔑64(1)

Question of whether execution of a document constituted a waiver of claimed oral misrepresentations was a question for trier of fact.

11. Fraud 🔑35

Whether acts of a defrauded party constitute a waiver must be determined in connection with circumstances of each case.

12. Appeal and Error 🔑1064(1)

Permitting counsel for a party to read proposed instructions to the jury does not constitute reversible error.

13. Novation 🔑13

Court did not err in instructing jury on question of novation by the execution of a written land exchange contract although plaintiffs were relying exclusively upon fraudulent oral representations.

14. Trial 🔑260(5)

Refusal of requested instruction by plaintiffs concerning their consultation with others regarding land exchange transaction was not a ground for reversal when plaintiffs, who charged defendants with fraud, not only consulted with others but relied upon their surveyor, engineer and attorney, and when element of reliance necessary for recovery was clearly explained to jury by other instructions.

William M. De Falla, Los Angeles, for plaintiffs and appellants.

Martin L. Abrams, El Monte, for defendants and respondents Gladstone Holmes, Inc., and Matt Patritti.

Joseph Lewis, Los Angeles, for defendants and respondents Sam Vitale and Mary Sobieski.

Samuel B. Stewart, Hugo A. Steinmeyer and Robert H. Fabian, Los Angeles, for defendant and respondent Doris Heil.

874 BURKE, Presiding Justice.

Plaintiffs Bertha and Robert Regus instituted action charging six defendants with conspiracy to defraud plaintiffs of a strip of land 25 feet wide by 390 feet long which plaintiffs contend should have become vested in them as a result of a transaction involving an exchange of properties.

Plaintiffs acquired certain property on Stewart Avenue in Baldwin Park, California, in 1952, a portion of which was purchased from Tony and Rosalie Vitale, deceased parents of defendants Sam Vitale and Mary "Vitale" Sobieski. Early in the year 1955 an escrow was opened by defendant Heil as escrow clerk whereby Tony and Rosalie Vitale agreed to exchange certain property with plaintiffs. The Vitales were to grant property fronting on Stewart Avenue to plaintiffs and plaintiffs were to pay the sum of $750 to the Vitales and join in a grant of their interest in property not on a street to defendant Gladstone Holmes, Inc., a tract developer, which was purchasing contiguous land from the Vitales.

A dispute arose as to the boundary limits of the property to be acquired by the plaintiffs. Defendant Bell was employed by Tony Vitale to survey the lands in question. Plaintiffs called upon an engineer, Frederick A. Cogswell who was familiar with the property to advise them.

On February 22, 1955, Mr. Cogswell made a survey of the property and met in plaintiffs' home with Mrs. Regus, defendant Bell, Sam Vitale, Mary Sobieski, Tony and Rosalie Vitale. Plaintiff Robert Regus was not present. Mr. Bell prepared a written "agreement" in the presence of the parties which was prefaced with the statement "In order to settle the boundarys [sic] of the Regus-Vitale property as set forth in various deeds and agreements, * * *." All parties present signed the document with Bell and Cogswell acting as witnesses. During her testimony Mrs. Regus denied signing the agreement on direct-examination, and was equivocal on that point in cross-examination, but it is apparent that she did in fact sign it. The document provided that in the exchange of lands plaintiffs were to receive 345 feet of frontage on Stewart Avenue and quitclaim "all rights outside of this new deed." This varied from the 370 feet on Stewart which plaintiffs claim they had previously been assured they would receive through the exchange of properties.

In the latter part of April 1955 the parties went to the escrow to arrange for its final closing. Defendant Heil was not present. Another escrow clerk participated in her place. 875 At that time Mrs. Regus read over the documents which had been prepared for plaintiffs' signatures. These instruments provided for 345 feet of frontage on Stewart Avenue. At that time she told Mr. Bell she was entitled to from 350 to 352 feet frontage thereon but nevertheless executed the instruments without insisting upon the change. Mrs. Regus testified at the trial, in answer to a question as to whether she was given any written description of the property which they were acquiring, that she looked at the escrow instructions and saw the figure "345." Plaintiffs' attorney, Mr. Johnson, was also present at the escrow at the request of plaintiffs, and it was only after considerable discussion and argument that plaintiffs signed the deeds and closing documents.

Mr. Regus testified that on February 22, 1955, he was told by his wife of the written agreement that had been made that day as to what property plaintiffs were to receive and what property and cash they were to give in return. He stated he accepted his wife's actions in reaching this agreement. He further testified that he knew Frederick Cogswell and that he was a surveyor and engineer who had done some surveying and engineering for plaintiffs; that his attorney, Mr. Johnson, was present at the escrow and talked with him and explained things before the final papers were signed.

The trial was by jury and lasted approximately ten days. The jury brought in a verdict for defendants.

Plaintiffs' cause of action is predicated on the oral representations allegedly made to them by defendants to the effect that plaintiffs were to receive not less than 370 feet of frontage on Stewart Avenue.

The defendants rely on the agreement of February 22, 1955, which document they assert constituted a novation.

Plaintiffs' contention is that even though they signed the escrow papers, and assuming the document submitted by defendants was signed by Mrs. Regus, plaintiffs' damage was caused by the concerted acts of defendants and each of them through their fraudulent oral representations to plaintiffs that the latter were to receive more land than they actually received.

On appeal plaintiffs contend the court committed error in giving defendants' (Vitale and Sobieski) Instruction "E" which read:

> "That if you find from the evidence that a new agreement or novation was entered into by the parties, plaintiffs and the Vitales; then you must disregard all previous agreements between these parties. If you find that the 876 plaintiffs herein received all they were entitled to receive under this new agreement or novation, then you must find for the defendants and each of them."

and defendants' Instruction "I" reading:

> "1625 of the Civil Code of California provides that 'the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.'
>
> "Paragraph 1860 of the Code of Civil Procedure further provides 'the circumstances to be considered. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the *jury* be placed in the position of those whose language it is to interpret.'" (Emphasis added.)

Certainly Instruction "E" and the first paragraph of Instruction "I" are correct statements of the law and are applicable to the facts of this case. Each of the instructions relates to the existence and effect of the agreement of February 22, 1955. The making of the agreement and its effect on the prior oral representations are in issue on the determination of whether or not plaintiffs justifiably relied upon representations of the defendants.

[1] Instruction "E" and the first paragraph of Instruction "I" refer to a rule of law often designated "the parol evidence rule." This rule reduced to its simplest terms denies the admission of extrinsic evidence to vary the terms of an integrated written instrument.

In fraud cases the parol evidence rule is normally held inapplicable; that is, parol evidence of fraud is admissible to establish invalidity of a written instrument where such evidence tends to establish some independent fact or representation or some fraud in procurement of the instrument or some breach of confidence concerning its use. (Chastain v. Belmont, 43 Cal.2d 45, 51, 271 P.2d 498; Richard v. Baker, 141 Cal.App.2d 857, 863, 297 P.2d 674.)

[2] However, the parol evidence rule is applied and parol evidence is held inadmissible where the alleged fraud concerns a promise or representation directly at variance with the terms of the written instru-

ment. (Bank of America Nat. Trust & Savings Ass'n v. Pendergrass, 4 Cal.2d 258, 263, 264, 48 P.2d 659; Bank of America National Trust & Savings Ass'n v. Lamb Finance Co., 179 Cal.App.2d 498, 502, 3 Cal. Rptr. 877.)

[3] In the instant case the alleged fraudulent promise ⊥877 or representation made by some of the defendants was that plaintiffs were to receive 370 feet of frontage on Stewart Avenue as a result of the real property exchange transaction. That representation was followed on February 22, 1955, by an integrated written agreement providing for 345 feet of frontage. Clearly the parol representation as to the amount of frontage is directly at variance with the amount specified in the written instrument. Even assuming such parol representation was fraudulent the jury was properly instructed to disregard it if they found there was a novation.

[4, 5] With respect to the second paragraph of Instruction "I", which sets out the language of section 1860, Code of Civil Procedure, plaintiffs are correct in stating that such a rule of construction is intended to guide the judge in arriving at a conclusion of law as to the legal meaning of an instrument and the jury should not be left with the interpretation of the legal effect of a contract. Furthermore, they assert the rule of construction set forth in section 1860 can only be invoked to explain an ambiguity which appears on the face of the document itself. (Barnhart Aircraft, Inc. v. Preston, 212 Cal. 19, 22, 297 P. 20.)

[6, 7] However, as pointed out in Coats v. General Motors Corp., 3 Cal.App.2d 340, 356, 39 P.2d 838, where the meaning of a writing is uncertain or ambiguous and parol evidence is introduced in aid of its interpretation, the question of its meaning is for the jury. Moreover, assuming that under the facts of the case before us the general rule more properly applied, submission to the jury of a question of law does not constitute reversible error where the jurors followed correct instructions applicable to the issues. (Poncino v. Sierra Nevada Life & Casualty Co., 104 Cal.App. 671, 676, 286 P. 729.)

[8, 9] Here, as in the cases cited in the preceding paragraph, the evidence was sufficient to sustain the verdict of the jury. Certainly the giving of the instruction, assuming it to have been subject to criticism, did not result in a miscarriage of justice. There were ample other reasons for the jury to inquire into and consider the circumstances under which the agreement of February 22, 1955, was executed. It was offered in evidence by defendants for the purpose of proving that the charged fraud was waived by the novation which it is claimed took place through the execution of the instrument, at least by Mrs. Regus. Whether the fraud was waived or not ⊥878 is commonly a question of fact for the jury. (Wilder v. Beede, 119 Cal. 646, 651, 51 P. 1083.)

[10, 11] The issue as to whether there was a novation was first raised in the pleadings and subsequently retained as an issue in the pretrial order. There was also an issue of fact as to whether the document by which the claimed novation took place was either signed or binding upon the plaintiffs. The testimony of others present established the fact that Mrs. Regus did sign it. In view of these issues it was proper for the jury to receive evidence of the facts and circumstances surrounding the execution of the document and to be instructed that they could consider the circumstances under which it was made. The question of whether the execution of such a document constituted a waiver of the claimed oral misrepresentations was a question for the trier of fact. (French v. Freeman, 191 Cal. 579, 590, 217 P. 515.) Whether acts of a defrauded party do or do not constitute a waiver must be determined in connection with the circumstances of each case. (Chung v. Johnston, 128 Cal.App.2d 157, 165, 274 P.2d 922.)

[12] Plaintiffs contend that the court committed error in allowing counsel for defendants Sam Vitale and Mary Sobieski to

read verbatim their proposed Instruction "I" to the jury during his argument and over the objection of counsel for plaintiffs. While, as pointed out by plaintiffs' counsel, the practice of permitting attorneys during argument to read portions of the proposed instructions to the jury is to be discouraged, it does not constitute reversible error for a judge to have permitted it to be done. (Boreham v. Byrne, 83 Cal. 23, 29, 23 P. 212; People v. Conley, 134 Cal.App.2d 580, 582, 285 P.2d 693.) Clearly, such procedure is entirely within the discretion of the trial judge and we find there was no abuse of such discretion in this case.

[13] It is contended by plaintiffs that the court also committed error in instructing the jury on the question of a novation when the plaintiffs were relying exclusively upon fraudulent representations. We find no merit in this contention.

[14] Lastly, plaintiffs contend that the court should not have refused an instruction proffered by plaintiffs dealing with their consultation with others regarding the transaction. They cite Feckenscher v. Gamble, 12 Cal.2d 482, 85 P.2d 885, and Neher v. Hansen, 12 Cal.App. 370, 107 P. 565, as support for the statement that a party charging detrimental misrepresentations is not precluded from relying on the misrepresentations even if he or she consulted
879 with others regarding the transaction complained of. In the Feckenscher case the evidence was clear that the plaintiff's lawyer, although consulted, refused to advise the plaintiff. In the Neher case it was held that there was no error in the court's refusal to instruct the jury to the effect that if plaintiff consulted with or received information from others such fact of itself precluded plaintiff's recovery as it would not follow as a matter of law that such information as was received through the consultation was of such a character as to influence plaintiff in the transaction. Such an instruction would take from the jury the determination as to whether or not plaintiff relied upon the representations made by defendants.

In the case before us it is clear that plaintiffs not only consulted with others but relied upon their surveyor, engineer and attorney. The element of reliance necessary to the recovery in an action for fraud was clearly explained to the jury by several other instructions given by the judge.

Article VI, section 4½ of the California Constitution provides "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Martin v. Vierra, 34 Cal.App.2d 86, 95, 93 P.2d 261, 94 P.2d 567.) We find no miscarriage here.

Judgment is affirmed.

JEFFERSON and FORD,* JJ., concur.

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207 Cal.App.2d 767

The PEOPLE of the State of California, Plaintiff and Respondent, 767
v.
Edward F. STADNICK and Zella Mae Snyder, Defendants and Appellants.
Cr. 7287.

District Court of Appeal, Second District, Division 2, California.
Sept. 24, 1962.
Hearing Denied Nov. 21, 1962.

Prosecution for first degree robbery. The Superior Court of Los Angeles County, H. Eugene Breitenbach, J., entered judgments of conviction and orders denying motion for new trial and the defendants appealed. The District Court of Appeal, Herndon, J., held that the evidence sustained the convictions and the admission of testimony of defendants' conversations as overheard by means of electronic devices, did not deprive them of due process.

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* Assigned by Chairman of the Judicial Council.

Affirmed.

1. Robbery 🔑24(1)

Evidence sustained convictions of first degree robbery. West's Ann.Pen.Code, §§ 31, 211.

2. Criminal Law 🔑59(3)

While presence of accused at scene of crime is not alone sufficient to make him participant and he is not guilty merely because he does not act to prevent it, his presence is circumstance tending to support finding that he is principal and may be considered by jury with evidence of his companionship with principal and of his conduct before and after offense. West's Ann.Pen.Code, § 31.

3. Robbery 🔑15

Unarmed accused who aids and abets armed companion in commission of first degree robbery is guilty of first degree robbery. West's Ann.Pen.Code, §§ 31, 211.

4. Criminal Law 🔑59(5)

Since it need not be shown that direct perpetrator of crime expressly communicated purpose to accused in order to make accused liable as aider and abettor, one may aid or abet in commission of crime without having previously entered into a conspiracy to commit it. West's Ann.Pen.Code, § 31.

5. Constitutional Law 🔑266

Admission of testimony as to conversations of defendants in police station room which was electronically equipped so that officers, unknown to defendants and contrary to promises made, could overhear defendants, did not deny defendants due process where testimony added little additional weight to the People's case and conversations were not procured through any threat or promise. West's Ann.Code Civ. Proc. § 1881.

6. Criminal Law 🔑523

Fact that confession has been procured by employment of falsehood by police officer does not alone exclude it nor does employment of any artifice, deception or fraud, if artifice or fraud employed was not calculated to produce untrue statement.

7. Criminal Law 🔑523

Fact that confession was obtained by promise of secrecy does not render it incompetent if there was no motive to produce false statement.

8. Criminal Law 🔑622(1)

Separate trial of defendants is not matter of right in every instance.

9. Criminal Law 🔑622(5)

Accused's right to separate trial may be waived either by express agreement or by failure to object to joint trial.

10. Criminal Law 🔑622(2)

Evidence failed to disclose any abuse of discretion by trial court in denying defendants' motion, made after second day of trial, for a separate trial.

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Ernest L. Graves, Wilmington, for appellants.

Stanley Mosk, Atty. Gen., Jack E. Goertzen, Deputy Atty. Gen., for respondent.

⊥HERNDON, Justice. ⊥769

Appellants Edward F. Stadnick and Zeila Mae Snyder appeal from judgments convicting them of first degree robbery in violation of section 211 of the Penal Code; they also appeal from the orders denying their motions for new trials.

Initially, appellants were charged in a four-count information with a co-defendant, Timothy M. Burke. Count One charged that appellant Stadnick and Burke had robbed one John Hamlinn of $165 on January 9, 1960, and that at the time of the commission of the offense they were armed with a .380 Belgium Automatic Pistol. Count Two charged that appellants Snyder and Burke robbed one Mary G. Sparks of $20 on January 10, 1960, while similarly armed. In the third and fourth counts, the co-defendant Burke was separately charged with two additional robberies on January

10, 1960. Appellant Stadnick also was charged with two prior felony convictions which he admitted. Following the selection of a jury, the co-defendant Burke, who was 770 separately represented by counsel other than counsel representing appellants, changed his plea to guilty to all counts. The matter then proceeded to trial on the remaining counts involving appellants; it resulted in verdicts that appellants were guilty of first degree robbery "as charged in the information". Appellants were sentenced to state prison for the terms prescribed by law.

The evidence of the Hamlinn robbery consisted of the testimony of the victim that on the night in question Burke entered the liquor store where he was employed and ordered a bottle of vodka. The witness turned, took a bottle from the shelf, and when he turned again to face the counter, he noticed that Burke had a gun in his hand and that appellant Stadnick was standing beside him. Burke demanded that the witness hand over all the money. The witness removed the money from the cash register and when Stadnick, who was closest to him, held out his hand, the witness placed the money in it. Stadnick then went behind the counter and checked the cash register drawer for a false bottom. Burke, who had kept the gun aimed at the witness during these proceedings, asked whether there was any more money; the witness thereupon produced some change from under the counter and handed it to Burke. Burke then directed the witness to the rear of the store and Stadnick remarked, "Don't worry. We won't hurt you. Just do as you are told and everything will be all right." Burke held the witness at gun point for a few minutes at the rear of the store while Stadnick left. Burke left the store with a warning to the witness not to follow him.

Appellant Stadnick did not testify, but Burke was called as a witness on his behalf. He testified in substance: that he had known Stadnick for some two years; that they lived together; that they drove to the store together and left together; but that Stadnick had been unaware of Burke's sudden decision to rob the store and had not participated therein. Burke further testified that although Stadnick was "very angry" about the robbery, he had accepted $50 of the loot in payment of certain "arrearages in rent". Burke explained his being in arrears in his rent, despite the very substantial proceeds of some eighteen previous robberies committed by him, by stating that he spent money "pretty quick". Burke also indicated that Stadnick knew of his possession of the gun.

The evidence as to the Sparks robbery was the testimony of the victim that she was alone in the small grocery store where she worked when she noticed appellant Snyder at the bread counter. Some conversation was had in which Snyder asked, 771 "Is there anything fresh in here besides you?" She then noticed Burke at the counter holding a gun on her. She gave him all the money she had. Snyder moved toward her during this transaction. A customer then entered, and at Burke's direction, she waited on him and he left. Snyder drew even nearer the witness while the customer was in the store. Burke then told her to go into the back room. She did so and "Mrs. Snyder followed me back there and she and he closed the door." When the witness emerged from the rear room Mrs. Snyder and Burke had gone.

Burke also testified on behalf of appellant Snyder, and again stated that, although he had known her for some time, and in fact they and others had been drinking at his apartment the previous night, (after the Hamlinn robbery above described) she was unaware of his sudden decision to rob the grocery store and had not participated therein. It is not entirely clear from the record whether Snyder shared the apartment with Burke and Stadnick, but it would have been a reasonable inference from the evidence that she did. When she took the stand in her own behalf, she testified that "*they* wanted me to fix something to eat, and having been drinking I decided upon sandwiches, and there wasn't any bread, so I went to the store to get some bread." (Emphasis added.) Later, however, she stated that no one had told her to go, that she "just decided" she was going to make sandwiches for herself, "the baby and Jake". However, although she returned to the apartment after the robbery, she did not make any sandwiches or tell Jake of the robbery, but simply told him to watch the baby as she "wouldn't be around to care for her". She then left, went to a bar and resumed her drinking. She was later arrested and returned to the store where she was definitely identified by the victim.

[1] Appellants' first assignment of error is that the evidence is insufficient to sustain the verdicts. Manifestly, this contention is completely without merit. Section 31 of the Penal Code provides that *"All persons concerned in the commission of a crime, * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, * * * are principals in any crime so committed."* (Emphasis added.)

[2-4] While the mere presence of an accused at the scene of a crime is not alone sufficient to make him a participant, nor is he guilty merely because he does not act to prevent it, his presence *is* a circumstance tending to support a finding ⌊772 that he is a principal and may be considered by the jury with evidence of his companionship with the principal and of his conduct before and after the offense. (People v. Mauldin, 181 Cal.App.2d 184, 189, 5 Cal.Rptr. 243; People v. Carlson, 177 Cal.App.2d 201, 205, 2 Cal.Rptr. 117; People v. Moore, 120 Cal.App.2d 303, 306, 260 P.2d 1011.) An accused who, in the commission of first degree robbery, aids and abets a companion who is armed with a deadly weapon, is not less guilty of such robbery because he himself is unarmed. (People v. Perkins, 37 Cal.2d 62, 64, 230 P.2d 353.) It need not be shown that the direct perpetrator of a crime expressly communicated his purpose to the accused in order to make the latter liable as an aider and abettor. (People v. Carlson, supra, at page 205, 2 Cal.Rptr. at page 120); and one may aid or abet in the commission of a crime without having previously entered into a conspiracy to commit it. (People v. Villa, 156 Cal.App.2d 128, 134, 318 P.2d 828.)

In addition to the evidence heretofore set forth regarding appellants' participation in the crimes charged, there was also testimony regarding conflicting statements made by them following their arrests.

There was testimony that appellant Snyder initially told the police officers that she entered the grocery store with Burke, that they left together and that afterward they went to drink at a bar, the name of which she did not recall. In the recorded conversation between appellants and Burke, hereinafter more fully discussed, appellant Snyder stated that she "had told the cops that she had gone into Max's Grocery Store to buy a bottle of Vodka". Further, in the same conversation, Snyder asked what explanation the others were going to make to their going "to that liquor store, so far away, and not hold it up,"—thereby indicating her prior knowledge of the earlier robbery involving Stadnick. In addition, a recording of a conversation between Burke and the police officers was played before the jury by way of impeachment. Since the contents of that recording have not been made a part of the record, we may assume that this additional evidence may have served further to discredit Mrs. Snyder's version of the relevant events. The record demonstrates that the evidence of guilt is abundantly sufficient as to both appellants.

[5] Appellants next assert that they "were deprived of due process of law in that their convictions were secured by police eavesdropping effected by fraud." This assertion arises from the fact that following their arrests, after having been ⌊773 separately interrogated for a time, either the co-defendant Burke or appellant Stadnick requested that "the three of them be allowed to talk it over, and then they would see what they wanted to state, what kind of statement they wanted to make". The

investigating officer then directed them to a room which he stated was "soundproof" and told them they could "have ten minutes". The room was electronically equipped in such fashion that the officer could overhear their conversation in an adjoining room and simultaneously the conversation was being recorded elsewhere in the building. During the trial, the officer was permitted to testify regarding this conversation.

Actually this evidence lent little additional weight to the People's case because in substance it tended only to prove the fact that Burke had expressed his intention to plead guilty and to say that the others did not know what was going on. Appellants' statements during the conversation were merely to the effect that they had told "their stories" and were going to "stick by them." The "stories" as related by the officer were essentially the same as those to which they testified; the conversation admittedly contained no indication that they were going to "make up" anything.

Appellants do not suggest that this conversation invoked any such privileged or confidential communications as are protected by law (Code Civ.Proc., § 1881) or that any admissions or confessions therein made were secured through the use of any threat, menace or duress, or as the result of any promise of reward or immunity. It is simply urged that the conduct of the police in this case in violating appellants' promised privacy was "morally reprehensible, [and] was, in effect, simply a new and moderately ingenious device to secure involuntary admissions." The only citation presented by appellants for this contention is Lanza v. New York, 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384.

The facts in the cited case are substantially different from those here presented. There the authorities had placed secret recording devices in the *visitors'* room of a jail, and yet Mr. Justice Stewart, in delivering the opinion of the court, stated, "But to say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, ***is at best a novel argument.*** * * * Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, ⊥774 an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day. * * *" (Emphasis added.) Further, our Supreme Court denied a hearing and the United States Supreme Court denied certiorari (370 U.S. 965, 82 S.Ct. 1606, 8 L.Ed.2d 830) in the case of People v. Morgan, 197 Cal.App.2d 90, 16 Cal.Rptr. 838, which involved a similar electronic eavesdropping in the visitors' room of a jail by means of an intrabuilding telephone.

[6, 7] It was early established in this state that "The fact that a confession was procured by the employment of falsehood by a police officer, detective, or other person does not alone exclude it; nor does the employment of any artifice, deception, or fraud exclude it, if the artifice or fraud employed was not calculated to procure an untrue statement. Neither does the fact that a confession was obtained by a promise of secrecy render it incompetent, if there was no motive to produce a false statement." (People v. Castello, 194 Cal. 595, 602, 229 P. 855, 857.) Also, in People v. Santo, 43 Cal.2d 319, at page 325, 273 P.2d 249, at page 252, a policeman who had posed as one seeking to help a defendant in jail awaiting trial account for her whereabouts on the night of the crime, was permitted to testify regarding statements made by the defendant which tended to show her consciousness of guilt and which amounted to admissions against interest.

[8, 9] It is appellant's final assignment of error that they were prejudiced by the court's refusal to order separate trials. While it is true that when the co-defendant Burke plead guilty following the selection of the jury, the primary connecting link between the two appellants and the two crimes was removed from the cause, appellants did

not see fit to request a severance at that time. Rather, they chose to wait until the second day of trial after the People had put on almost their entire case in chief, consisting of the testimony of the two victims and the arresting officer, before they determined to make their motion. A separate trial is not a matter of right in every instance. (People v. Lushenko, 170 Cal. App.2d 772, 779, 339 P.2d 956.) Even such right as an accused may have to a separate trial may be waived either by express agreement or by failure to object to a joint trial. (People v. Marvich, 44 Cal.App.2d 858, 860, 113 P.2d 223.)

[10] Appellants cite People v. Alviso, 55 Cal. 230 for the proposition that it is discretionary with the trial court whether it will grant separate trials following a waiver and argue that ⊥775 where discretion exists the possibility of abuse thereof also must exist. This is doubtless true, but certainly no showing of abuse of discretion appears from the instant record.

The judgments and orders denying new trials are affirmed as to both appellants.

FOX, P. J., and ASHBURN, J., concur.

207 Cal.App.2d 775

⊥775 ⊥**The PEOPLE of the State of California, Plaintiff and Respondent**

v.

Edward Frank STADNICK, Defendant and Appellant.

Cr. 7376.

District Court of Appeal, Second District, Division 2, California.

Sept. 24, 1962.

Prosecution for first degree robbery. The Superior Court of Los Angeles County, Alfred P. Peracca, J., entered a judgment of conviction and the defendant appealed. The District Court of Appeal, Herndon, J., held that the evidence sustained the conviction and that there was no prejudicial error in admitting unobjected to testimony that accused shared apartment with person who was allegedly drinking with accused at time of his alibi, who was with accused in police lineup and who was at state prison.

Affirmed.

1. Robbery 🔑24(1)

Evidence sustained conviction of first degree robbery. West's Ann.Pen.Code, § 211.

2. Criminal Law 🔑741(2), 1159(5)

Accuracy of witnesses' identification of defendant presented a question for jury whose determination could not be disturbed by reweighing of evidence on appeal.

3. Criminal Law 🔑739(2)

Whether alibi of defendant, charged with first degree robbery, should have been accepted was a jury question and their rejection would, in light of conflicting evidence, not be disturbed on appeal.

4. Witnesses 🔑345(1)

Impeachment of witness by showing prior felony convictions is not unlawful. West's Ann.Code Civ.Proc. § 2051.

5. Criminal Law 🔑706

Asking of questions designed to show that accused shared apartment with particular individual who was allegedly drinking with accused at time of his alibi, who was in police lineup with accused, and who was presently in state prison was not misconduct by prosecutor.

6. Criminal Law 🔑1036(1)

Failure to object to testimony at time of trial generally forecloses any valid assignment of error upon appeal.

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Ernest L. Graves, Wilmington, for appellant.

Stanley Mosk, Atty. Gen., Jack E. Goertzen, Deputy Atty. Gen., for respondent.

⊥776 HERNDON, Justice.

[1] This is an appeal by Edward Frank Stadnick from a judgment of conviction of first degree robbery (section 211, Penal Code), following a jury trial. Appellant was found to have been armed at the time of the offense and to have suffered two prior felony convictions. The first assignment of error is to the effect that "the basic case against appellant was unconvincing". We shall assume that by this assertion appellant challenges the sufficiency of the evidence to support the verdict of the jury. An examination of the record discloses that the evidence supporting the jury's verdict is overwhelming.

A Mr. Townsend was an assistant manager of the Stater Brothers Market in Pomona on the evening of December 30, 1959. At approximately 8:30 p. m., after Mr. Townsend had removed the money from each of five registers, appellant approached him and handed him a note which stated that he was being held up and that two people were involved in the ⊥777 holdup. Appellant showed the victim a gun which appeared to be a German P-38, a weapon which Mr. Townsend had carried as a side arm in World War II. At appellant's direction Townsend accompanied him to the office area where he took possession of some $1200.00 in cash. While appellant was shoving his gun back under his waistband, Townsend suddenly struck at him with his fists. Appellant struck back and caused Mr. Townsend to trip over a stool and strike the back of his head against a wall. Appellant then stood over him and struck him numerous times with his fists. Townsend did not lose consciousness, and, after appellant had left, he called the police. He was thereafter hospitalized for the injuries which he had sustained.

A box boy at the store testified that he had interrupted appellant and Townsend while they were still in the front part of the store near a check stand in order to give Townsend certain coupons out of the cash registers. This witness noticed that Townsend thanked him in a rather strange voice, and he commented to another employee that it was strange Mr. Townsend would be talking to someone rather than taking the money from the registers directly to the office. This witness also remembered seeing appellant in the store at approximately the same hour some three or four days earlier.

A janitor at the store recalled seeing and speaking to appellant regarding another janitor at the side of the store around 7:30 p. m. on the night of the robbery. This witness saw him again when appellant brushed by him at about 8:45 p. m., and "he was walking pretty fast". This witness also remembered seeing and speaking to appellant twice during the preceding week at a nearby gas station where the witness also had been employed. From the information given the police by these three witnesses, it had been possible to compose a rather clear picture of appellant. Each of the witnesses was able to pick appellant out of a police lineup of approximately twelve persons some fifteen days after the robbery. Townsend also recognized appellant's voice in the lineup as being the same voice as that of the man who had held him up in the market.

[2] By way of defense, appellant introduced the testimony of three of his friends to the effect that appellant had burned his foot rather seriously in the early part of December, 1959, and that he had walked on crutches at least until after Christmas. Appellant also so testified as to this injury, and asserted that he had been treated by a doctor on about eight occasions. However, he was unable to remember either the ⊥778 dates of the treatments or the address of the doctor. He admitted that he was not using crutches during the last few days of December, and that he never told the arresting officers anything about this alleged condition. Appellant argues on the basis of his evidence that the witnesses for the prosecution must have been mistaken in his identification because none of them mentioned that he limped. Obviously, this was a matter for the jury to consider, and their determination will not be disturbed by a

re-weighing of the evidence on appeal. (People v. Kemp, 55 Cal.2d 458, 471, 11 Cal.Rptr. 361, 359 P.2d 913.)

[3] By way of a secondary defense, appellant called a bartender who testified that he had known appellant for approximately three years and that appellant was in his bar in Los Angeles from shortly before 9 p. m. until closing time on the night of December 30, 1960. Although this witness said that he knew of appellant's foot injury some two weeks earlier, he did not notice it on the night of the 30th. He did remember, however, that appellant was short of funds and that he had loaned appellant $10.00. Whether this alibi should have been accepted was clearly a question for the jury, and their rejection thereof in the light of conflicting evidence will not be disturbed on appeal. (People v. Williams, 53 Cal.2d 299, 303, 1 Cal.Rptr. 321, 347 P.2d 665.)

It might well be noted that the fact that appellant could spend several hours in the bar of his friend, the bartender, without the latter noticing the condition of his foot, reasonably could be regarded as sufficient to cast considerable doubt upon the seriousness of such condition on the date in question.

[4] Actually appellant in his brief appears to recognize the futility of his arguing the sufficiency of the evidence in this instance, for he devotes a considerable portion thereof to a criticism of section 2051 of the Code of Civil Procedure permitting impeachment of a witness by showing that he has been convicted of a felony. He asserts that it was the prejudice developed by his admission of two earlier felony convictions, in addition to the more recent robbery conviction this day affirmed by this court in People v. Stadnick, page 30 of 25 Cal.Rptr., that caused the jury to find him guilty. He refers us to the Model Code of Evidence, 1942 Edition, of the American Law Institute, wherein the practice of impeachment of defendants in this fashion is discussed. However, appellant's brief also recognizes that he cannot properly ask this court to declare the procedure unlawful. In this he is correct. (People v. Peete, 28 Cal.2d 306, 312, 169 P.2d 924; People v. Meehan, 124 Cal.App.2d 589, 594, 269 P.2d 70; certiorari denied, 348 U.S. 845, 75 S.Ct. 67, 99 L.Ed 666.)

[5] Appellant's second and final assignment of error is the alleged misconduct of the deputy district attorney in developing the fact that one Timothy Burke shared an apartment with appellant, was allegedly drinking with appellant at the time of his alibi, was with appellant in the police lineup, and was in the state prison at the time of trial. Further, the district attorney developed the fact that appellant had not seen his ex-wife, Zela Mae Snyder, since May 9, 1960, the date upon which, as appellant admitted, he had been convicted of armed robbery in Los Angeles.

It was appellant himself on his direct testimony who brought out the fact that he lived with Burke and that his ex-wife came to the apartment frequently to care for their three-year old child. How the statement that appellant had last seen his ex-wife on the date of *his* prior conviction could have prejudiced him in any way is difficult to understand, since no reference whatsoever was made to *her* conviction. Thus, appellant's assertion that the jury must have concluded that she, too, was convicted, and that, therefore, he must have been a member of a robbery ring, is purest conjecture.

[6] The facts elicited regarding appellant's friend Burke were clearly relevant, for the note handed to the witness Townsend indicated that two men were involved in the holdup and it was appellant's defense that he had never been in Pomona and had been drinking with Burke in Los Angeles on the night in question. It was therefore entirely proper for the prosecution to prove that one of the witnesses at the scene of the robbery had picked Burke out of the police lineup as a man who also had been in the market a few days prior to December 30, 1959. Moreover, no objection was made to any of said questions nor was

any motion made to strike any of the answers. Such failure to object at the time of trial generally forecloses any valid assignment of error upon appeal. (People v. Lopez, 124 Cal.App.2d 100, 105, 268 P.2d 171; People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881.)

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.

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208 Cal.App.2d 167

|167 | **Patricia F. PEMBERTON and Charles W. Pemberton, Plaintiffs and Appellants,**

v.

INCE BROTHERS PIPELINE CONSTRUCTION COMPANY, a co-partnership; Earl G. Ince and Glenn Ince, individually and as co-partners thereof; and Earl M. Pellegrini, doing business as Santa Clara Construction Company, Defendants and Respondents.

Civ. 19416.

District Court of Appeal, First District, Division 2, California.

Oct. 3, 1962.

Rehearing Denied Oct. 18, 1962.

As Amended Nov. 1, 1962.

Hearing Denied Nov. 28, 1962.

Action by husband and wife for injuries sustained when automobile in which they were riding struck a mound of dirt placed alongside of street in connection with installation of a storm sewer. From an adverse judgment of the Superior Court, Santa Clara County, N. J. Menard, J., the husband and wife appealed. The District Court of Appeal, Shoemaker, J., held that trial court should have, on its own motion, instructed jury to view with caution the oral admissions of one of defendants in his deposition, which was read to the jury by his counsel, to the effect that husband was driving automobile at time that it struck a pile of dirt in street, but such failure was not prejudicial to husband and wife when it had significance only with respect to husband's contributory negligence and contributory negligence was immaterial to outcome of the case.

Judgment affirmed.

1. Appeal and Error ⚿1067

Failure to instruct jury to view with caution oral admissions of one of defendants in his deposition, which was read to jury by his counsel, to effect that husband was driving automobile at time that it struck a pile of dirt in street, was not prejudicial to husband and wife when it had significance only with respect to husband's contributory negligence and contributory negligence was immaterial to outcome of the case. West's Ann.Code Civ.Proc. § 2061, subd. 4.

2. Automobiles ⚿309(2)

Evidence did not warrant an instruction on doctrine of imminent peril with respect to accident which occurred when automobile in which husband and wife were riding collided with a mound of dirt that had been placed on edge of street in connection with installation of storm sewer.

3. Negligence ⚿139(1)

Generally, it is error to instruct on imminent peril unless at least two courses of action are available to a party after the danger is perceived.

4. Trial ⚿261

Trial court did not err in refusing a requested instruction which was incomplete insofar as it referred to one statute and made reference to another statute which concededly was not violated, even though reference to a third party may have been proper. West's Ann.Vehicle Code, §§ 21363, 21406, 21465.

5. Trial ⚿261, 267(1)

Trial court has no duty to correct an incomplete instruction or to modify or edit a proposed instruction, and it is not error to refuse an incomplete proposed instruction.

6. Trial 🔑261

Even if a proposed instruction was impliedly modified, trial court properly refused to give it when certain portions thereof were admittedly defective.

7. Appeal and Error 🔑231(7)

An objection specifying wrong ground to admission of evidence amounts to a waiver of the grounds not urged.

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Edward J. Niland, Boccardo, Blum, Lull, Niland & Teerlink, San Jose, for appellants.

Campbell, Custer, Warburton & Britton, San Jose, for respondents Earl G. Ince and Ince Bros. Pipeline Const. Co. George A. Strong, Santa Clara, of counsel.

John P. Whitney, by F. H. Pearson, Jr., San Jose, for respondent Earl M. Pellegrini dba Santa Clara Const. Co.

⊥169 ⊥SHOEMAKER, Justice.

The plaintiffs Pemberton, husband and wife, commenced the action below to recover damages for injuries sustained when an automobile occupied by them and one Stephen San Filippo struck a mound of dirt while proceeding along Payne Avenue in the City of San Jose. They have appealed from an adverse judgment entered on a jury verdict, contending that the court erred in refusing and omitting certain instructions, and in admitting and refusing to admit certain evidence.

The defendant, Ince Brothers Pipeline Construction Company, a subcontractor of the defendant Santa Clara Construction Company, was installing a storm sewer along the north side of the paved portion of Payne Avenue, an asphalt roadway running generally from east to west, two traffic lanes in width. Ince Brothers' trenching operations along the northernmost edge of the roadway entailed the excavation of a large amount of soil. During the day, this soil covered most of Payne Avenue. Both eastbound and westbound vehicular traffic utilized a bypass along the southerly side of the pavement to avoid the obstruction. Excavated soil which was not used to back-fill the trench was moved some 25 feet south of the roadway into a new subdivision in which residential construction was in progress. At the end of each day, the excavated soil was removed from the southernmost, or eastbound, traffic lane and shaped along the open trench and around a trenching machine which was located at the west end of the trench. Conflicting evidence viewed in the light most favorable to the verdict indicates that on the night in question this mound of soil was between four to five feet in height, and twenty-five feet in length.

On the night of January 21, 1958, about an hour before the plaintiffs' accident, one Kenneth Heisler, while driving in the eastbound traffic lane of Payne Avenue in the area described, was confronted with the headlights of an automobile approaching in his lane of traffic. When the oncoming automobile was approximately 100 feet away, Heisler swerved to his left, colliding with the mound of soil near its east end. Heisler testified⊥that he struck the mound ⊥170 while at least partly in the eastbound traffic lane; that his vehicle ultimately came to rest in the bypass area south of the roadway; and that he did not notice the mound of soil along which he was proceeding until after the impact. After the accident, he walked to a nearby home, telephoned his wife and the highway patrol, and was then driven home.

Highway patrol officers arrived at the scene of the Heisler accident at 10 p. m., set out fuse flares, and proceeded with their investigation. Shortly thereafter, witnesses Boehnke and Gage arrived at the scene in a tow-truck. The officers left the scene to interview Heisler, and had proceeded approximately two or two and one-half miles east on Payne Avenue when, at 10:29 p. m., they received a radio call that a second automobile had struck the mound of soil.

The plaintiffs were occupants of the automobile involved in this second accident.

The negligence relied on by plaintiffs was that the defendants [1] had maintained an unilluminated mound of dirt on the roadway, failing to provide motorists with warning of the obstruction. Testimony was elicited from each of the aforementioned persons, as well as from certain of Ince Brothers' employees and the defendant, Earl Ince, as to the size of the mound of soil, the portion of the roadway which it covered, and the extent to which it was illuminated by flare pots and cordoned off by barriers. This testimony was highly conflicting. It is not contended, however, that the state of the evidence on this crucial issue does not warrant a defense verdict. Viewed in accordance with the usual rules of appellate review, the record reveals evidence from which the jury might properly have concluded that the mound of soil and its approaches were sufficiently illuminated and barricaded at the time of both accidents.

The plaintiffs' first contention on appeal stems from the failure of the court to instruct, on its own motion, that evidence of the oral admissions of a party ought to be viewed with caution. The defendant Earl Ince was not present at the trial. His deposition was read to the jury by his counsel. Therein, in response to an inquiry whether he conversed at the scene of the accident with any of the occupants of the San Filippo vehicle, Ince testified to an argument between himself and Pemberton in which the latter stated that he was ⊥171 the driver of the vehicle. Ince also testified, as did highway patrol Officer Kissner, that Mr. Pemberton appeared to have been drinking. Mr. Pemberton testified in rebuttal that he could not recall the conversation. He denied having told Ince that he was the driver of the car. He and San Filippo both testified that San Filippo was the driver of the car, and that none of them had been drinking during the evening.

The trial court, determining that the evidence raised an issue as to the identity of the driver of the vehicle, instructed that the jury might find Mr. Pemberton guilty of contributory negligence if it found that he, and not San Filippo, was the driver.

[1] A trial court is required by section 2061, subdivision 4, of the Code of Civil Procedure, to instruct a jury on all proper occasions that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution. However, the record amply discloses that the court's failure to do so did not result in prejudice to the plaintiffs. (Cf. Freeman v. Nickerson (1946) 77 Cal.App.2d 40, 63, 174 P.2d 688; People v. Gardner, supra.) The trial court instructed the jury that the contributory negligence of Mr. Pemberton, if any, would bar only his recovery and not that of his wife, and that any negligence on the part of San Filippo could not be imputed to either of the Pembertons. It informed the jury that, under the evidence, Mrs. Pemberton could not be found negligent, and that if they found the defendants were negligent and their negligence a proximate cause of her injuries, they should return a verdict in her favor. Thus, the issue raised as to the identity of the driver of the vehicle had significance only with respect to the question of Mr. Pemberton's contributory negligence. The jury returned a verdict against both plaintiffs and in favor of the defendants. Since contributory negligence was not in issue with respect to Mrs. Pemberton's cause of action, the verdict necessarily reflects a determination in favor of the defendants on the issue either of negligence or proximate cause. Indeed, the jury was instructed that they were to determine these two issues first, and that if they found in favor of the defendants on either, they were to cease their deliberations at that point. It follows that the issue of Mr. Pemberton's contributory negligence was immaterial to the out-

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[1] The named defendants are Ince Brothers Pipeline Construction Company, Earl Ince and Glenn Ince, individually and as co-partners in the company, and Earl M. Pellegrini, doing business as Santa Clara Construction Company.

come of the case and that the plaintiffs could not have been prejudiced by the court's failure to give an instruction which had significance only in relation to that issue. (See Witt v. Jackson (1961) 57 A.C. 57, 69, 17 Cal.Rptr.⊥172 369, 366 P.2d 641; Chadwick v. Condit (1962) 205 A.C.A. 357, 360, 23 Cal. Rptr. 245.)

Plaintiffs theorize, however, that the contradictory testimony on these issues created for the jury a question as to the credibility of Ince, the Pembertons, and San Filippo, and that a determination of this question against them would necessarily have tended to influence the jury's appraisal of all their testimony. For this reason, it is argued, the court's failure to give the cautionary instruction was prejudicial. The contention is purely hypothetical. The record discloses evidence other than that adduced from these witnesses which would have supported a verdict either way. It fails to disclose that the verdict depended upon the extent to which the jury accorded credence to these witnesses, or that any jury determination of the credence of these witnesses necessarily resulted from this and no other conflict in the evidence. Under these circumstances, the prejudice claimed by plaintiffs is not shown to have existed.

[2, 3] The plaintiffs next contend that the court erred in refusing to give their requested instructions on the doctrine of imminent peril. It is argued that the instruction should have been given to qualify the standard of care by which the jury was to measure the reasonableness of the conduct of Heisler and San Filippo. With respect to the conduct of San Filippo, there was no evidence which would have supported such an instruction. To the contrary, he testified that he did not see the mound of dirt until he was within 20 feet of it while traveling at a speed of approximately 30 miles per hour, and that he had no opportunity to swerve before striking the mound. "Generally it is error to instruct on imminent peril unless at least two courses of action are available to a party after the danger is perceived." (Givens v. Southern Pacific Co. (1961) 194 Cal.App.2d 39, 46, 14 Cal. Rptr. 736, 740; see also Perry v. Piombo (1946) 73 Cal.App.2d 569, 572–573, 166 P.2d 888.) The court did not err in refusing the instruction insofar as San Filippo was concerned. Apart from this, the proposed instruction would have had no relevance except in connection with the reasonableness of Heisler's conduct. However, the reasonableness of his conduct was not a factor bearing on the outcome of the case. The court instructed the jury that if it found that both Heisler and Ince Brothers were negligent and that negligence proximately caused the plaintiffs' injuries, then both would be liable in the absence of contributory negligence. Again, in summarizing ⊥173 the instructions, the court instructed that if the conditions bringing about the plaintiffs' accident were the result of the negligence of both Heisler and Ince Brothers, then Ince Brothers was to be held responsible. The jury was thus informed that negligence on Heisler's part, if found to exist, would not relieve defendants of liability. Thus, it was immaterial whether his conduct was determined to be reasonable or not. Plaintiffs contend, however, that Heisler's conduct had significance with respect to the issue of proximate cause. It is argued that his conduct might have operated either as a concurring or superseding cause of plaintiffs' injuries, and that whether it amounted to a superseding cause, thus terminating defendants' liability, depended upon whether it was reasonably to be foreseen by them. From this foundation, plaintiffs make the curious argument that it was therefore unnecessary for the jury to decide whether Heisler's conduct was reasonably foreseeable, and that in deciding this question the jury should have had in mind the reasonableness of his conduct. The simple answer to this argument is that the question of whether Heisler's conduct amounted to a superseding cause of plaintiffs' injuries was never before the jury. The instructions given told the jury, in legal effect, that

Heisler's conduct could amount to no more than a concurring cause of plaintiffs' injuries, not terminating defendants' liability. The court did not err in refusing the proposed instructions on the doctrine of imminent peril.

[4] The plaintiffs requested a lengthy instruction (proposed instruction number 6) which incorporated sections 470, 465.7, and 473, subdivision a,[2] of the Vehicle Code then in effect, as well as a portion of a Santa Clara County ordinance relating to the construction of drains along roads in that county, and which informed the jury that violations of these provisions constituted negligence as a matter of law. Section 470 of the Vehicle Code provided: "Detour signs shall be erected at the nearest points of detour from that portion of a highway, or from any bridge, which is closed to traffic while under construction or repair." Section 465.7 provided that the State Department of Public Works shall determine and publicize the specifications for uniform types of warning signs, lights and devices to be placed on the highway by any agency performing work which affects safe movements of traffic on the highway, and that only such signs shall be used. ⌊174 ⌊Section 473, subdivision a, prohibited the display of unauthorized signs, signals and lights.

Plaintiffs concede that there was no contention in the case that defendants had used unauthorized warning devices in violation of section 473, subdivision a. They also concede the accuracy of defendants' contention that the portion of the proposed instruction relating to section 465.7 was incomplete in that the proposed instruction did not inform the jury of the types of warning devices which were authorized by the State Department of Public Works. It was further agreed at the trial that the Santa Clara County ordinance which was included in the proposed instruction was inapplicable, inasmuch as the accident occurred within the city limits of the City of San Jose. Nevertheless, plaintiffs now contend that the court erred in refusing the instruction insofar as it set forth the requirements of section 470 of the Vehicle Code.

[5] It is fundamental that a trial court does not err in refusing an incomplete proposed instruction (Pobor v. Western Pac. R. R. Co. (1961) 55 Cal.2d 314, 324, 11 Cal. Rptr. 106, 359 P.2d 474), that it has no duty to correct an incomplete instruction (Shaw v. Pacific Greyhound Lines (1958) 50 Cal. 2d 153, 158, 323 P.2d 391; Smith v. Sugich Co. (1960) 179 Cal.App.2d 299, 308, 3 Cal. Rptr. 718), or to modify or edit a proposed instruction. (Slovick v. James I. Barnes Constr. Co. (1956) 142 Cal.App.2d 618, 630, 298 P.2d 923; Stapp v. Marshburn (1958) 165 Cal.App.2d 808, 813, 332 P.2d 798, 333 P.2d 351; Flynn v. Wallace (1959) 173 Cal. App.2d 592, 595, 343 P.2d 767.) The court's refusal of the proposed instruction number 6 was justified on any of the aforementioned rules. Had plaintiffs desired a separate instruction on section 470 of the Vehicle Code, they should have requested it.

[6] It is contended that plaintiffs impliedly withdrew that portion of the proposed instruction dealing with the Santa Clara County ordinance when they orally submitted to the court a request that the jury be instructed in the terms of a portion of the San Jose Municipal Code. This submission occurred during a discussion in chambers, in the course of which plaintiffs' counsel offered into evidence a provision of that code which provided: "* * * and the person who has made the excavation must maintain proper barricades and lights and assume full responsibility for such excavation." Plaintiffs requested, alternatively, that the jury be instructed according to the above statement. Upon objection by opposing ⌊175 counsel to the last seven words of the provision, the court stated that it would give the remaining portion of the offered statement. There is nothing in the reported discussion which bears out plaintiffs' claim

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[2] Now sections 21363, 21406, and 21465.

that the proposed instruction number 6 must be deemed to have been submitted intact except for the portion relating to the Santa Clara County ordinance. However, assuming that plaintiffs' contention is correct, the instruction, although "impliedly modified," was still properly refused by the court on the ground that portions thereof were admittedly defective. The argument that defendants would not have been prejudiced by the incompleteness of the proposed instruction is one which might properly be addressed to this court were defendants appealing from an adverse judgment, but has no bearing on the propriety of the trial court's refusal of the proposed instruction. Nor was the alleged error aggravated by the trial court's sustaining an objection to plaintiffs' inquiry whether a particular witness had seen detour signs in the area. Four other witnesses had previously testified that none were observed. (Hayes v. Harry (1960) 183 Cal.App.2d 412, 417, 6 Cal.Rptr. 671; Guardianship of Levy (1955) 137 Cal.App.2d 237, 250, 290 P.2d 320; Zellers v. State of California (1955) 134 Cal.App.2d 270, 276–277, 285 P.2d 962.)

[7] The defendant Pellegrini, called as a witness in his own behalf, was permitted to testify over objection that the performance of Ince Brothers on other jobs had led him to believe that they were competent independent contractors, and that on his daytime visits to the instant job site, he had observed no lack of precautions. Plaintiffs contend that the court's error in admitting this testimony accentuated its error in refusing their proposed instruction number 6. The record discloses that Pellegrini's counsel offered the testimony as tending to show that Pellegrini had exercised care in selecting a competent independent contractor for the project. (Cf. 26 Cal.Jur.2d, Independent Contractors, § 20, p. 416.) Plaintiffs correctly point out on appeal that Pellegrini's alleged liability was based upon the inherently dangerous nature of the activity engaged in by the independent contractor, and that his care in selecting a competent contractor was not in issue. However, the record reveals that Pellegrini's testimony was not objected to as being outside the issues framed by the pleadings. Rather, the gist of plaintiffs' objection below was that the offered testimony was not competent to show that Ince Brothers had exercised due care on the particular night in question. 176 The court's ruling on plaintiffs' objection was made on the basis of the doctrine of multiple admissibility (see Daggett v. Atchison, T. & S. F. Ry. Co. (1957) 48 Cal.2d 655, 665, 313 P.2d 557, 64 A.L.R.2d 1283), and plaintiffs participated in posing the decision for the court thusly. At no time was the objection now urged on appeal called to the attention of the trial court. The situation is a proper one for application of the rule that an objection specifying wrong grounds amounts to a waiver of grounds not urged. As stated in Rupp v. Summerfield (1958) 161 Cal.App.2d 657, at p. 662, 326 P.2d 912, at p. 915: "When inadmissible evidence is offered, the opposing party must object and specifically state the grounds of his objection in such a manner that it clearly informs the court of the point on which a ruling is desired and the proponent of the defect to be corrected. An objection specifying the wrong grounds, or a general objection, amounts to a waiver of all grounds not urged. [Citations.]"

Judgment affirmed.

KAUFMAN, P. J., and AGEE, J., concur.

Rehearing denied; PETERS, J., dissenting, WHITE, J., sitting pro tem.

208 Cal.App.2d 246

⊥246 ⊥**The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Solly TERENO, Defendant and Appellant.

Cr. 8014.

District Court of Appeal, Second District, Division 1, California.

Oct. 5, 1962.

The Superior Court, Los Angeles County, Evelle J. Younger, J., entered a judgment of conviction for bookmaking, and modified a probation order previously entered, and defendant appealed. The District Court of Appeal, Lillie, J., held that modification of probation order entered on condition that defendant not engage in any bookmaking activities was proper where defendant, during probationary period, engaged in bookmaking activities for which he was charged and convicted.

Judgment affirmed; purported appeal from order denying a motion for new trial dismissed.

1. Criminal Law 🔑982.6(4)

Modification of probation order entered on condition that defendant not engage in any bookmaking activities was proper where defendant, during probationary period, engaged in bookmaking activities for which he was charged and convicted. West's Ann.Pen.Code, § 337a, subd. 3.

2. Criminal Law 🔑1124(1)

An appeal from a purported order denying a motion for new trial would be dismissed where record was silent concerning such a motion and no order relative to denial of a new trial appeared in the record.

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Matthews & Stanley, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and, Norman H. Sokolow, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

Having found defendant guilty of four counts of bookmaking in violation of section 337a, subdivisions 1 and 3, Penal Code, the trial judge on February 10, 1961, sentenced ⊥247 him to a term of 180 days in the county jail; he suspended sentence and granted defendant probation for a period of three years on certain specified terms and conditions, among them, that defendant "not gamble or engage in any bookmaking activities or have paraphernalia thereof in his possession, and not be present in places where gambling or bookmaking is conducted," and that he "obey all laws, orders, rules and regulations of the probation department and of the court." Shortly thereafter defendant was again arrested and charged with four counts of bookmaking; he was found guilty of a violation of section 337a, subdivision 3, Penal Code, as alleged in count 3 of the information (No. 242588). On August 22, 1961, the court denied probation and sentenced defendant to 90 days in the county jail. At the same time, and in the instant case, the court found defendant to be in violation of the probation order of February 10, 1961, and ordered the same modified to provide that he serve the next 90 days in the county jail, probation to continue under the same terms and conditions upon his release. The court ordered the jail terms in case no. 242588 and in the instant case to run concurrently. From the judgment defendant appeals.

[1] It appearing that defendant engaged in bookmaking activities on March 23, 1961, for which he was charged and convicted (judgment affirmed by this court on August 29, 1962, People v. Tereno, 207 A.C.A. 250, 24 Cal.Rptr. 501), in violation of section 337a, subdivision 3, Penal Code, and the probation order of February 10, 1961, the lower court properly found defendant to be in violation of the order, and modified the same. The judgment is affirmed.

[2] While defendant has also appealed from an order denying a motion for new

trial, the record in both cases is silent concerning such a motion and no order relative to denial of a new trial appears therein. Thus, appeal from the purported order is dismissed.

WOOD, P. J., concurs.

208 Cal.App.2d 104

104 **The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Alberto BARQUERA, Jr., and Rigoberto Gomez, Defendants and Appellants.

Cr. 7922.

District Court of Appeal, Second District, Division 2, California.

Oct. 1, 1962.

Prosecution for selling heroin and for conspiring to sell heroin. From a judgment of the Superior Court, Los Angeles County, Joseph L. Call, J., the defendants appealed. The District Court of Appeal, Fox, P. J., held that refusal of committing magistrate at preliminary hearing to require the production of narcotics agent's notes and memoranda which were later ordered produced and inspected by defense counsel at trial did not constitute a disregard of defendants' substantial rights.

Affirmed.

1. Criminal Law 🔑998

Judgment of conviction will not be set aside because of defect in preliminary examination unless defendant has been deprived of some substantial right.

2. Criminal Law 🔑238

In order that person charged with crime may be held to answer by committing magistrate, it is only necessary that evidence, rationally viewed, be sufficient for it to appear that offense charged has been committed and that there is probable cause to believe that defendant is guilty of that offense.

3. Criminal Law 🔑234

Refusal of committing magistrate at preliminary hearing to require production of narcotics agent's notes and memoranda which were later ordered produced and inspected by defense counsel at trial did not constitute a disregard of defendants' substantial rights.

4. Criminal Law 🔑404(4)

Evidence reasonably established continuous chain of custody of heroin between time it was received from defendant and its presentation in evidence at trial, and where it was established that each balloon offered in evidence contained heroin, fungible nature of heroin rendered non-prejudicial any mix-up between exhibits.

5. Criminal Law 🔑404(1)

Where prosecution relies upon demonstrative evidence it has burden of showing that there was no substitution or tampering therewith, but such burden is not an absolute one requiring prosecution to negative all possibility of tampering.

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Elinor K. Chandler, for appellants.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., George W. Kell, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice. 106

Appellants were convicted of selling heroin, and of conspiracy to sell heroin in violation of section 182 of the Penal Code. They have appealed from the judgment and order denying their motion for a new trial.

Appellant Alberto Barquera, Jr., was found guilty on counts 3 and 5 of selling heroin. Appellant Rigoberto Gomez was found guilty on count 2 of the same offense. Both appellants were convicted of the conspiracy charge, count 6.[1]

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[1] Other defendants who are not parties to this appeal were found guilty of various counts.

Appellants do not challenge the sufficiency of the evidence except as it relates to the sufficiency of the foundation to justify the admission into evidence of each of the exhibits. In sum, the record discloses that narcotic agent Cota testified that he made five purchases of heroin from appellants or their co-defendants.

On cross-examination, Cota testified that he had made notes concerning the various transactions testified to by him. Defense counsel thereupon moved that all such notes and reports be made available to the defendants. The court ordered Cota to bring his notes into court the next morning. Upon the resumption of the trial the next day, the deputy district attorney delivered Cota's handwritten reports to defense counsel. These notes constituted "the entirety of everything [Cota had] written regarding this case." The court also ordered that all typewritten reports be produced. This was done. The magistrate had declined to require the production of these notes and memoranda at the time of the preliminary hearing.

Initially the defendants argue that "because of the denial of the right to discovery, appellants were not legally committed for trial by the magistrate, thus the trial court was without jurisdiction to proceed to trial and judgment." We find no merit in this contention. The information by which appellants were charged is not questioned; the fact that they were represented by counsel, personally arraigned and appeared before the court is not questioned; and the fact that the subject matter of the proceeding was properly within the jurisdiction of the superior court is also not questioned. The record establishes the regularity of the proceedings with respect to each of these matters. Therefore, the superior court had jurisdiction unless the magistrate disregarded substantial rights guaranteed to the defendants. (People v. Elliot, 54 Cal.2d 498, 503, 6 Cal.Rptr. 753, 354 P.2d 225.)

⊥107 ⊥[1–3] In this case we augmented the record on appeal to include a copy of the reporter's transcript of the preliminary hearing. This transcript reveals that Cota testified in detail to each sale. In order that a person charged with a crime may be held to answer by a committing magistrate, it is only necessary that the evidence, rationally viewed, be sufficient for it to appear that the offense charged has been committed, and that there is probable cause to believe that the defendant is guilty of that offense. (Kind v. Superior Court, 143 Cal.App.2d 100, 102, 299 P.2d 414; Calhoun v. Superior Court, 46 Cal.2d 18, 29, 291 P.2d 474; Bompensiero v. Superior Court, 44 Cal.2d 178, 183, 281 P.2d 250.) Cota's testimony was sufficient to justify the magistrate in holding the appellants to answer. The fact that the appellants were deprived of the use of Cota's notes (which were not used by the officer during his testimony at the preliminary hearing nor prior thereto to refresh his recollection) does not change this conclusion. A judgment of conviction will not be set aside because of a defect in the preliminary examination unless the defendants have been deprived of some substantial right. (People v. Elliot, supra, 54 Cal.2d 498, 503, 6 Cal.Rptr. 753, 354 P.2d 225; People v. Tarbox, 115 Cal. 57, 60, 46 P. 896; People v. Sehorn, 116 Cal. 503, 505, 48 P. 495.) Cota's notes could serve no purpose other than that of impeachment. After having been furnished all of Cota's notes and memoranda at the trial, appellants offer no suggestion that had they had these notes and memoranda at the preliminary and used the material therein for cross-examination, the magistrate would not have been justified in holding them to answer. The material was obviously of little or no value—for with it available at the trial, appellants were nevertheless found guilty beyond a reasonable doubt. We cannot, therefore, say that they were deprived of any substantial right that resulted in prejudice to their case by not having Cota's notes and memoranda made available at the preliminary hearing. The statement of the Supreme Court in Mitchell v. Superior Court, 50 Cal.2d 827, at p. 830, 330 P.2d 48, at p. 50, is here apposite: "Since there was competent evidence to justify committing defendants and disclosure of the names of the informers [which had been refused at the preliminary] can be obtained at the trial, defendants were not prejudiced by the error or deprived of any substantial right."

[4] Appellants contend that the trial court prejudicially erred in receiving into evidence People's Exhibits 2 through 5 on the ground that no proper foundation had been laid. ⌊108 They contend that there had been a substitution or tampering with the exhibits in question. This contention is based upon the testimony of the chemist Arnold that "I notice at this time that there are two vials within this envelope. There were not two vials at the time of the receipt of the envelope. Apparently the exhibit has been mixed up. There was only one vial at the time of receipt." But Arnold also testified that to the best of his recollection, Exhibit 1 had one plastic vial in it at the time of receipt and Exhibit 4 also had one plastic vial in it at the time of receipt by him. It is apparent therefore that the "mix-up" consisted merely in the misplacement of the plastic vial from the envelope of Exhibit 1 into the envelope of Exhibit 4. It should be noted that the People's proffered Exhibit 1 was not received in evidence. As to Exhibits 2 through 5, a chain of possession was clearly established. The chemist Arnold testified that when he received each envelope from Cota, it was sealed; that from each of the envelopes he removed a balloon which contained a powdery substance; that he analyzed the substance and determined that it was heroin; that he thereafter returned the powder to its individual package and re-sealed the envelope with his own sealing wax; and that the envelopes were from then on stored in a safe in room 105 of the California State Building. In addition, Cota identified each balloon and the handwritten notations that he had placed on each for the purpose of identifying them prior to their delivery to Arnold in the sealed envelopes.

The exhibits remained in the safe until the preliminary hearing when Arnold removed them therefrom and took them to Division 32 of the Municipal Court for the hearing. At the conclusion of the first day of the preliminary hearing, the court clerk handed the envelopes back to Arnold for overnight custody. Arnold checked the contents of each envelope, determining that the exhibits were exactly as he had given them to the district attorney on the previous day. He then stored the exhibits in the safe over-night and returned them the next morning to Division 32. At that time they were received into evidence and Arnold did not see them again until he testified in the court at the time of trial.

[5] Where the People rely upon demonstrative evidence, they have the burden of showing that there was no substitution or tampering therewith. "[B]ut it has never been suggested by the cases * * * that this burden is an absolute one requiring the party to negative all possibility of tampering." (People⌊109 v. Riser, 47 Cal.2d 566, 580, 305 P.2d 1, 10.) The evidence in this case reasonably established the continuous chain of custody from the date the contraband was received from appellants until its admission in evidence at the trial. If there was in this case the "barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." (People v. Riser, supra, p. 581, 305 P.2d p. 10.)

Since it was established by the chemist's testimony that each exhibit did, in fact, contain heroin, which testimony was uncontradicted, any "mix-up" of the fungible powder itself could not have resulted in any prejudice to the appellants. The heroin, though it be mixed and mixed again with other heroin, would still remain heroin.

Affirmed as to each appellant.

ASHBURN and HERNDON, JJ., concur.

208 Cal.App.2d 239

⊥239 **Luis Perea RIVAS, Plaintiff & Appellant,**

v.

Arnulfo AYALA, Defendant & Respondent.

Civ. 6851.

District Court of Appeal, Fourth District, California.

Oct. 4, 1962.

An action was brought for injuries sustained in a knife fight between the plaintiff and defendant. The Superior Court of San Bernardino County, John P. Knauf, J., rendered a judgment for the defendant, and the plaintiff appealed. The District Court of Appeal, Shepard, J., held that evidence sustained the trial judge's findings that the plaintiff was the aggressor and that the defendant acted in proper and reasonable self defense and used no more force than was reasonably necessary to repel the assault committed on him by the plaintiff.

Judgment affirmed.

1. Appeal and Error 🔑1010(1)

Reviewing court is bound by evidence which supports findings and judgment of trial court.

2. Assault and Battery 🔑35

Evidence sustained trial court's findings in action for injuries sustained by plaintiff in knife fight with defendant that plaintiff was aggressor and that defendant acted in proper and reasonable self defense and used no more force than was reasonably necessary to repel assault committed on him by plaintiff.

3. Appeal and Error 🔑171(1)

Theory, which was not pleaded, and which was never suggested to trial judge for consideration at any time, would not be considered on appeal. Cal. Rules of Court, rule 14.

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Marshall Miles, San Bernardino, for appellant.

Harold King, San Bernardino, for respondent.

SHEPARD, Justice. ⊥240

[1] Some time between 12:00 midnight and 2:00 a. m. of May 3, 1960, at the Apache Cafe, San Bernardino, California, an altercation occurred between plaintiff, Luis Perea Rivas, age 34, weight 215, a cook's helper, and defendant Arnulfo Ayala, age 70, weight 165, a retired Santa Fe railroad worker. While the broad outlines of what happened are not in dispute, the exact details of how the altercation started in the cafe and who the aggressor was after they left the cafe are in sharp conflict. Because where such conflict exists this court is bound by the evidence which supports the findings and judgment of the trial court, we shall so relate it. (Brewer v. Simpson, 53 Cal.2d 567, 583[1-2], 2 Cal. Rptr. 609, 349 P.2d 289.)

About one year previously, Luis had been a tenant in a house belonging to Ayala and Luis had been evicted. Shortly thereafter, Luis and his uncle "Chevo" Rivas met Ayala returning home late at night in an intoxicated condition. The two Rivas' attacked Ayala, knocked him to the ground and severely beat him. Some time before midnight of the night here in question, Ayala came to the cafe, sat on a stool at the bar about five feet from the door and next to Mary Bareta (a niece of Luis), ordering a Seven-Up for himself and a beer for Mary. Some time after midnight Luis came in and took ⊥241 a seat at the bar several stools away and next to a Bobby Silva. A short time later Luis came close to Ayala, started a discussion involving "Chevo," and challenged Ayala to fight. Ayala refused. Luis kept repeating his challenge. The bartender ordered Luis to leave Ayala alone and finally ordered Luis to get out of the bar. Luis refused. Finally, Ayala left with Luis. As he walked out he saw a knife in Luis' hand.

Outside, Luis and Ayala walked a few paces around the corner. Luis swung his knife at Ayala. Ayala had a small pocket-knife with a two or two and a half inch blade which he evidently opened as they were walking. When Luis struck, Ayala struck back two or three times and cut Luis on the face and abdomen. All this took place in a few seconds or a minute. Luis walked away bleeding. Ayala did not follow him. Luis was taken to the hospital by others, for medical attention. Ayala had never before been in a knife fight.

Peculiarly, there were at least four other persons in the bar well known to both parties. But the only witness called by either party was a taxi driver who saw the parties walk out together, saw waving arms for a few seconds but could not see who struck what blow, if any, saw blood running from Luis and called the police. He contributed nothing to the question of who the aggressor was. Judgment was rendered for defendant. Plaintiff appeals.

SELF DEFENSE

[2] Plaintiff first contends that as a matter of law defendant's actions cannot be justified as self defense, citing as authority People v. Hinshaw, 194 Cal. 1, 227 P. 156; Fraguglia v. Sala, 17 Cal.App.2d 738, 62 P.2d 783. The quotation given by plaintiff from the Hinshaw case provides its own answer:

> "* * * that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance, or fault, to create a real or apparent necessity for making a felonious assault."

The court found orally that plaintiff was the aggressor and also found in its written findings

> "That at the time and place of the occurrence in question the defendant herein acted in proper and reasonable self defense and used no more force than was reasonably necessary to repel the assault committed upon him by the plaintiff."

The evidence factually supports both the oral statement of the trial court and its written finding. The Fraguglia ⊥242 case involved a fight between two rubbish truck workers. The judgment there was reversed because there was no evidence that defendant was the aggressor in the sense of the rule as set forth in the Hinshaw case.

Furthermore, the trial court may well have believed that defendant finally concluded that plaintiff would attack him in any event and that he would be at a disadvantage in the close quarters of the bar. Some of defendant's answers are inconsistent with this conclusion, but when the whole testimony is read together, with the defendant's lack of fluency and English understanding in mind, it becomes a possible conclusion. Plaintiff's continued insistence on fighting, his refusal to heed the orders of the bartender to leave defendant alone and get out, the fact that an open blade in plaintiff's hand was seen by defendant as they started out of the cafe, the fact that defendant had been previously attacked and inexcusably beaten by plaintiff and "Chevo," the fact that defendant obviously misunderstood the import of several questions, the answers that he was not "afraid" but felt it necessary to protect himself from a knife attack, plus the fact that defendant repeatedly asked plaintiff to leave defendant alone and to go away, all put together lend credence and support to such a belief. If such was the belief of the trial judge, it would render involuntary the willingness of defendant to remove the scene of the impending fight from the close quarters of the bar. In any event the evidence provided ample support for the court's finding. We find the case of Ballew v. Davis, 76 Cal.App.2d 418, 173 P.2d 317, more nearly in point. There, a photographer was found by the court to have been threatening to strike defendant because defendant was obstructing the photographer's view. Defendant therein was held to be acting in self defense when he anticipated the photographer's blow.

MUTUAL CONSENT TO COMBAT

[3] Plaintiff now contends, for the first time, that this was voluntary mutual combat

and that self defense may not be used as a defense in a damage action in case of voluntary mutual combat. But we need not examine this theory. It was not the theory upon which the case was pleaded or tried and was never suggested to the trial judge for his consideration at any time. Theories never suggested to the trial judge, and which neither he nor the opposing party had any opportunity to consider at the trial level, are not ⊥243 properly presented for the first time on appeal. (Rule 14, California Rules of Court; Richard v. Richard, 123 Cal.App.2d 900, 903[7], 267 P.2d 867; Estate of Bialy, 185 Cal.App.2d 634, 638[3], 8 Cal.Rptr. 663; Estate of Sayegh, 118 Cal.App.2d 327, 332[4], 257 P.2d 995.)

The judgment is affirmed.

GRIFFIN, P. J., and COUGHLIN, J., concur.

208 Cal.App.2d 232

⊥232 **Clarence E. WHALEY, Plaintiff and Appellant,**

v.

John D. KIRBY, Clarence Meyers, D. E. Thomas, police officers; A. Elmer Jansen, Chief of Police of the City of San Diego, et al., Defendants and Respondents.

Civ. 6781.

District Court of Appeal, Fourth District, California.

Oct. 4, 1962.

Hearing Denied Dec. 12, 1962.

False imprisonment action. From judgment of dismissal after sustaining of demurrer to complaint as amended without leave to further amend, William A. Glen, J., the plaintiff affirmed. The District Court of Appeal, Griffin, P. J., held that reasonable and probable cause for detention and psychiatric examination of plaintiff existed, where he had displayed placard accusing young lady and numerous governmental officials of the most flagrant and immoral conduct, had refused to delete those references, had broken detention, had struck officer, and had accused officers of being part of conspiracy.

Affirmed.

1. False Imprisonment 🔑13

Establishment of lack of probable or reasonable cause is necessary element in action for false arrest or false imprisonment; overruling Collins v. Jones, 131 Cal.App. 747, 22 P.2d 39.

2. False Imprisonment 🔑13

Reasonable and probable cause for detention and psychiatric examination of plaintiff suing for false imprisonment existed, where he had displayed placard accusing young lady and numerous governmental officials of the most flagrant and immoral conduct, had refused to delete those references, had broken detention, had struck officer, and had accused officers of being part of conspiracy. West's Ann.Welfare & Inst.Code, § 5050.3.

3. False Imprisonment 🔑13

Although normally, conviction or acquittal of a person suing for false imprisonment is immaterial, findings of psychiatrists and act of court in committing plaintiff to state mental hospital were elements to be considered.

4. False Imprisonment 🔑13

Fact that plaintiff was released from state mental hospital on habeas corpus was immaterial in determining whether there was reasonable and probable cause for his detention and psychiatric examination.

5. False Imprisonment 🔑20(1)

Complaint failed to state cause of action against chief of police for false imprisonment, in absence of positive allegation of his participation in detention of plaintiff.

6. Pleading 🔑8(1), 48

Conclusions or deductions from facts or the absence of facts alleged do not constitute a cause of action.

7. False Imprisonment 🔑20(1)

Allegations of liability of chief of police for false imprisonment of plaintiff because of claimed failure to remove and suspend police officers involved in detaining plaintiff and taking him to state mental hospital were not sufficient to show that officers were incompetent or unfit or that chief had notice thereof or negligently failed to remove officers.

8. Municipal Corporations 🔑742(4)

To recover against officer of city for his claimed negligence, compliance with statutes as to filing of claim must be alleged. West's Ann.Gov.Code, §§ 801, 803.

◆

Clarence E. Whaley, appellant, in pro. per.

Alan M. Firestone, City Atty., and G. Don Lindberg, Deputy City Atty., for respondents.

233 GRIFFIN, Presiding Justice.

Plaintiff-appellant Clarence E. Whaley, in propria persona, filed this action for claimed false imprisonment against John D. Kirby, Clarence Meyers and D. E. Thomas, police officers; and A. Elmer Jansen, Chief of Police of the City of San Diego, as well as Dr. H. N. Welborn, Dr. W. E. Wiend and Dr. C. F. Lengyel; R. B. James, County Clerk; H. Fegan, Deputy County Clerk; Judge L. N. Turrentine, Judge Bonsall Noon and the City of San Diego.

He alleges generally that on May 25, 1957, he stood on a sidewalk at Fifth and Broadway in San Diego and displayed a placard in protest of a denial of his drivers instructor's license "by Governor Goodwin Knight and the California Dept. of Motor Vehicles." The sign had on it:

> "A BIG HOUSECLEANING IN ORDER. * * * How much crookedness behind this denial?"

234 His claim was that certain charges were made against him accusing him of publicly, falsely and libelously making scandalous statements to injure the character of certain government officials. The sign further contained an imputation of unchastity and wanton sexual activity involving a young lady employee of the Department of Motor Vehicles, stating that she became infected with a loathsome venereal disease. The sign also contained the accusation that government employees gave and accepted bribes. It also said:

> "My Fellow Citizens! For the good of society please take action in ousting the government employees and officials involved in the above mentioned evils.
>
> "Signed,
> "Clarence E. Whaley"

The complaint then alleges that defendant John D. Kirby and other police officers stopped at the curb and asked defendant to sit in the police car with them so they could talk to him and study the wording on the placard; that after plaintiff complied the officers informed him that he was violating a city ordinance by displaying the sign without a permit and that it was a violation of the Penal Code to exhibit obscene and indecent literature; that plaintiff was asked to and he did go to the police station to see what the police captain had to say about it; that after some conversation, some officer directed Officer Kirby to take plaintiff to the psychiatric ward and plaintiff was taken there; that the officers had no process giving them authority to do so and the officers had no reasonable or probable cause to do this or to believe that plaintiff was so mentally ill as to render him dangerous to himself or to others or that he should be suitably restrained for his own protection; that on arriving at the hospital, plaintiff tried to run away and he gave one of the officers a punch in the face and started to struggle with them; that plaintiff was subdued and taken to the ward; that he was strapped, hands and feet, for some hours; that defendants Dr. Wiend and Dr. Lengyel, in their official capacity, falsely imprisoned plaintiff and aided and abetted in his illegal commitment to Patton State Hospital; that they made false accusations in their medical report; that on arrival at

Patton, plaintiff wrote a lengthy letter to the F.B.I., the governor, the Motor Vehicle Department and the police department, to no avail.

Then follows the allegation that defendant H. N. Welborn, ⌊235 acting as assistant counselor for the County of San Diego, aided and abetted in his false imprisonment by making false statements in his report to the psychiatric board; that defendant R. B. James, County Clerk, and his deputy, defendant H. Fegan, failed to deliver to plaintiff copies of the formal papers of commitment while he was in the psychiatric ward; that defendant Judge L. N. Turrentine, as Judge of the Superior Court, furthered said false imprisonment by illegally committing plaintiff to Patton because plaintiff was not served with the formal charges, had no opportunity to subpoena witnesses, and was not represented by counsel, and that Judge Turrentine said, "You can apply for a jury trial when you get to Patton"; that defendant Judge Noon furthered the false imprisonment by failing to answer and take heed to plaintiff's letter written to him about Judge Turrentine being requested to release plaintiff from Patton forthwith because his constitutional rights had been violated. Apparently, some form of trial was granted to plaintiff and an attorney appointed to represent him. Plaintiff alleges that the trial was continued to make certain tests of plaintiff for tuberculosis because he had lost so much weight. He complains of his treatment in Patton. Apparently, he remained there from May 31, 1957 to January 10, 1958.

Plaintiff seeks $200,000 for compensatory damages and $100,000 for punitive damages, plus $100 costs to pay his attorney for obtaining his release on habeas corpus.

Plaintiff added certain amendments to the original complaint, inserting the name of D. E. Thomas, city police officer, as a defendant, and inserting the name of Chief of Police A. Elmer Jansen, as a superior officer who authorized Officers Thomas and Kirby to place the plaintiff in the psychiatric ward, and this allegation is based on a conversation plaintiff had with the city manager and his assistant about July 1958, but he was not told who authorized the officers to place him there, although he "assumed" the chief authorized it. On December 19, 1960, plaintiff filed another amendment to the complaint, inserting the name of defendant Lieutenant Clarence Meyers, charging that on January 4, 1960, plaintiff interviewed these officers and recognized Meyers as the officer on watch on May 25, 1957.

Demurrers, both general and special, were interposed to the complaint and amendments thereto. Apparently, the court sustained the demurrers and allowed 30 days' leave to amend as to all defendants except Judge Turrentine and ⌊236 Judge Noon. On March 8, 1961, plaintiff filed a document entitled, "AMENDMENTS APROPOS TO HEARING ON DEMURRERS HELD FEB. 9/61."

It alleged generally that defendant Lieutenant Clarence Meyers was the officer on watch at the time and was superior to defendant Officers Kirby and Thomas and as such did authorize them to imprison plaintiff in the psychiatric ward; that they knew plaintiff was not a mentally ill person at the time; that the display of the placard was within his right of freedom of speech; that Dr. Wiend and Dr. Lengyel well knew that these officers had no reasonable cause for taking plaintiff into custody and that Officer Kirby had no probable cause for signing the petition filed with the county clerk on May 25, 1957; that their report which stated that plaintiff had numerous paranoid delusional ideas and recommended commitment to Patton therefor was not done in good faith and was so groundless that it could only be considered as "psychiatric gobbledygook." It is then alleged that their lack of good faith deprived them of the immunity provided by Welfare and Institutions Code, section 5047.

It then alleged that defendant Chief of Police Jansen was *negligent* in failing to take action for the suspension or removal of Lieutenant Meyers and Officers Kirby and Thomas as being unfit and incompetent officers after he received constructive notice or knowledge of said false imprisonment of plaintiff in the psychiatric ward, as a result of plaintiff's inquiry of the city manager, who said that the chief of police had been contacted as to who authorized Officers Kirby and Thomas to put plaintiff in the psychiatric ward. Damages are claimed in this respect. A demurrer to the complaint as amended was sustained without leave to amend and the complaint was dismissed.

Plaintiff appeals only from the judgment as to defendants Chief of Police Jansen, Lieutenant Meyers and Officers Kirby and Thomas.

Plaintiff argues that a cause of action was stated, because when an arrest is made without legal process all that need be alleged to charge an unlawful arrest is the arrest without process, the imprisonment and the damage. (Citing Kaufman v. Brown, 93 Cal.App.2d 508, 209 P.2d 156; 22 Cal.Jur.2d sec. 43, p. 78.)

It is also claimed that a peace officer is liable for false imprisonment when he takes a person in custody without having reasonable cause to believe the person is so mentally ill 237 that he is likely to cause injury to himself or others. (Citing Collins v. Jones, 131 Cal.App. 747, 22 P.2d 39; Welf. & Inst. Code, sec. 5050.3.)

It is argued that the reasons set forth in the petition instituting the hearing were insufficient to show probable cause. They are factually about the same as here shown and as alleged by the plaintiff. It is argued that the complaint states a cause of action against Chief of Police Jansen, because it shows that he negligently failed and refused to suspend or discharge the police officers involved in this action. (Citing Fernelius v. Pierce, 22 Cal.2d 226, 138 P.2d 12.)

[1] It is apparent that the complex, detailed and somewhat erratic account of plaintiff's arrest clearly indicates that the officers had reasonable cause to believe that a misdemeanor was being committed in their presence. See Penal Code, sections 650½, 248 and 370; and Municipal Code, section 56.27. However, the arrest was not made by the officers for any of the aforementioned offenses committed in the presence of the officers pursuant to section 836 of the Penal Code. The detention was made pursuant to section 5050.3 of the Welfare and Institutions Code, which provides generally that:

> "When any person becomes so mentally ill as to be likely to cause injury to himself or others and to require immediate care, treatment, or restraint, a peace officer * * * who has reasonable cause to believe that such is the case, may take the person into custody for his best interest and protection and place him as provided in this section."

The weight of authority today holds that the establishment of lack of probable or reasonsable cause is a necessary element in an action for false arrest or imprisonment, overruling Collins v. Jones, supra, 131 Cal.App. 747, 22 P.2d 39, in this respect. See also Coverstone v. Davies, 38 Cal.2d 315, 239 P.2d 876.

[2–4] The Legislature has clearly stated the right of an officer to take a person into custody if he had reasonable cause to believe that person to be so mentally ill as to be dangerous to himself or others. (Welf. & Inst. Code, sec. 5050.3) Accepting as true the account alleged in the complaint, it is clear that there was reasonable and probable cause for the detention and psychiatric examination. The plaintiff was displaying a placard accusing a young lady and numerous governmental officials of the most flagrant and immoral conduct. He refused to delete these references. He broke detention, 238 struck an officer and accused the officers of being a part of a conspiracy. He was restrained at the hospital. The justification for the detention is clearly shown on the face of the complaint. While normally the conviction or acquittal of the defendant is immaterial in an action for false imprisonment, the findings of psychiatrists and the act of the court in committing a person to a state mental hospital are elements which must be considered in this type of false arrest action. Reasonable cause is shown herein and the conclusions of the subsequent examination further demonstrate the validity of the observations of the arresting officer. The fact that the doctors made a finding of a paranoid condition and the court ordered commitment substantiates the dangerous mental condition of the plaintiff at the time of the arrest. (Coverstone v. Davies, supra, 38 Cal.2d 315, 239 P.2d 876; Baer v. Smith, 68 Cal.App.2d 716, 157 P.2d 646.) The fact of his release on habeas corpus is also immaterial. (Vallindras v. Massachusetts, etc., Ins. Co., 42 Cal.2d 149, 265 P.2d 907.) The complaint and its amendments fail to state a cause of action because reasonable cause for the detention is overwhelmingly shown on its face. It is clear from the facts alleged in the complaint that plaintiff has concluded from the fact of an interview with Lieutenant Meyers that Meyers authorized or commanded his detention in the psychiatric ward. The facts alleged show that Lieutenant Meyers was not even present when plaintiff was transported to the hospital. The detention was instituted by Officers Kirby and Thomas, acting under the authority of Welfare and Institutions Code, section 5050.3.

[5–7] The claimed liability of Chief of Police Jansen is predicated on the basis of claimed interviews with the city manager's office in July 1958. There is no positive allegation of his participation in the detention. Conclusions or deductions from facts, or, as in this case, the absence of facts alleged, do not constitute a cause of action. (39 Cal.Jur.2d p. 191, sec. 130.) The amended complaint alleging liability of Chief of Police Jansen because of claimed failure to remove and suspend the police officers involved is not sufficient to show that the officers were incompetent or unfit and that the chief had notice thereof or negligently failed to remove them. (Michel v. Smith, 188 Cal. 199, 205 P. 113; 22 Cal. Jur.2d p. 70, sec. 33.)

[8] To recover against an officer of a city for his claimed⌊*negligence*, compliance ⌊239 with sections 801 and 803 of the Government Code, as to the filing of a claim, must be alleged. (Payne v. Bennion, 178 Cal. App.2d 595, 3 Cal.Rptr. 14.)

Judgment affirmed.

COUGHLIN and STONE,* JJ., concur.

208 Cal.App.2d 73

⌊**ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corp., and Wilmer T. Disney, Petitioners,** ⌊73

v.

SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF CONTRA COSTA, Respondent.

Willie Earl GUNN, Real Party in Interest.

Civ. 20775.

District Court of Appeal, First District, Division 2, California.

Oct. 1, 1962.

Hearing Denied Nov. 28, 1962.

Proceeding on petition for writ of prohibition to prevent the respondent court from giving effect to order made pursuant to motion under discovery statutes. The District Court of Appeal, Agee, J., held that oral statements made by employees of defendant railroad, being sued for personal injuries, to its claim adjuster for purpose of defending any action against railroad and any summary of statements by adjuster were privileged, but there was no abuse of discretion in ordering production of railroad's pictures, if any, of plaintiff since accident.

Peremptory writ issued in part and in all other respects order approved.

1. Discovery ⇐90

Oral statements made by employees of defendant railroad to its claim adjuster for purpose of defending any action against railroad arising out of automobile-train collision and adjuster's summary of such statements forwarded to defense attorneys were privileged and not discoverable. West's Ann.Code Civ.Proc. §§ 2016, 2030, 2031.

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* Assigned by the Judicial Council.

2. Discovery 🔑88

Order requiring railroad to produce any pictures taken of plaintiff since happening of accident, which resulted in suit for personal injuries against railroad was not an abuse of discretion. West's Ann.Code Civ. Proc. §§ 2016, 2030, 2031.

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Robert W. Walker, J. H. Cummins, Matthew H. Witteman, Mirko A. Milicevich, Henry M. Moffat, Los Angeles, for petitioners.

John J. Fox, Oakland, for real party in interest.

AGEE, Justice.

Petitioners seek a writ of prohibition to prevent the respondent court above-named from giving effect to an ⌊74 order made pursuant to a motion made under sections 2030 and 2031 of the Code of Civil Procedure.

This is an action for damages for personal injuries, and arises out of an auto-train collision occurring on August 6, 1960. Plaintiff in the action is the real party in interest herein, and petitioners are defendants Santa Fe, which is a corporation, and Disney, the engineer of the train. The action was filed on August 2, 1961.

On March 20, 1962, plaintiff served upon defendants a set of interrogatories pursuant to section 2030 of the Code of Civil Procedure. On April 4, 1962, Santa Fe filed its answers and objections thereto, objecting only to interrogatories numbered 8g, 10g, 23, 24 and 25. On April 10, 1962, Disney filed his answers and objections, objecting only to interrogatories numbered 10g, 23, 24 and 25.

On April 18, 1962, plaintiff served and filed a motion to compel answers to these unanswered interrogatories. He also included therein a motion under section 2031 of the Code of Civil Procedure for an inspection of any data relating to the subject matter of the interrogatories.

Pursuant to such motion, the respondent court ordered defendants to answer the interrogatories in question and to produce "those documents and writings which will produce the answers to the above-requested interrogatories."

The answers made by defendants to other interrogatories disclosed that between August 9, 1960, and August 16, 1960, one K. E. Sale, 44 Fourth Street, San Francisco, California, Sutter 1-7600, extension 268, had interviewed Disney and three other named persons, all of whom were employees of Santa Fe, and had obtained oral statements from them regarding the accident and that Mirko A. Milicevich (one of the attorneys of record for defendants Santa Fe and Disney) was "aware of the contents of said statements."

The record shows that Sale is a claims adjuster employed by Santa Fe and that he acted herein for Santa Fe as such employee; that Disney and two of the other witnesses were members of the traincrew and the remaining witness was a yard clerk working near the scene of the accident. The names, addresses and telephone numbers of all four employee-witnesses were given in the answers of defendants.

Interrogatories 8g and 10g are identical in wording and in their application herein. Each requests "[T]he substance of each oral statement." So far as pertinent herein, this refers ⌊75 to the oral statements of Disney and the other three employees given to Sale and communicated to Milicevich. Any technical objection that this calls for production and inspection of whatever written summary or report was made by Sale of his interviews is resolved by the motion later made which, as stated above, was based upon section 2031 as well as section 2030 of the Code of Civil Procedure.

Interrogatories 23, 24 and 25 refer to pictures and will be discussed separately.

Santa Fe responded to 8g and 10g by objecting thereto "upon the ground that all of the above mentioned statements were taken from employees solely for the purpose of defending this action." Disney responded that he had not taken any statements from anyone, and he also made the same objection as that made by Santa Fe.

Plaintiff then made the motion referred to above and stated therein: "Said motion will be made upon the grounds that the answers to the interrogatories requested [8g, 10g, 23, 24 and 25] are not privileged but in fact are permitted under C.C.P. 2016, C.C.P. 2030 and C.C.P. 2031." This is the only ground stated in the motion.

The major portion of defendants' memorandum to the trial court is devoted to the question of privilege. Plaintiff's reply memorandum to the trial court is likewise directed almost entirely to this point. In our opinion, the record clearly shows that the issue of privilege was before the trial court for its determination. Nowhere does the record show that the objection and response made to 8g and 10g were not understood by both sides to be based upon the ground of privilege. Everything in the record is contrary to plaintiff's statement to us that "Petitioners are raising the issue of privilege for the first time on appeal."

The petition herein alleges and plaintiff's answer thereto does not deny the following: "[T]hey constitute, as to Santa Fe, oral statements taken from its own employees for the dominant purpose of protecting it in the event of litigation arising from the collision, and as to Disney, his oral statement about the accident, now in the possession of attorneys representing him in the action."

The record shows without contradiction that the oral statements made to Sale by defendant Disney and the other three employees were taken for the sole purpose of defending against ⌊76 any claim against Santa Fe arising out of the accident in question, and that Sale's report of such interviews was forwarded to one of the attorneys for Santa Fe to be used for that purpose.

[1] Under the undisputed facts, as stated hereinabove, the trial court was in error as a matter of law in ordering defendants to disclose the contents of the oral statements or to produce the summary thereof made by Sale. (Gene Compton's Corp. v. Superior Court, 205 A.C.A. 421, 23 Cal. Rptr. 250.)

In the Compton case, plaintiff had fallen on a stairway in a restaurant operated by defendant corporation. This occurred on November 18, 1960, at 9:15 o'clock p. m. The next day the manager employed by defendant filled out an accident report which was forwarded to the defendant's insurance carrier. On December 2, 1960, an adjuster for the insurance carrier took signed statements from the manager and another employee as to what they knew regarding the accident. Plaintiff filed an action some months later, and on August 17, 1961, defendant was served with summons and complaint. On August 23, 1961, the suit papers and statements referred to were sent to an attorney who had been selected by the insurance carrier. On August 24, 1961, this attorney accepted employment to defend the action. Plaintiff filed interrogatories under section 2030 of the Code of Civil Procedure. This resulted in an order being made that defendant provide plaintiff with the manager's "First Report of Accident" and the later statements signed by the manager and the other employee. After this order was made, plaintiff moved under section 2031 of the Code of Civil Procedure for an order to inspect these three statements. The parties agreed that the earlier order could be treated as having been made pursuant to section 2031. The appellate opinion notes that, instead of to the employer, the accident report was made to the insurance carrier and the statements were made to the insurance adjuster and this was "all some 8 or 9 months before litigation commenced and before the selection of an attorney to represent petitioner [defendant]." (P. 426, 23 Cal.Rptr. p. 253.)

Justice Bray, who wrote the opinion, then states: "These facts squarely present the question: Are the report of the insured's manager and his statement and that of another employee concerning an accident on the insured's premises prepared for submission and submitted to the insurance carrier ⊥77 for transfer to an attorney to be appointed by the carrier to represent the insured in the event of litigation, privileged? It is conceded that the material demanded is discoverable, unless only it is protected by the privilege rule." (P. 426, 23 Cal.Rptr. p. 253.)

The court's question was answered by it in the affirmative and it was ordered that the trial court be prohibited "from giving effect to its order requiring petitioner to provide plaintiff with the report and statements herein described."

The Compton opinion makes a thorough analysis of the authorities on the point in question, particularly Greyhound Corp. v. Superior Court (1961) 56 Cal.2d 355, 15 Cal.Rptr. 90, 364 P.2d 266. It would serve no useful purpose to repeat that analysis herein.

[2] *Still or moving pictures.* Interrogatories 23, 24 and 25 are directed to any pictures taken of plaintiff since the happening of the accident. Defendants objected upon the ground that the sole purpose of these interrogatories is to uncover defendants' impeaching evidence. The order requires the defendants to answer these questions and, in effect, produce any such pictures in their possession or under their control. This is a matter of discretion with the trial court, under the record as presented herein, and there is no showing of any abuse of that discretion. (Suezaki v. Superior Court, 58 A.C. 169, 23 Cal.Rptr. 368, 373 P.2d 432.)

The record shows that this matter was briefed and orally argued before submission to the trial court and its order recites that good cause appeared for such order. The trial judge undoubtedly concluded that plaintiff had shown a need for such pictures in order to protect against surprise and also to prepare examination of the person who took the pictures. (See Suezaki, supra, p. 175, 23 Cal.Rptr. pp. 370, 371, 373 P.2d pp. 434, 435.)

If defendants' answers admit to the existence of any such pictures, the trial court will probably find it necessary to make a more detailed order covering the time, place, extent and manner of inspection. (Code Civ. Proc. § 2031.) The wording of the present order has already been quoted above.

It is ordered that a peremptory writ issue prohibiting respondent court from giving effect to that portion of its order requiring petitioners to disclose the contents of the oral statements in question or to produce the summary or report thereof. The order in all other respects is approved and the ⊥78 alternative writ of prohibition heretofore issued herein is discharged.

The parties shall each bear their own respective costs in this proceeding.

KAUFMAN, P. J., and SHOEMAKER, J., concur.

208 Cal.App.2d 83

⊥83 **PEOPLE of the State of California, Plaintiff and Respondent,**
v.
James Austin SIMONS, Defendant and Appellant.
Cr. 4115.

District Court of Appeal, First District, Division 2, California.
Oct. 1, 1962.

Prosecution for unlawful possession of narcotics. The Superior Court, County of Monterey, Elmer Machado, J., entered a judgment of conviction and the defendant appealed. The District Court of Appeal, Kaufman, P. J., held that highway officer, who had been called to automobile by garageman who explained the peculiar actions of defendant, had reasonable cause to search automobile without warrant for evidence of registration slip and when he did not find same to search automobile for stolen articles, and narcotics found in shaving kit were admissible as product of reasonable search.

Judgment affirmed and appeal from order denying motion for new trial dismissed.

1. Criminal Law ⇨1023(13)

Purported appeal from order denying new trial, filed after effective date of statute abolishing appeals from such orders except in special circumstances, must be dismissed as an appeal from nonappealable order. West's Ann.Pen.Code, § 1237.

2. Criminal Law ⇨394.5(4)

When search is made without warrant and not justifiable as incident to arrest, burden rests on prosecution to show proper justification.

3. Criminal Law ⇨394.4(12)
Searches and Seizures ⇨3(1)

Highway patrol officer, who had been informed of peculiar actions of defendant by garageman who had towed defendant's automobile, had reasonable grounds to search automobile without a warrant and when he did not find registration slip he was justified in searching automobile for stolen articles or contraband, and narcotics found in shaving case in automobile were admissible as product of reasonable search. West's Ann.Vehicle Code, § 2805; West's Ann.Health & Safety Code, § 11500.

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Hutton & Foley, by Edward J. Foley, King City, for appellant.

Stanley Mosk, Atty. Gen., John S. McInerny, Eric Collins, Deputies Atty. Gen., San Francisco, for respondent.

⊥84 ⊥KAUFMAN, Presiding Justice.

Convicted by a jury of possession of narcotics, in violation of section 11500 of the Health and Safety Code, defendant appeals from the judgment of conviction and from the order denying his motion for a new trial. He argues that the judgment must be reversed because the narcotics were obtained by an unlawful search and seizure.

[1] We turn first to the appeal from the order denying the motion for a new trial. The record indicates that the notice of appeal was filed on November 24, 1961, after the effective date [September 15, 1961] of the 1961 amendment to section 1237 of the Penal Code, which abolished the appeal from an order denying a motion for a new trial in criminal cases, except in special circumstances not applicable here. Therefore, the purported appeal from the order denying the motion for a new trial must be dismissed as an appeal from a nonappealable order (People v. Britton, 205 A.C.A. 626, 22 Cal.Rptr. 921).

The record reveals the following facts: On Friday, August 18, 1960, at about sundown, the defendant, who was driving to Los Angeles with a male companion, had mechanical difficulties with his Volvo automobile three or four miles south of San Ardo in Monterey County. He parked the car on the side of the highway and flagged down a passing Texaco truck driven by Gerald Johnson.

Johnson, after refusing defendant's offer of $20 to tow him to Paso Robles, because it was against company rules, agreed to take the defendant to San Ardo for a mechanic. The defendant was very excited and nervous but not drunk; the defendant's rapid conversation did not make much sense, and he fidgeted so much that Johnson began to doubt whether he should have given the defendant a ride. Johnson left the defendant at a Shell service station in San Ardo, after telling the mechanic, Conner, that the defendant was acting odd and was highly excited.

Conner and the defendant drove out to the Volvo. Before leaving, Conner telephoned his employer, Kearns, at home. Kearns indicated he would drive directly out to the Volvo. The defendant told Conner he was a male nurse and was looking for work, was on his way to Los Angeles, but would do field work if any was available.

When Conner and the defendant arrived at the Volvo, the defendant's male companion was waiting for them with a woman in a station wagon. The defendant's companion said: "Hurry up, we got a ride to L. A." Conner thought it was 185 very strange that the woman in the station wagon was waiting to pick up the defendant and his companion, as it was dusk and the area was a sparsely populated one. All three also appeared drunk to him. In arranging for the repairs, the defendant gave Kearns an AAA card with the last name of Simons but with a different first name. Conner hitched up the Volvo while Kearns took the defendant's AAA card and then left. On his way back to San Ardo, Conner stopped to check the tow chain at the Tidewater station owned by Bill Standard. Standard told Conner that the defendant had stopped in earlier and had mentioned wanting only $1 worth of gas to go to Los Angeles, and that he thought the car might be stolen.

Because of this statement and the peculiar circumstances of the defendant's hurried departure, Conner stopped Highway Patrol Officer Silliman on the way back and asked the officer to come by and check the Volvo. Silliman arrived shortly after 8:30 p. m. After hearing Conner's story, including the fact of an AAA card with the name of James Simons, Silliman radioed the license number to Salinas to find out whether the car was stolen. He was told it was not but proceeded to search the vehicle for the registration. He did not check with Sacramento. As the door on the driver's side was blocked, he entered from the passenger side, and looked for the registration slip on the steering post, on the visor and in the glove compartment, the three most common places for the display of the registration certificate. He did not look at the fourth most common place, the dashboard.

In the glove compartment, he found several slips of paper bearing names. He also noticed an assortment of items in the back seat: paraphernalia from an encyclopedia company [which appeared to indicate that the car belonged to an encyclopedia salesman]; bows and arrows, bottles of peculiar flavored non-alcoholic syrup and two boxes of groceries. Because of the slips of paper in the glove compartment and the things in the back seat, Silliman continued his search, believing the latter items might be the result of a burglary. Silliman did not, however, have a particular burglary in mind. In a zipper shaving case, lodged between the door and the back seat, Silliman found some shaving equipment and several bottles of pills. The contents of some of the bottles of pills were subsequently identified as narcotics.

Two days later, on Sunday, August 20, about 6:00 p. m., the defendant returned to the Shell station to pick up his car. 186 Conner called Officer Silliman who immediately came to question the defendant. The defendant showed the officer the registration certificate which was folded to a three inch by four inch rectangle and taped to the dashboard on the driver's side, clearly showing his name. Although the registration slip was white, and the dashboard off-white, Silliman could see the registration very clearly from the outside of the vehicle. Upon being questioned by the officer about the pills, the defendant admitted that he had taken them from a drawer in Mt. Zion Hospital in San Francisco, where he had been employed, and indicated that he took the pills to calm his nerves. Subsequently, the defendant was arrested for possession of narcotics.

A motion under Penal Code, section 995 was made and denied at the preliminary hearing. A motion to suppress the evidence upon the grounds of illegal search and seizure was made and heard prior to the trial and renewed at the beginning of the trial. The motion was denied and during the trial, the defendant was permitted to have a continuing objection to the offer of evidence based on the search and seizure. Subsequently, the objection was overruled. On this appeal, defendant argues that: 1) the search which produced the evidence was an unreasonable general exploratory search, as Officer Silliman had no reasonable cause to believe that the Volvo was stolen or that a burglary had been committed; 2) there was no "emergency" requiring the search of the automobile without a warrant; 3) Silliman could not search the Volvo on the basis of the information supplied by Conner as Conner was not a reliable informer.

[2] The search was made without a warrant and not justified as incidental to the arrest of the defendant. Under such circumstances, the burden rests on the prosecution to show proper justification. Consequently, the determinative question on this appeal is whether, in the absence of a warrant or arrest, the search was a reasonable one (People v. Brown, 45 Cal.2d 640, 643–645, 290 P.2d 528; citing Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543; People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57).

[3] Section 2805 of the Vehicle Code provides: "A member of the California Highway Patrol may inspect any vehicle of a type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, used car lot, or other similar establishment, for the purpose of locating stolen vehicles or ⊥87 investigating the title and regi⊥stration thereof." The question then is whether under the authority of the above section, plus the information given the officer by Conner that the defendant acted odd, together with the admitted fact that the officer did not see the registration slip, made the search reasonable under the circumstances. A reading of the record discloses a series of strange and unusual circumstances. These circumstances plus the fact that the officer admittedly did not see a registration slip justified the officer as a reasonable man to search the automobile to see if there were any stolen articles or contraband (see People v. Ingle, 53 Cal.2d 407, 2 Cal.Rptr. 14, 348 P.2d 577 and People v. Nebbitt, 183 Cal.App.2d 452, 7 Cal.Rptr. 8).

The trial court, therefore, was justified in denying the motion to suppress the evidence upon the grounds of an illegal search and seizure and accordingly, there is no prejudicial error in the record before us.

Judgment affirmed. Appeal from order denying motion for new trial is dismissed.

SHOEMAKER and AGEE, JJ., concur.

208 Cal.App.2d 243

⊥PEOPLE of the State of California, ⊥243
Plaintiff and Respondent,
v.
Dwayne L. BUTTERFIELD, Defendant
and Appellant.
Cr. 4124.

District Court of Appeal, First District,
Division 3, California.
Oct. 5, 1962.

Prosecution on charge of violating statute penalizing escape. From an adverse judgment of the Superior Court, Santa Clara County, Raymond G. Callaghan, J., the defendant appealed. The District Court of Appeal, Draper, P. J., held that defendant, who while on parole called his parole agent's office and after being questioned was placed under arrest and who then ran and escaped from the agent, did not "escape" within contemplation of statute concerning escape by a prisoner.

Judgment reversed.

Escape 🔑4

Defendant, who while on parole called his parole agent's office and after being questioned was placed under arrest and who then ran and escaped from the agent, did not "escape" within contemplation of statute concerning escape by a prisoner. West's Ann.Pen.Code, § 4531.

See publication Words and Phrases for other judicial constructions and definitions.

◆

Thomas H. Hughes, San Jose, for appellant (under appointment of the District Court of Appeal).

Stanley Mosk, Atty. Gen., John S. McInerny, Derald E. Granberg, Deputy Attys. Gen., San Francisco, for respondent.

244 DRAPER, Presiding Justice.

This appeal presents only a question of construction of Penal Code Section 4531, one of a number of code sections penalizing escape. Defendant was charged, tried to the court without a jury, and convicted of violation of the section. He appeals.

Defendant had been paroled from state prison. He called at his parole agent's office. That officer questioned him and, on the basis of defendant's answers, placed him under arrest for parole violation. Defendant ran. Despite the handicap of being handcuffed, he outdistanced the parole agent in a three-block race. He was recaptured next day.

Clearly defendant escaped from actual custody after a lawful arrest. The question is whether this escape is within the definition of the section under which defendant was charged and tried.

"Every prisoner committed to a State prison who escapes * * * from any prison road camp, prison forestry camp, or other prison camp or prison farm or other place while under the custody of prison officials, officers or employees" comes within Section 4531.

For certain purposes, a parolee remains in a broad sense a prisoner (People v. Denne, 141 Cal.App.2d 499, 507–510, 297 P.2d 451, p. 457), one for whom "parole has * * * pushed back the prison walls" (id., 508, 297 P.2d 451, p. 457). But it seems clear that he is not one "committed to a State prison". Code references to "prisons" in the title of which Section 4531 is a part "refer to all facilities, camps, hospitals and institutions for the confinement, treatment, employment, training and discipline of persons" in custody of the Department of Corrections (Pen.Code § 6082). Defendant's parole had suspended, or conditionally released him from, his prior commitment to such an institution. Such suspension is of the essence of parole. Although the parolee remains in custody of the Department of Corrections, he is not recommitted to a specific facility of the department until revocation of his parole. Such revocation may be made by the Adult Authority without notice (Pen.Code § 3060), but only for cause (Pen. Code § 3063; In re McLain, 55 Cal.2d 78, 245
87, 9 Cal.Rptr. 824, 357 P.2d 1080). No such revocation is shown in the record here. Thus defendant was not a "prisoner committed to a State prison" within the meaning of Section 4531. Since he was not "at work," he does not come within the final clause of the section as one "at work outside or away from prison".

In view of this determination, we need not resolve the question whether the parole agent in whose custody he was is a prison official, officer or employee, as also required by Section 4531.

Our conclusion that the escape charged is not within the section relied upon is strengthened by the language of the following code section. It provides that "[e]very prisoner * * * convicted of a felony * * * who is in the lawful custody of any officer or person" and escapes, is guilty of a felony (Pen.Code § 4532[b]). By eliminating the requirement that the prisoner be one "committed to a State prison", and the requirement that the custody be that of "prison officials, officers or employees", it seems designed to cover precisely the situation here presented. The statute of limitations has not run against prosecution under that section.

Judgment reversed.

SALSMAN and DEVINE, JJ., concur.

208 Cal.App.2d 203

⊥203 ⊥**Elvira O'REILLY, Plaintiff and Appellant,**

v.

Adrian J. ORRADRE, Floyd M. Grigory and Denise Jean Grigory, his wife, Defendants and Respondents.

Civ. 20329.

District Court of Appeal, First District, Division 2, California.

Oct. 4, 1962.

Action to enforce an alleged executed parol agreement to partition land and to quiet title thereto. From an adverse judgment of the Superior Court, Monterey County, Stanley Lawson, J., the plaintiff appealed. The District Court of Appeal, Agee, J., held that evidence sustained finding that there was no executed parol agreement to partition land and that plaintiff was not owner of a portion of particular land in dispute.

Judgment affirmed.

Partition 🔑5

Evidence sustained finding that there was no executed parol agreement to partition land and that plaintiff was not owner of a portion of particular land in dispute.

◆

Courtney L. Moore, San Francisco, for appellant.

Raymond W. Shellooe, Salinas, for respondents.

AGEE, Justice.

Plaintiff appeals from an adverse judgment in an action to enforce an alleged executed parol agreement to partition land and to quiet title thereto. The determinative issue on appeal is whether the trial court's finding that the parties had not entered into any such agreement is supported by the evidence. We find that it is. The facts as disclosed by the record follow.

Miguel and Marianne Orradre were the parents of Elvira O'Reilly (plaintiff), Adrian J. Orradre (a defendant), and Michel Orradre.[1] In 1935, they executed two deeds by which they conveyed their ranch lands in Monterey County to their children, reserving life estates in themselves. One deed conveyed ⊥204 parcels comprising 1,998.79 acres to Elvira. The other deed conveyed the remaining lands to Adrian and Michel and included a 360 acre tract known as the "Collins property." This tract is the subject of this litigation.

In 1927, some eight years before, Miguel had, by a codicil to his will, devised the Collins property and three other tracts to Elvira. Upon his death in 1936, his will and codicil were admitted to probate. The final decree of distribution (incorrectly) recited that all of the lands described in the devise to Elvira had been conveyed to her prior to Miguel's death. The decree did not purport to distribute any of the lands conveyed under either of the two 1935 deeds.

Miguel died in 1936. In 1938, his widow, Marianne, deeded to Adrian, Michel and Elvira, her life estate interest in the properties which had been respectively conveyed to them in 1935.

In 1939, Elvira orally leased her 1,998.79 acres to one Lanigan for cattle grazing purposes. The property was unfenced. Adrian and Michel were raising sheep and, when Lanigan's cattle began to wander onto their property, Adrian objected. Elvira and Adrian discussed the matter and made a trip into the area together. This is located in the San Ardo district and the terrain is rugged. They stood on a high ridge overlooking the property and orally agreed that a drift fence should be placed along the line of the ridge rather than to have it follow the actual boundary line, which did not follow the contours but ran straight through canyons and ravines. This arrangement made the fence less expensive while serving the same purpose, which was to keep the cattle from straying. The fence line agreed upon ran through the Collins tract. Elvira erected the fence at her own expense. For the next nineteen years, Elvira and her lessee used the portion of the Collins property on "her side" of the fence for cattle grazing. Adrian has paid the taxes on the subject property since 1938.

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[1] In 1939, Michel deeded his interest in the subject property to Adrian and he is not a party herein.

In 1957, Adrian conveyed his lands, including the Collins tract, to his daughter and her husband, defendants Denise and Floyd Grigory. In 1958, Floyd removed the fence and put up a new one along the boundary line between the Collins tract and the property which had been conveyed to Elvira by her father and mother under the 1935 deed.

Elvira thereupon brought this action against Adrian, Floyd and Denise. The judgment quieted the title to the Collins tract in Floyd and Denise.

205 The trial court found that there was never any dispute between Elvira and Adrian as to the ownership of the Collins property and that Elvira never at any time claimed such ownership; further, that Adrian did not at any time settle any dispute with Elvira relating to the ownership of the Collins property or agree with her to a division or partition thereof; that in December, 1939, they agreed to the location of a fence along the ridge of lands mostly owned by Adrian, which fence was to be constructed by Elvira for the purpose of preventing Lanigan's cattle from trespassing upon Adrian's lands; that it was not agreed by Adrian and Elvira that the Collins tract was to be so divided that the portion to the south and east of the proposed fence was to be hers and the portion to the north and west thereof should be Adrian's.

Lanigan testified that when he talked to Elvira about leasing her property he told her that he could not very well use it for cattle if it were not fenced; that when his cattle strayed onto Adrian's property, Adrian brought the matter to his attention and he took it up with Elvira; that "I spoke to her about why not get a quick fence, what we call a drift fence, that could be built shortest and easiest possible way to keep my cattle in and she said she would go and see her brother about it"; that Elvira later told him that she and her brother had been up on the ridge and "decided about where to put this drift fence"; that the next Sunday he and Elvira rode horses out to the site and Elvira told him that her brother "had said [to] build it along down approximately on top of the Ridge the quickest and easiest place that could be built"; that although his cattle grazed up to the drift fence, none of the Collins property was ever leased by him.

Lanigan also testified that he had lived in the San Ardo area for 73 years and that it was the custom to "give and take; see, build a fence where it's easiest and quickest. If you build a fence on the surveyed lines you go across ravines and angling up across sides of hills and taking hill pieces of canyons and then angling back again and it cuts it all up and cattle get in pockets where they can't get out and can't get water. * * You can take your fence down if you ever wish to put it on the line and get the line surveyed and the survey is agreed to by both parties, you can take that fence down and fence it on the line."

Elvira testified that she and Adrian "decided to ride up to the site so we could both determine just where we were going to fence from"; that "we were to put up a fence 206 so that Ade's stock would stay on his side and our stock could stay on our side"; that her brother said that "he was letting me put the fence where it was easiest to put, which included the Collins property, said it was a mix-up in the attorney's office of some sort that it wasn't in the deed"; that he said, "Well, I am letting you put the fence where it is easiest on the stock."

Adrian testified that more than two hundred head of Lanigan's cattle were running over eight or nine thousand acres of his property and that he told Elvira that she "had to do something about those cattle, build a fence or keep them away best we could, so she came down one Sunday and came down on my place, Pancho Rico, had dinner, and then after dinner—in the meantime at dinner I asked her let's go see where the best place we can build a fence to keep the cattle from going from there over here, which we did. We took a pickup and we drove clear up there, Saddle, as far as we could with the pickup and stood there for a few minutes and looked around. Well, I said, 'Don't you think you best make a fence right straight through here on top of the Ridge, quickest way, temporary fence to keep those cattle out of the way?' And she said, 'Yes, I think that would be the quickest way to do it.'"

The following answers were then given to the following questions: "Q. Now, when you—was anything more said between you and your sister, Mrs. O'Reilly, when you were standing up there in the Saddle about the fence or about anything? A. No, there was nothing else said about it, going to go at it soon as she could, that's all. Q. Was there anything said about who was to be the owner of the property on either side of the fence? A. Nothing said about it. Q. At any time did Mrs. O'Reilly, your sister, tell you she should have gotten the Collins property? A. Never mentioned it."

One of the theories alleged in plaintiff's complaint is that her brothers had conspired to defraud her of the Collins tract by obtaining the 1935 deeds from their infirm father, then not advising her of them, and representing to the probate court during distribution of the father's estate that the tract had already been conveyed to her. The trial court found against the plaintiff in all of the particulars alleged by her in support of this theory and the matter is not pursued on this appeal. However, in fairness to the attorney in the probate proceedings, it should be noted that the only purpose of the recitals in the petition and decree, to the effect that ⌊207 all of the real property devised by decedent had been conveyed by him prior to his death, was to inform the court of the reason why such real property was not being distributed under the decree. The statements therein that the Collins property had been conveyed to Elvira in accordance with the 1927 codicil were incorrect but were not made with any intent to defraud.

We are aware that the facts have been related herein in the light most favorable to respondents and that we have not discussed the legal effect of what appellant terms "an executed parol agreement partitioning land." Such discussion would be necessary only if the trial court had found that the parties had made any such agreement. Judgment affirmed.

KAUFMAN, P. J., and SHOEMAKER, J., concur.

58 Cal.2d 528, 375 P.2d 33

⌊528 ⌊**Anne S. AMEN, Plaintiff and Appellant,**

v.

MERCED COUNTY TITLE COMPANY et al., Defendants and Respondents.

S. F. 21082.

Supreme Court of California, In Bank.

Oct. 9, 1962.

Tavern buyer's action against escrow holder for breach of contract. The Superior Court, Merced County, R. R. Sischo, J., sustained a demurrer to the complaint and the buyer appealed. The Supreme Court, Traynor, J., held that action by buyer of tavern property against escrow holder, for breach of escrow agreement which required holder to pay any debts of seller in excess of $10,000 out of proceeds, was action on written contract to which four-year statute of limitations applied, even though escrow holder, which had performed pursuant to agreement, had not signed it.

Judgment as to certain defendants affirmed and in all other respects judgment reversed.

Opinion 21 Cal.Rptr. 158 vacated.

1. Escrows 🔑3

Escrow holder must strictly comply with instructions of parties.

2. Escrows 🔑3

Upon escrow holder's breach of an instruction that it has contracted to perform or of implied promise arising out of agreement with buyer or seller, injured party acquires cause of action for breach of contract.

3. Escrows 🔑3

If escrow holder acts negligently it will ordinarily be liable for any loss occasioned by its breach of duty.

4. Limitation of Actions 🔑24(2)

If escrow instructions are in writing and escrow holder accepts them or if escrow holder prepares instructions, offers to perform them, and buyer and seller accept offer, action for failure to comply with instructions is an action on written contract for purposes of statute of limitations, even though it was accepted orally or by an act other than signing. West's Ann.Code Civ. Proc. §§ 337, 339.

5. Contracts 🔑324(1)

Action is on written contract even though based on promise implied from writing.

6. Limitation of Actions 🔑24(2)

Four-year statute of limitations applicable to written contracts does not require that writing be signed by party to be charged. West's Ann.Code Civ.Proc. § 337.

7. Limitation of Actions 🔑24(2)

Action by buyer of tavern property against escrow holder, for breach of escrow agreement which required holder to pay any debts of seller in excess of $10,000 out of proceeds, was action on written contract to which four-year statute of limitations applied, even though escrow holder, which had performed pursuant to agreement, had not signed it; Shumaker v. Rippy, 138 Cal.App.2d 815, 292 P.2d 536 and Howard v. Security Title Ins. & Guarantee Co., 20 Cal.App.2d 226, 66 P.2d 1247, disapproved. West's Ann.Code Civ.Proc. § 337.

8. Limitation of Actions 🔑95(1)

Even if seller's action against escrow holder were not based on written contract two-year statute of limitations would not commence to run against her until she knew or should have known facts that constituted holder's breach of duty. West's Ann.Code Civ.Proc. § 339.

9. Limitation of Actions 🔑179(2)

In absence of special demurrer on ground that buyer did not specifically allege when she discovered escrow holder's breach of duty, allegations that buyer was never informed of communications between escrow holder and State and that buyer's receipt of notice of tax liability on specified date was her first knowledge of liability were sufficient to allege notice of holder's breach on that date. West's Ann.Code Civ. Proc. § 339.

10. Escrows 🔑3

Existence of fiduciary duty between escrow holder and buyer obviated necessity of buyer pleading fraud in action against holder for breach of duty to disclose buyer's potential liability for unpaid sales taxes. West's Ann.Rev. & Tax.Code, §§ 6811, 6812.

◆

T. N. Petersen, Merced, and Guernsey Carson, San Francisco, for plaintiff and appellant.

Preston, Braucht & George and H. C. George, Merced, for defendants and respondents.

530 ⊥TRAYNOR, Justice.

Plaintiff appeals from a judgment of dismissal entered after the sustaining of defendants' demurrers to her amended complaint without leave to amend. Her first cause of action alleged that defendant Merced County Title Company breached a contract with her to act as escrow holder. Her second cause of action, based on negligence, alleged the same acts and omissions as did the first.*

The amended complaint alleges that on April 2, 1958 plaintiff and her husband entered into a written contract to purchase a tavern. The contract, in the form of escrow instructions, was typed on forms provided by defendant and was signed by the sellers and by plaintiff and her husband. The initials of D. M. Guest, defendant's agent, were typed at the top of the form. The purchase price of $74,300 was to be paid $10,000 in cash, $54,300 by a note and deed of trust, and 531 ⊥$10,000 by the buyers' assumption of certain debts. The instructions to defendant stated that: "Any debts over $10,000 will be paid by the Merced County Title Company out of the proceeds of the sale" and that "* * * this escrow is accepted by your company [defendant] subject to all terms and conditions set forth herein and printed on the back hereof, which terms, conditions and the instructions given herein have been read by and agreed to by all parties signing these escrow instructions." On April 14, 1958, before the escrow closed, the State Board of Equalization mailed to plaintiff in care of defendant a notice that plaintiff should obtain a tax clearance certificate to avoid liability for state sales taxes owed by the seller. (See Rev. & Tax.Code, §§ 6811, 6812.) One of the board's auditors also called Guest on the telephone, repeated the warning, and asked whether a certificate would be requested. Guest replied that it would not. Plaintiff was never informed of the written notice or of the telephone conversation; no certificate was requested, and on June 26, 1958, the escrow closed. The sellers failed to pay the sales taxes, which amounted to $4,749.84, and on October 31, 1959, plaintiff received notice of her liability to the state as successor to the sellers. Six days later the state filed a lien for the taxes due. Since plaintiff had already assumed $10,000 of the debts of the business, she ultimately found herself with a liability of $14,749.84 despite the fact that she had instructed defendant to pay debts exceeding $10,000 out of the proceeds.

Plaintiff did not file her complaint until July 29, 1960, more than two years after defendant allegedly breached an express provision of its contract and an implied promise to inform her of the potential tax liability. The trial court sustained the demurrer apparently on the ground that the two-year statute of limitations applicable to "an action upon a contract, obligation or liability not founded upon an instrument of writing * * *" barred plaintiff's action. (Code Civ.Proc. § 339.) Plaintiff contends, however, that her action was on a written contract, that the four-year statute of limitations therefore applies (Code Civ.Proc. § 337), and that in any event, the statute did not begin to run until October 31, 1959, when she first received notice of the state's lien.

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* The third cause of action against Western Title Insurance and Guaranty Company to which the trial court also sustained a demurrer is not involved in this appeal.

[1–5] An escrow holder must comply strictly with the instructions of the parties. (Rianda v. San Benito Title Guarantee Co., 35 Cal.2d 170, 173, 217 P.2d 25; Shreeves v. Pearson, 194 Cal. 699, 711, 230 P. 448; Dawson v. Bank of America, ⊥532 100 Cal.App.2d 305, 309, 223 P.2d 280.) Upon the escrow holder's breach of an instruction that it has contracted to perform or of an implied promise arising out of the agreement with the buyer or seller, the injured party acquires a cause of action for breach of contract. (See Francis v. Eisenmayer, 171 Cal.App.2d 221, 225–227, 340 P.2d 54; Karras v. Title Ins. & Guarantee Co., 118 Cal.App.2d 659, 665–666, 258 P.2d 866; Chicago Title & Trust Co. v. Cleary, 319 Ill.App. 83, 48 N.E.2d 576, 578; Rest. 2d Agency, § 14D, Comment a.) Similarly, if the escrow holder acts negligently, "it would ordinarily be liable for any loss occasioned by its breach of duty." (Rianda v. San Benito Title Guarantee Co., supra; Karras v. Title Ins. & Guarantee Co., supra; see Rest. 2d Agency, §§ 399(b), 401.)

If the escrow instructions are in writing and the escrow holder accepts them or if the escrow holder prepares the instructions, offers to perform them, and the buyer and seller accept the offer, an action for failure to comply with the instructions is on a written contract. The contract may be "in writing" for purposes of the statute of limitations even though it was accepted orally or by an act other than signing. (Cleveland Trust Co. v. Elbrecht, 137 Ohio St. 358, 30 N.E.2d 433, 436; McCormick v. Taft, 61 Ohio App. 200, 22 N.E.2d 510, 511; Fey v. Loose-Wiles Biscuit Co., 147 Kan. 31, 75 P.2d 810, 812–813; First Nat. Bank of Berwyn, Okl. v. Raymer, 180 Okl. 529, 71 P.2d 485, 487–488; Atlanta, K. & N. Ry. Co. v. McKinney, 124 Ga. 929, 53 S.E. 701, 704, 6 L.R.A.,N.S., 436; Schmucker v. Sibert, 18 Kan. 104, 111; see 38 Mich.L.Rev. 257, 258; 1 Corbin on Contracts, § 31 at pp. 84–86; cf. Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 164 P. 792; California Jewelry Co. v. Provident Loan Ass'n, 6 Cal.App.2d 506, 510–511, 45 P.2d 271.) An action is on a written contract, even though it is based on a promise implied from the writing. (See Comunale v. Traders & General Ins. Co., 50 Cal.2d 654, 662, 328 P.2d 198, 68 A.L.R.2d 883; Lawrence Barker, Inc. v. Briggs, 39 Cal.2d 654, 661, 248 P.2d 897; Simmons v. Birge Co., D.C., 52 F.Supp. 629, 633-634; Indian Territory Illuminating Oil Co. v. Rosamond, 190 Okl. 46, 120 P.2d 349, 354, 138 A.L.R. 246; Home Ins. Co. v. Mercantile Trust Co., 219 Mo.App. 645, 284 S.W. 834, 835–836; 1 Corbin on Contracts, § 31 at p. 84; but see Grant v. Williams, 158 Neb. 107, 62 N.W.2d 532, 536.)

[6, 7] A longer period of limitations applies to actions on written contracts than to actions on oral contracts, since the writing is clear evidence in permanent form of the terms of ⊥533 the agreement. (See Homire v. Stratton & Terstegge Co., 157 Ky. 822, 164 S.W. 67, 69; 38 Mich.L.Rev. 257, 259.) When a party has agreed to the writing, there is no reason to invoke the two-year statute of limitations applicable to oral agreements. The four-year statute of limitations, unlike the statute of frauds, does not require that the writing be signed by the party to be charged. Had the Legislature meant to make a signature mandatory for a writing to qualify for the longer period of limitations it would have so provided as it did in section 360 of the Code of Civil Procedure, which requires that a new promise to perform under an old contract be signed to start the statute running anew. Plaintiff's action was therefore on a written contract.

Defendant invokes Shumaker v. Rippy, 138 Cal.App.2d 815, 816, 292 P.2d 536, in which the court held that "The two-year statute of limitations * * * is applicable either to an action for breach of an escrow agreement or to an action for damages on account of negligence in the performance thereof." Similar holdings appear in Roberts v. Carter & Potruch, 140 Cal.App.2d

370, 373, 295 P.2d 515, and in Howard v. Security Title Ins. & Guarantee Co., 20 Cal. App.2d 226, 228–229, 66 P.2d 1247. (But see Simmons v. Bank of America, 159 Cal. App.2d 566, 569, 323 P.2d 1043.) In the Roberts case, however, the instructions to the escrow holder were oral. In the Howard case the court rejected the plaintiff's contention that an action based on the violation of escrow instructions was on a written contract and viewed the cause of action as one for negligence. (Howard v. Security Title Ins. & Guarantee Co., supra, 20 Cal. App.2d at p. 229, 66 P.2d 1247.) The holdings in the Shumaker and Howard cases appear to be based upon a misreading of Lattin v. Gillette, 95 Cal. 317, 30 P. 545. There this court held that when the defendants were employed to search the title of certain premises and made a report that included a written certificate that title was vested in one Birnbaum, free of encumbrances, "the written certificate * * * although an instrument in writing is not an instrument upon which * * * [defendants'] liability is founded." (Id. at p. 322, 30 P. at page 547.) In the Lattin case the contract of employment was oral and the title report was mere "evidence relied upon by * * * [plaintiff] to establish the breach of * * * contract * * *." (Id. at p. 323, 30 P. at page 547.) In the Shumaker and Howard cases, however, it was alleged that the escrow holder had breached an actual or implied provision of a written contract. Although in both these cases the writing was a memorandum of the agreement between the buyer and ⊥534 the seller, it was also a written memorandum of the contract between the escrow holder and the parties to the sale contract. To the extent that the Shumaker and Howard cases are inconsistent with the views expressed herein, they are disapproved.

[8–10] Even if plaintiff's action were not based on a written contract, the statute would not run against her until she knew or should have known the facts that constituted the breach of defendant's duty. In the absence of a special demurrer on the ground that plaintiff did not specifically allege when she discovered defendant's breach, her allegations that she was never informed of the communications between defendant and the State Board of Equalization and that notice of the tax liability was sent to her for the first time on October 31, 1959, were sufficient to allege that she discovered or was put on notice of defendant's breach on that date. It was sufficient to overcome a demurrer based on the statute of limitations that she alleged an injury that would ordinarily escape her discovery and discovery within the statutory period, that defendant was an escrow holder (and hence was a fiduciary, see e. g., In re Chrisman, D.C., 35 F.Supp. 282, 285), and facts showing that her ignorance of the breach was justifiable. (See Kane v. Cook, 8 Cal. 449, 458; Rafter v. Hurd, 136 Kan. 127, 12 P.2d 837, 839; Dawson, Undiscovered Fraud and Statutes of Limitation, 31 Mich.L.Rev. 591, 607–613; Dawson, Fraudulent Concealment and Statutes of Limitation, 31 Mich.L.Rev. 875, 887–893; 63 Harv.L.Rev. 1177, 1214–1217; 6 Williston on Contracts (rev. ed.) § 2033, at p. 5703.) Cases in which the defendant stands in a fiduciary relationship to the plaintiff are frequently treated as if they involved fraudulent concealment of the cause of action by the defendant. The theory is that although the defendant makes no active misrepresentation, this element "is supplied by an affirmative obligation to make full disclosure, and the non-disclosure itself is 'fraud'." (Dawson, Fraudulent Concealment and Statutes of Limitation, supra at p. 887; see Kane v. Cook, supra; Frazier v. Frazier, 211 Ala. 176, 100 So. 118, 119–120; Boon v. Root, 137 Wis. 451, 119 N.W. 121, 122–123; Bent v. Priest, 86 Mo. 475, 488–489; Kelley v. Nealley, 76 Me. 71, 74; Batts v. Winstead, 77 N.C. 229, 231–232 [238]; Hoyle v. Jones, 35 Ga. 40, 43–44; 51 Harv.L.Rev. 1300, 1301; 43 Harv. L.Rev. 471.) There is no need to resort to this fiction, however, for the very existence of a fiduciary relationship obviated the necessity of plaintiff's pleading fraud.

(Rafter v. Hurd, supra, 12 P.2d at p. 839; see Dawson, Undiscovered Fraud and Statutes of Limitation, ⊥535 supra at pp. 610–621; 1 Mechem, Agency (2d ed.) § 1347 at pp. 984–986.) If, as plaintiff alleged, defendant breached its fiduciary duty to disclose her potential liability for the unpaid sales taxes, it would be manifestly unjust to hold that her action was barred by the statute of limitations when her failure to file a timely complaint resulted from that breach.

The judgment is affirmed as to defendants Western Title Insurance Company and William S. Fisher, its agent. In all other respects the judgment is reversed.

GIBSON, C. J., and PETERS, WHITE, and TOBRINER, JJ., concur.

SCHAUER and McCOMB, JJ., concur in the judgment.

58 Cal.2d 522, 375 P.2d 37

⊥522 **ESTATE of Elmer L. SANDERSON, Deceased.**

Balbena S. SYSTER, Administratrix, etc., Contestant and Appellant,

v.

The ROMAN CATHOLIC BISHOP OF SAN DIEGO et al., Respondents.

L. A. 26462.

Supreme Court of California,
In Bank.
Oct. 9, 1962.
Rehearing Denied Nov. 7, 1962.

Proceeding on petition by administratrix of estate of deceased brother of testator to determine heirship and to have declared invalid under the California Probate Code charitable bequests contained in will which testator had executed eight days before his death. From a judgment of the Superior Court, San Diego County, C. M. Monroe, J., the administratrix appealed. The Supreme Court, Schauer, J., held that administratrix of testator's brother was a proper person to carry forward the contest which had been initiated by testator's brother during the brother's lifetime, but that provisions naming alternate legatees in the event charitable bequests were declared void because of statute were not invalid even though, as bishop and auxiliary bishop, the alternate legatees would, as men of good conscience, carry out testator's wishes though they were not legally bound to do so.

Affirmed.

Opinion, 20 Cal.Rptr. 651, vacated.

1. Wills 🔑**13(3)**

Right of brother of testator to institute proceedings to have declared invalid charitable bequest contained in will executed only eight days before testator's death was a property right belonging to brother and, following brother's death, brother's spouse, in her role as administratrix, was a proper person to carry on the brother's contest which had been initiated by brother before his death. West's Ann.Prob.Code, § 41.

2. Wills 🔑**13(3)**

Although under Probate Code relative of enumerated class may avoid charitable legacy or devise contained in will executed within 30 days of testator's death, such right can be exercised only if and only to extent that relative would have taken property but for such legacy or devise, so that an otherwise effective disposition in the will of the portion of the estate represented by charitable gifts will render claims of relative ineffectual. West's Ann.Prob.Code, § 41.

3. Wills 🔑**675**

No precatory trust was created where testator intended to create a moral obligation upon legatee to carry out his wishes but expressed the intent that the obligation not be legally enforcible and where testator deliberately left matter of its performance exclusively to good faith of legatees.

4. Wills ⚷13(2), 675

Where testator made charitable bequests in will executed eight days before his death but also named alternative legatees if charitable bequests were declared void by reason of any statute with a request that such legatees carry out testator's wishes, but where no secret trust had been entered into, charge of invalidity against charitable bequests did not render alternative provision invalid even though alternative legatees, as bishop and auxiliary bishop, although not legally bound, would feel morally compelled to follow testator's wishes. West's Ann.Prob.Code, § 41.

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Robert A. Kaiser, Jeremiah F. O'Neill, Jr., and John E. Nolan, Oakland, for contestant and appellant.

Howard S. Dattan, Victor E. Urias and Quintin Whelan, San Diego, for respondents.

⊥523 ⊥ SCHAUER, Justice.

This is an appeal from a judgment dismissing a petition to determine heirship, approving and settling accounts of the executor, ordering payment of fees, and decreeing distribution of the estate to certain charitable beneficiaries named in decedent's will. We have concluded that the trial court correctly determined that by reason of a substitutional dispositive clause of the will contestant-appellant may not avoid the charitable gifts, and that on the specified ground the judgment should be affirmed insofar as relevant to that controlling issue.

From the record it appears that decedent executed his will on January 24, 1957, and died eight days later, on February 1, 1957. By the terms of the will the entire estate was bequeathed to certain charitable institutions. The will further provides as follows: "In the event that any bequest or devise ⊥ in this Will be declared void by ⊥524 reason of any statute in effect at the time of my death restricting or prohibiting testamentary gifts to charity, then I give, devise and bequeath the amount or amounts thereof to Charles F. Buddy and Thomas Ackerman of San Diego, California, as joint tenants, and without imposing or attempting to impose any legally enforceable obligation upon them, request that they carry out my wishes as expressed in this Will."

At the time the will was executed Charles F. Buddy was the Roman Catholic Bishop of the Diocese of San Diego, and it is undisputed that the "Thomas" Ackerman named in the will was intended to refer to Richard Ackerman, Auxiliary Bishop of San Diego.

The will was offered for probate in February 1957, and before expiration of that month decedent's sole survivor and heir, his brother Harvey Syster,[1] filed objections to probate. Mr. Syster, in his verified specification of objections to the will, alleges "That * * * the purported dispositions in said document are within the purview of Probate Code, Section 41,[2] of

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[1] Decedent Elmer L. Sanderson, it appears, had changed his family name from Syster to Sanderson.

[2] Probate Code, section 41 provides in relevant part:

"No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least 30 days before the death of the testator. * * * All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected.

"Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, the State of California; that HARVEY SYSTER, brother of the said decedent, requests that said provisions be declared invalid."

Mr. Syster died in June 1957 and his widow, as administratrix of his estate, carries on his attack against the dispositive provisions of the will. Following various proceedings (see Estate of Sanderson (1959) 171 Cal.App.2d 651, 341 P.2d ⊥525 358), the will was admitted to probate (see Estate of Sanderson (1960) 183 Cal.App.2d 740, 6 Cal.Rptr. 893), and in November 1959 petition for final distribution was filed. In December 1959 Mrs. Syster, in her capacity as "Administratrix of the Estate of HARVEY SYSTER, Contestant," filed objections to the petition for final distribution and reasserted the ground, among others, which her husband had advanced in his objections to probate of the subject will, i. e., "that the purported dispositions in said document are within the purview of Probate Code, Section 41;" and in February 1960 she (here also acting as the duly qualified, representative of her deceased husband) filed a petition to determine heirship.[3] Following a trial on the two matters the court in a single judgment ordered the petition to determine heirship dismissed and the estate to be distributed in accordance with the terms of the will. This appeal by Mrs. Syster (of course, in her representative capacity) followed.

[1] We have concluded that it is unnecessary to determine whether the trial court erred in dismissing the petition to determine heirship. This is true because in the circumstances of this case the ultimate result must be the same regardless of whether the dismissal order be affirmed or reversed. However, to preclude implication of support for erroneous inferences, it is appropriate to point out that the trial court in making the order of dismissal appears to have had the view that under our decision in Estate of Bunn (1949) 33 Cal.2d 897, 900–901 [3], 206 P.2d 635, Mrs. Syster was not a person entitled to carry on the contest or assert that the dispositive provisions of the will violated Probate Code, section 41. In this the trial court was mistaken. It was not Mrs. Syster as an individual claiming in her own right who was objecting to distribution under the will; it was Mrs. Syster solely in her capacity as qualified personal representative of Harvey Syster, surviving (and *subsequently* deceased) brother of Elmer L. Sanderson (Syster), who was carrying on Harvey's claim to the property interest which he had asserted during his lifetime.

⊥526 Nothing which we said in the Bunn case (see also Estate of Hughes (1962) 202 A.C.A. 20, 26–27 [8–11], 20 Cal.Rptr. 475) precludes the personal representative of decedent's surviving heir from carrying on and prosecuting by appropriate legal proceedings the attack on the validity of the charitable bequests *which had been initiated by the surviving heir.* In the Bunn case the heir entitled to challenge the will died without having asserted any appropriate claim. We there (pp. 900–901 [3] of 33 Cal.2d, 206 P.2d 635) quoted from a decision of the Supreme Court of Iowa (Karolusson v. Paonessa (1928) 207 Iowa 127 [222 N.W. 431, 433]) and reasoned, "'*If such designated parties* [the relatives listed in the statute] do not challenge the

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in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will."

[3] The petition to determine heirship carefully alleges the ground of objection to the dispositive provisions of the will asserted by Harvey Syster, i. e., "that said estate is not in a condition to be closed by reason of a pending appeal in said estate, and by reason of the pending determination of the objections of Harvey Syster, deceased, by and through Balbena B. Syster, the administratrix of the Estate of Harvey Syster, under the provisions of Section 41 of the Probate Code of the State of California."

bequest to charity, it does not lie in the mouth of any other person to challenge it. It may often happen that a testator will make a bequest to charity * * * and leave a surviving spouse, and the spouse will fully acquiesce in such charitable bequest and wish that the will be carried out in its entirety. Could it be said that, under the statute, the mere fact of the existence of a surviving spouse would enable some other person, such as a distant collateral heir, to challenge the bequest to charity? We think not. [Citations.]'" (Italics added.) And the opinion continues (p. 901 of 33 Cal.2d, 206 P.2d 635), "Nor is the administratrix of the estate of Mrs. Bunn's husband [in the circumstances there extant] in any better situation, for the right to contest a will on this ground [violation of Probate Code section 41] has been held to be purely personal, to be narrowly restricted, and one which does not pass to the representative of a decedent as a part of his estate. [Citation.]"

In the case at bench, however, the first step in the proceeding to establish the personal claim of the heir was taken by him when he filed objections to probate specifically asserting that he was "the brother and sole heir at law of said decedent * * [that] the purported dispositions in said document [the will] are within the purview of Probate Code section 41 * * * [and that he] Harvey Syster, brother of the said decedent, requests that said provisions [of the will] be declared invalid." Thus the heir himself made the election and asserted the claim. This he was entitled to do. We are of the view that Harvey's claim of heirship to the property of Elmer's estate, as thus evidenced and asserted, is of the nature of a property right (Estate of Baker (1915) 170 Cal. 578, 585–588, 150 P. 989; see also Estate of Field (1951) 38 Cal.2d 151, 154–155 [2], 238 P.2d 578) and is not cut off by his subsequent death.

527 ⊥ For reasons hereinafter developed it appears, nevertheless, that the judgment appealed from must be affirmed insofar as it settles the accounts and reports of the executor, allows and orders fees and expenses to be paid, and directs distribution of the estate. This result follows solely on the ground that the substitutional clause of the will providing for disposition of the estate in case the charitable gifts be declared void defeats appellant's right to avoid the charitable provisions. The order purporting to dismiss the petition to determine heirship is therefore immaterial and may be disregarded.

[2] Under the terms of section 41 a relative of the enumerated class may avoid a charitable legacy or devise only if and to the extent he would have taken the property but for such legacy or devise; where there is an otherwise effective disposition in the will of the portion of the estate represented by the charitable gifts, the claims of the relative are ineffecutal. (See fn. 2, ante; Estate of Haines (1946) 76 Cal.App.2d 673, 675–679 [1, 2], 173 P.2d 693; Estate of Davis (1946) 74 Cal.App.2d 357, 360–362 [2], 168 P.2d 789.)

In order to avoid the substitutional clause of the subject will, appellant contends that the gift thereby made is a mere subterfuge and that the bishops named therein would hold the gift upon a secret trust. Bishop Buddy, called as a witness, testified that as a man of good conscience he would feel obligated to carry out the testator's wishes although not legally compelled to do so nor obligated to do so as a priest. The trial court found that the bishops did not agree orally or otherwise prior to the death of decedent to dispose of or hold the gift in accordance with any direction or request of decedent and that no secret trust of any sort was created.

As appears hereinabove, although the testator specifically declined to impose any legally enforceable obligation upon the bishops to use the gift for charitable purposes, he did request in his will that they so use it.

[3, 4] The law has long been settled that no precatory trust is created where the testator intended to create a moral obliga-

tion upon the legatee to carry out the testator's wishes, but expressed the intent that the obligation not be legally enforceable and "deliberately left the matter of its performance exclusively to the good faith of the legatee." (Estate of Hamilton (1919) 181 Cal. 758, 769 [7], 186 P. 587 and cases there cited; see also In re Duncan's Estate (1956) 145 Cal.App.2d 612, 614–615 [2–3], 302 P.2d 892.) Pursuant to this rule, it appears that no precatory trust was created by the ⌊528 testator here, and for that reason neither his brother nor any other relative may avoid the charitable gifts contained in the will. Cases relied upon by appellant, such as Estate of Hughes (1957) 148 Cal.App.2d 782, 784–786 [2], 307 P.2d 404, show no such specific intent expressed by the testator, and no useful purpose would be served by discussing them further.

For the reasons above stated, the above specified portions of the judgment appealed from are affirmed.

GIBSON, C. J., and TRAYNOR, McCOMB, PETERS, WHITE and TOBRINER, JJ., concur.

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58 Cal.2d 479, 375 P.2d 41

⌊479 **Edward L. SILLER et al., Plaintiffs and Appellants,**

v.

BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents;

MASON–PINE, INC., et al., Real Parties in Interest, and Respondents.

S. F. 21109.

Supreme Court of California,
In Bank.
Oct. 2, 1962.
Rehearing Denied Oct. 31, 1962.

Proceeding for peremptory writ of mandate to compel board of supervisors and planning commission of city to set aside order granting building variance. The Superior Court, City and County of San Francisco, Carl H. Allen, J., denied petition and plaintiffs appealed. The Supreme Court, Schauer, J., held that granting of variance from off-street parking provisions of city planning code requiring that one parking place be provided for each dwelling unit was not improper, where it appeared that many parking places would stand vacant and unused if builder provided prescribed number, and that to require prescribed number would constitute unnecessary hardship.

Affirmed.

Opinion, 21 Cal.Rptr. 636, vacated.

1. Mandamus 🔑72

Mandamus is appropriate remedy to test proper exercise of discretion vested in local board of supervisors of city. West's Ann.Code Civ.Proc. § 1094.5(c).

2. Zoning 🔑703, 704

Power to review order of board of supervisors and planning commission of city and county was conditioned on determining that findings were not supported by substantial evidence in light of whole record, where challenge rested on claimed insufficiency of evidence, and court did not have right to judge intrinsic value of evidence or weigh it. West's Ann.Code Civ. Proc. § 1094.5(c).

3. Zoning 🔑678

View by planning commission members of site or personal knowledge of physical conditions of site and neighborhood characteristics constituted independent evidence which must be deemed by reviewing court to have been considered by commission members in reaching their decision granting building variance. West's Ann.Code Civ. Proc. § 1094.5(c).

4. Zoning 🔑488

Granting or denial of building variance is primarily in discretion of body designated by applicable ordinance or statute; no vested right is affected by either denial or grant.

5. Zoning ⚷678

Where building variance is granted, it is presumed that official duty was performed in investigating matter and that existence of necessary facts was found.

6. Zoning ⚷623

Decision of municipal body to grant or deny building variance will not be disturbed by courts, in absence of showing of abuse of discretion.

7. Zoning ⚷503

Granting of variance from off-street parking provisions of city planning code requiring that one parking place be provided for each dwelling unit was not improper, where it appeared that many parking places would stand vacant and unused if builder provided prescribed number and that to require prescribed number would constitute unnecessary hardship. West's Ann.Code Civ.Proc. § 1094.5(c).

8. Zoning ⚷251

Purpose of off-street parking provisions of city planning code, which declared that code provisions should be interpreted in light of good faith attempt to take steps toward relieving traffic congestion and to enhance public safety, convenience and welfare by requiring ample parking facilities in connection with dwelling units thereafter constructed, was not to provide off-street parking for other than occupants of new dwelling units.

9. Zoning ⚷503

Under section of city planning code, which, in one section, authorized variances from any provisions of another section specifying number of off-street parking places required for dwelling units thereafter constructed, and which defined off-street parking space in a third section, definitions became in practical effect part of section specifying number of spaces required and variances could be granted with respect to size of spaces as defined.

10. Municipal Corporations ⚷41

It was not for court to re-examine way in which planning commission of city exercised its discretion.

Lawrence W. Jordan, Jr., Bernard P. McCullough and Rogers, Clark & Jordan, San Francisco, for plaintiffs and appellants.

Dion R. Holm, Thomas M. O'Connor, City Attys., and Bernard J. Ward, Deputy City Atty., for defendants and respondents.

Jacobs, Sills & Coblentz and Donald M. Cahen, San Francisco, for real parties in interest and respondents.

⊥SCHAUER, Justice. ⊥481

Plaintiffs appeal from a judgment denying their petition for a peremptory writ of mandate to compel the Board of Supervisors and the Planning Commission of the City and County of San Francisco to set aside an order granting a building variance to Mason-Pine, Inc., the principal real party in interest, hereinafter sometimes called Mason-Pine.

[1, 2] As ground for reversal, plaintiffs contend that the record upon which the planning commission acted shows as a matter of law that the provisions of the planning code allowing variances have not been met; i. e., that in granting the subject variance the commission abused its discretion and exceeded its authority. Mandamus is an appropriate remedy to test the proper exercise of discretion vested in a local board; and where, as here, the challenge rests on claimed insufficiency of the evidence, the court's power of review is conditioned on determining "that the findings are not supported by substantial evidence in the light of the whole record" before the board. (Code Civ.Proc. § 1094.5, subd. (c); Atchison etc. Ry. Co. v. Kings Co. Water Dist. (1956) 47 Cal.2d 140, 143 [1], 302 P.2d 1; Lindell Co. v. Board of Permit Appeals (1943) 23 Cal.2d 303, 315 [5], 144 P.2d 4.) Upon such review the "court does not have the right to judge the⊥intrinsic value ⊥482 of the evidence or to weigh it." (Damiani v. Albert (1957) 48 Cal.2d 15, 17 [1], 306 P.2d 780; Thompson v. City of Long Beach (1953) 41 Cal.2d 235, 240 [3], 259 P.2d 649.)

For the reasons hereinafter stated we have concluded that the trial court was correct in its determination that upon the entire record before the commission the granting of the variance is not shown to be unsupported by substantial evidence, that no abuse of discretion appears, and that the judgment should be affirmed.

Plaintiffs allege in their petition for the writ that they own real property located within 300 feet of property owned by the principal real party in interest on the corner of Mason and Pine Streets in San Francisco; that in February 1960 Mason-Pine filed with the planning commission an application for a variance from certain off-street parking provisions of the city planning code with respect to apartments proposed to be constructed in San Francisco; that following hearings the commission granted the variance; that plaintiffs appealed to the board of supervisors, which heard the matter and affirmed the order of the commission. Plaintiffs further allege that Mason-Pine presented to the commission no evidence of special circumstances and unnecessary hardship, as required by the provisions of the planning code, and that therefore the order granting the variance was unauthorized and invalid.

The trial court reviewed the record of the proceedings before the commission, heard brief testimony from one witness as to statements made by himself at the hearing before the board of supervisors, and following argument by the parties denied plaintiffs' petition and discharged the alternative writ theretofore issued. This appeal by plaintiffs followed.

On March 31, 1960, when Mason-Pine was granted the variance by the commission, article 4.5 of the San Francisco Planning Code (Ch. II, pt. II, San Francisco Municipal Code), in effect since 1955, set forth certain off-street parking requirements. Section 111 provided that "The *interpretation and application* of the provisions of this Article shall be made in the light of a good faith attempt on the part of the Board of Supervisors to take a step toward relieving traffic congestion and to enhance the public safety, convenience and welfare by requiring *ample parking facilities* in connection with dwelling units hereafter constructed." (Italics added.)

Section 112 set forth certain definitions: "For the purpose of this Article * * * (b) Dwelling Unit. The words 'dwelling unit' mean a room or suite of rooms that 483 is designed for, or is occupied by, one family doing its own cooking therein and having only one kitchen * * * (d) Off-Street Parking Space. The words 'off-street parking space' mean an off-street area within the building housing the dwelling unit, or on the lot where the building is located, not less than one hundred sixty (160) square feet in area, net, exclusive of access or maneuvering area, or ramps, columns, or the like, to be used exclusively as a temporary storage space for one private motor vehicle. Each required parking space shall be of usable shape, independently accessible and properly maintained."

Section 113 provided that "The number of off-street parking spaces required for dwelling units hereafter constructed in * * * San Francisco shall be one off-street parking space for each dwelling unit."

Section 114 authorized variances, as follows: "The City Planning Commission may, upon application, *grant variances* from *any of the provisions* of Section 113 of this Article, after public notice and hearings, if it is of the opinion that special circumstances exist in the particular case, and that unnecessary hardship would result from the strict interpretation and enforcement of such provisions * * *" (Italics added.)

The variance granted by the commission to defendant authorized 174 parking spaces for a building to contain 190 dwelling units (rather than the one-for-one ratio set forth in section 113, quoted hereinabove), none of which parking spaces was either as large as 160 square feet in area or required to be independently accessible. There was evidence that Mason-Pine had purchased the subject site with full knowledge of the Planning Code provisions.

From the building plans submitted by Mason-Pine and from the evidence presented at the hearings before the planning commission, it appears that the proposed building as finally approved by the commission is to contain 19 stories with 190 dwelling units, of which 114 are to be one-bedroom units and the remaining 76 are to be "efficiency units" (one room with adjoining kitchenette and bath). The building is to be located on the corner of Mason and Pine Streets, within five blocks of San Francisco's central financial district and of the Union Square shopping area, and assertedly is designed for use by moderate-income tenants desiring to live within walking distance of their places of work. There was evidence that only 25% to 50% of such moderate-income tenants (i. e., the tenants of only 48 to 95 of the 190 units in ⊥484 the building, which nevertheless was to contain 174 parking spaces) would own automobiles; that within the area surrounding and serving the subject site there were three garages with storage parking stalls available; and that the operator of "the parking lot on the subject site" had never been able to rent more than ten of his forty available parking stalls on a monthly basis despite repeated efforts so to do.

Mason-Pine asserted also that if denied a variance it would be compelled to decrease the number of proposed dwelling units in order to comply with the one-for-one 160 square feet parking space requirement; that such a change in design would necessarily result in larger units with correspondingly higher rents which would include the cost of vacant garage space, and which would require moderate-income tenants to double up or would prohibit them from occupying the premises.

[3] In addition, the planning commission members either viewed the site[1] or were personally familiar therewith and by their own knowledge were aware of the physical condition of the site and of the neighborhood characteristics. Such view and knowledge constitute independent evidence which must be deemed by the reviewing court to have been considered by the commission members in reaching their decision. (See Key v. McCabe (1960) 54 Cal.2d 736, 739 [3], 8 Cal.Rptr. 425, 356 P.2d 169; City & County of San Francisco v. Superior Court (1959) 53 Cal.2d 236, 251 [14], 1 Cal.Rptr. 158, 347 P.2d 294; Flagstad v. City of San Mateo (1957) 156 Cal.App.2d 138, 141–142 [5], 318 P.2d 825.)

[4–7] Further, the granting or denial of a variance rests primarily in the discretion of the body designated by the applicable ordinance or statute; no vested right is affected by either the denial or the grant; where a variance is granted it is presumed that official duty was performed in investigating the matter and that the existence of the necessary facts was found; and the decision of the municipal body to grant or deny a variance will not be disturbed by the the courts in the absence of a clear and convincing showing of an abuse of discretion. (Flagstad v. City of San Mateo (1957), supra, 156 Cal.App.2d 138, 140–141 [1–4], 318 P.2d 825 and cases there cited; see also County of San Diego v. McClurken (1951) 37 Cal.2d 683, 691– ⊥485 692 [11–12], 234 P.2d 972; City and County of San Francisco v. Superior Court (1959), supra, 53 Cal.2d 236, 251 [13], 1 Cal.Rptr. 158, 347 P.2d 294.)

In reliance upon various cases dealing with variances from uses permitted under zoning schemes, plaintiffs first urge that the evidence is insufficient to show the "special circumstances * * * and * * * unnecessary hardship" which the San Francisco Planning Code (§ 114 of art. 4.5) states the commission must be "of the opinion" would result before a variance from the off-street parking requirements may be granted. Particularly is this true, say plaintiffs, where, as here, the property was purchased with full knowledge of the restrictive provisions. (See Minney v. City of Azusa (1958) 164 Cal.App.2d 12, 31–32 [20, 23], 330 P.2d 255; City of San Marino v. Roman Catholic Archbishop (1960) 180 Cal.App.2d 657, 673 [12], 4 Cal.Rptr. 547; Clark v. Board of Zoning Appeals (1950) 301 N.Y. 86, 92 N.E.2d 903; Devaney v. Board of Zoning Appeals (1946) 132 Conn. 537, 45 A.2d 828.)

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[1] For the purposes of this opinion we disregard as evidentially incompetent a statement (attributed to Mason-Pine's attorney) to the board of supervisors that in the opinion of Cahill Brothers, the engineers who were developers of the project, further excavation to provide additional garage space would be unsafe on the steep hillside where the building was to be constructed.

In the first place, however, the variance here granted was not from a zoning plan or scheme, but rather from provisions for off-street parking which would appear to be more in the nature of a construction code or building ordinance. Further, such code itself specifies, in section 111 of article 4.5 that, so far as here material, its provisions shall be interpreted "in the light of a good faith attempt * * * to take a step toward *relieving traffic congestion* and to enhance the public safety, convenience and welfare by requiring *ample parking facilities* in connection with dwelling *units hereafter constructed.*" (Italics added.)

The authorization to the planning commission to grant variances "if it is of the opinion that special circumstances exist in the particular case, and that unnecessary hardship would result from the strict interpretation and enforcement" of the off-street parking requirements must be viewed in the light of the just-quoted provision laying down the rule for interpretation of article 4.5.

[8, 9] So viewed and so interpreted, it appears that the commission could determine that to require Mason-Pine to provide in its proposed building many parking spaces which would stand vacant and unused, which thus would *not* contribute toward "relieving traffic congestion," and which would be substantially *more than* ample "in connection with dwelling units" to be constructed, would constitute a special circumstance and unnecessary hardship against which the variance provisions ⌊486 of section 114 were designed to authorize relief. As already noted herein, even the 174 parking spaces required under the variance as granted by the commission were, according to Mason-Pine's evidence, substantially in excess of those which might be expected to be used by the 48 to 95 tenants who would own automobiles. Further, the rule of interpretation prescribed in section 111 of article 4.5 makes it clear that the provision of off-street parking for other than occupants of new dwelling units was not the purpose of the subject article.

[10] Plaintiffs next point out that none of the 174 parking spaces provided for in the proposed building meets the definition found in section 112 of being independently accessible and containing a minimum area of 160 square feet, and contend that in any event section 114 empowers the commission to grant variances from only the one-for-one parking requirements of section 113 and not from the provisions of section 112. This contention is without merit. Section 114 by its terms authorizes variances from "*any* of the provisions of Section 113" (italics added). Section 113 specifies the "number of off-street parking spaces required for dwelling units hereafter constructed." To learn the meaning of the term "off-street parking space" it is necessary to refer in turn to the definitions laid down in section 112. It thus follows that such definitions become in practical effect a part of section 113, from the provisions of which the commission may grant variances.[2]

For the reasons above stated it appears that the commission did not abuse its discretion or exceed its authority in granting the subject building variance. The judgment of the trial court refusing the peremptory writ is affirmed.

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[2] It may be observed also that the commission, had it found that the 160 square feet areas for parking spaces were desirable in the premises, in its discretion could have required that the total amount of space allocated to parking be divided into areas each containing a minimum of 160 square feet. It is not for the court, however, to re-examine the way in which the commission exercised its discretion.

GIBSON, C. J., and TRAYNOR, McCOMB, PETERS, WHITE and TOBRINER, JJ., concur.

58 Cal.2d 447, 375 P.2d 46

447 **The PEOPLE, Plaintiff and Respondent,**

v.

Albert LESSARD, Defendant and Appellant.

Cr. 7101.

Supreme Court of California,

In Bank.

Sept. 27, 1962.

Rehearing Denied Oct. 24, 1962.

Defendant was convicted in the Superior Court, City and County of San Francisco, Gerald S. Levin, J., of first degree murder, and he appealed. The Supreme Court, White, J., held that it was not error to exclude, as hearsay, transcript of testimony taken at coroner's inquest.

Affirmed.

1. Criminal Law ⟹874

In absence of request therefor, failure of court to poll jury does not constitute denial of constitutional right. West's Ann. Pen.Code, § 1163.

2. Criminal Law ⟹1040

Where jury is incompletely polled but no request is made for correction of error, further polling may be deemed waived by defendant, who cannot sit idly by and then claim error on appeal when inadvertence could readily have been corrected upon his merely directing attention of court thereto. West's Ann.Pen.Code, § 1163.

3. Criminal Law ⟹874, 1040

Even though only 11 jurors were polled at time of defendant's request therefor, there was no incomplete polling where twelfth juror was thereafter independently polled; and, in any event, defendant, who had failed to call oversight, if any, to court's attention, was not entitled to a reversal. West's Ann.Pen.Code, § 1163.

4. Homicide ⟹307(3)

Trial court would not be put in error for refusal to instruct jury on elements of murder of second degree where record was barren of any evidence to support verdict of murder of second degree. West's Ann. Pen.Code, § 189.

5. Criminal Law ⟹855(5), 925½(4)

Reading by jurors of newspaper accounts of trial in which they are engaged amounts to violation of their duty and obligation; and if such newspaper accounts would be at all likely to influence jurors in performance of duty, such misconduct constitutes ground for new trial. West's Ann. Pen.Code, § 1181, subd. 2.

6. Criminal Law ⟹956(12)

Under facts adduced, on motion for new trial because of alleged misconduct of jurors in reading newspaper account of trial and discussing case among themselves prior to its submission to them, trial judge did not err in refusing to indulge assumption that jurors had violated their oaths and disregarded his admonitions. West's Ann. Code Civ.Proc. § 604.

7. Criminal Law ⟹957(1)

It is improper to consider juror's affidavit for purpose of impeaching juror's own verdict, other than to show decision by lot or concealment of bias and prejudice by false answers on voir dire, and such rule is applicable, at least to extent that juror participated, even where juror was excused. West's Ann.Code Civ.Proc. § 657, subd. 2.

8. Homicide ⟹222

It was not error to exclude, as hearsay, transcript of testimony taken at coroner's inquest. West's Ann.Code Civ.Proc. §§ 1918, 1920, 1926, 1953e.

9. Criminal Law ⟹1166½(1)

Even if defendant's counsel had improperly advised him to admit to having been in motel room where homicide was committed, no such prejudice as would justify reversal occurred where, whatever story defendant gave, there was still abundant, substantial evidence that defendant committed homicide.

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Thomas M. Griffin, under appointment by the Supreme Court, and Richard J. Tuckerman, Oakland, for defendant and appellant.

Stanley Mosk, Atty. Gen., John S. McInerny and Edward P. O'Brien, Deputy Attys. Gen., for plaintiff and respondent.

450 WHITE, Justice.

A jury found defendant guilty of the first degree murder of Joseph Mazeski and fixed the penalty at death. Defendant admitted two prior felony convictions. The trial court denied defendant's motion for a new trial and entered judgment on the verdict. The appeal from the judgment is automatic. (Pen.Code, § 1239, subd. (b).) Although the order denying the motion for a new trial is not appealable, we are nevertheless authorized to review the denial in this proceeding. (Pen.Code, § 1237, as amended Stats.1961, ch. 850, § 5, p. 2229.)

With regard to the factual background surrounding this prosecution, the record reveals that on June 15, 1959 the deceased registered at the Travel Lodge Motel in San Francisco. He had in his possession approximately $800, the proceeds of a check for his summer pay as a school teacher. On the afternoon of June 16 he met defendant in a tavern directly across the street from deceased's motel. The two had drinks and some conversation. Thereafter defendant left the tavern shortly before 6:00 p.m. and returned in approximately 15 minutes. The latter accompanied by the deceased then left the tavern at approximately 6:30 p.m. The deceased's body was found in his motel room the following morning. Death was caused by knife wounds in his chest and back areas. Other wounds on the deceased's arms and hands were described as of a type inflicted when one attempts to ward off a knife attack.

Defendant's fingerprints were found throughout the deceased's motel room, and he admits to having entered the room after leaving the tavern. In addition, defendant's fingerprints 451 were found on a knife in a display case at a restaurant supply store located in the same neighborhood as the motel and tavern. The owner of the store testified that on the afternoon in question at approximately 6:00 p.m., a man who might have been the defendant entered his establishment and purchased a boning knife. Before making his selection, however, the customer examined another knife which was returned to the display case. When the owner heard of the homicide he informed the police of the purchase, and it was the knife remaining in the display case on which defendant's fingerprints were found. The murder weapon was never identified or recovered.

The latter admitted meeting the deceased at the tavern on the afternoon of June 16. He testified that after leaving the tavern they drove to another bar in the victim's automobile and then returned to the motel room; that deceased wanted to freshen up and while he was engaged in taking a shower defendant noticed deceased's wallet, removed it from the latter's clothing and quietly left. It is thus conceded that defendant committed a theft of personal possessions. By way of affirmative defense, defendant offered evidence that he boarded a Greyhound bus to Seattle, claiming that such bus left San Francisco at 9:30 p.m. Evidence was submitted which, if believed, could have established that hour as defendant's departure time. His purpose in establishing such time was to demonstrate that he could not have been in San Francisco at the time of decedent's death as testified to by witnesses for the prosecution. In this connection defendant asserts that the coroner's records indicate that death occurred not before 11:00 p.m. on June 16. This conclusion is drawn from a statement contained in the coroner's report that "deceased had apparently been dead from 10 to 12 hours when found." However, the coroner testified that the time of death could have been within a period preceding the discovery of the body by as much as 14 hours, which would have made it possible for defendant to have committed the crime and to have taken the bus which he claims to have boarded. The coroner admitted on the stand that the 10 to 12 hour estimate was a "best" estimate, but testified that unknown factors could cause considerable error in the estimate. Other than the admitted theft the defendant advanced no theory, either expressly or inferentially through evidence produced by him or the prosecution, which might have established a criminal act. His entire ⌊452 defense was directed to establishing that he was in no way connected with the homicide.

[1–3] As his first ground for reversal defendant contends that the clerk of the trial court failed to poll the entire jury when requested to do so by his counsel, following return of the guilty verdict. (Pen.Code, § 1163.) In response to the request of defendant the court ordered the jury to be severally polled. It appears from the transcript as originally prepared that 11 jurors were polled, all answering in the affirmative to the question "* * *, is that your verdict?" No request was made by counsel for defendant for further polling and the oversight, if any, was not otherwise called to the court's attention. Moreover, a duly verified correction to the reporter's transcript shows that the twelfth juror was also independently polled and that he too stated that the announced verdict was also his individual verdict. The verity of the corrected transcript is not put in issue.

The polling of the jury is a right available only upon the request of either party. (Pen.Code, § 1163.) A failure to make a proper request imposes no burden upon the court to poll the jury, nor in the absence of such request does a failure to so poll constitute a denial of a constitutional right. Where a jury is incompletely polled and no request is made for correcting the error, such further polling may be deemed waived by defendant, who cannot sit idly by and then claim error on appeal when the inadvertence could have readily been corrected upon his merely directing the attention of the court thereto. In any event, the record fails to reveal an incomplete polling in the present instance and no grounds for reversal are apparent.

[4] Defendant next assigns as error the refusal of the trial court to instruct the jury on the elements of murder of the second degree. In this connection the court instructed: "Although there are two degrees of murder, the evidence in this case is such that either the defendant is innocent of the charge of murder or he is guilty of murder in the first degree."

While an unbroken line of decisions holds that it is the duty of the court to instruct on every theory of the case finding support in the evidence (People v. Carnine, 41 Cal.2d 384, 390, 260 P.2d 16; People v. Carmen, 36 Cal.2d 768, 773–774, 228 P.2d 281), in the case now engaging our attention, however, the record is barren of any evidence that would support a verdict of murder of the second degree. The only theory advanced in the case at bar was that of murder in the first ⌊453 degree predicated either upon premeditation evidenced by defendant's purchase of the boning knife after meeting deceased or killing him in the course of a robbery. (Pen.Code, § 189.) As stated, the only theory advanced by defendant is that while a homicide was committed he was not the perpetrator thereof; that someone else purchased the knife and that someone other than he stabbed the decedent to death after defendant concededly removed the victim's personal possessions and fled. It therefore follows that if the jury was convinced beyond a reasonable doubt that defendant committed the homicide there was no alternative under existing law other than to find that the murder was of the first degree for the evidentiary features of the instant case are of such a nature as to warrant only such a finding as to the degree of the offense. (See People v. Turville, 51 Cal.2d

620, 633, 335 P.2d 678.) Defendant's reliance on the cases of People v. Carnine, supra, 41 Cal.2d 384, 260 P.2d 16; People v. Carmen, supra, 36 Cal.2d 768, 228 P.2d 281; People v. Bender, 27 Cal.2d 164, 163 P.2d 8; People v. Burns, 88 Cal.App.2d 867, 200 P.2d 134, (Cf. People v. Ah Lee, 60 Cal. 85), is unavailing for the reason that in the cited cases, unlike the one at bar, there was some evidence which tended to show such a state of facts as might bring the crime within the grade of second degree murder or of a lesser offense included within the crime charged. "[W]here the facts impel a conviction of murder of the first degree * * * and do not admit upon any view of the evidence of a finding other than of murder of the first degree, there is no occasion whatsoever to give instructions as to the differences between the degrees of murder." (People v. Bernard, 28 Cal.2d 207, 214, 169 P.2d 636, 640; see also People v. Peterson, 29 Cal.2d 69, 173 P.2d 11; People v. Honeycutt, 29 Cal.2d 52, 172 P.2d 698; People v. Dorman, 28 Cal.2d 846, 172 P.2d 686.) And in People v. Watts, 198 Cal. 776, at page 793, 247 P. 884, at page 890, we said: "In a criminal case instructions are always to be given with reference to the facts proved before the jury. Accordingly, it is the established rule that on the trial of a person charged with murder it is proper to refuse to given an instruction as to a lesser degree than that of murder in the first degree, or as to a lesser offense included within the crime charged, if the evidence is of such a nature as to warrant only a verdict of first degree murder, in the event that the accused is guilty at all." (See also People v. Dye, 130 Cal.App. 522, 20 P.2d 358.)

[5, 6] It is next contended by defendant that the jurors ⌊454 were guilty of misconduct in receiving evidence out of court and in discussing the case among themselves prior to its submission to them. This contention formed a basis for the motion for a new trial. (Pen.Code, § 1181, subd. 2.) An affidavit of a juror who was excused because of illness before the matter was submitted to the jury states that another juror read an inaccurate account of the trial in a newspaper, discussed the same with other jurors and based her premature opinion of defendant's guilt upon such newspaper article. It is alleged in the same affidavit that the jurors otherwise formed premature opinions of the defendant's guilt.

There can be no doubt that the reading by jurors of newspaper accounts of a trial in which they are engaged amounts to a violation of their duty and obligation and if such newspaper accounts would be at all likely to influence jurors in the performance of duty, the act would constitute a ground for a motion for a new trial. Jurors in a criminal action subscribe to an oath to render a true verdict according to the evidence. (Code Civ.Proc. § 604.) Under the oath which they take they cannot without a violation thereof receive impressions from any other source. However, the crucial question is whether it can be proved as a fact or may be presumed as a conclusion of law that the verdict of the jury may have been influenced by information or impressions received from sources outside of the evidence in the case.

In the case with which we are now concerned the affiant did not sit with the jury during its deliberations, and manifestly any statement in her affidavit as to the manner in which the jurors arrived at a verdict after submission of the cause to them amounts only to conjecture and speculation on the part of affiant. Moreover, in opposition to defendant's motion for a new trial an affidavit of the foreman of the jury was filed. It is stated therein that he did not hear any juror discuss the guilt of the defendant before deliberations, nor did he hear any expressions of prejudice. He states further that the jury deliberated only upon the evidence presented at the trial. We are satisfied no error was committed by the trial judge under the facts here present in refusing to indulge the assumption that the jurors in this case violated their oaths and disregarded his admonitions given throughout the trial and emphasized in his final instructions to them wherein he said:

"You are to be governed *solely by the evidence* introduced in this trial and the law as stated to you by me. The law forbids you to be governed by * * * conjecture * * * prejudice ⊥455 * * * public opinion or public feeling. * * * Both the people and the defendant have the right to demand, and they do demand and expect, that you will conscientiously and dispassionately *consider and weigh* the evidence * * * and that you will reach a just verdict, regardless of what the consequences of such verdict may be." (Emphasis added.) In any event, defendant fails to demonstrate the abuse of discretion necessary for the reversal of an order denying a motion for a new trial upon consideration of opposing affidavits. (People v. Cox, 174 Cal.App.2d 30, 41, 344 P.2d 399.)

[7] A further question, although dictum in view of our holding that the motion for a new trial was properly denied on the record, is raised as to the propriety of considering a juror's affidavit for the purpose of impeaching her own verdict (see People v. Sutic, 41 Cal.2d 483, 495, 261 P.2d 241), other than to show decision by lot or concealing bias and prejudice by false answers on *voir dire*. (Code Civ.Proc. § 657, subd. 2.) As stated, the juror here involved did not participate in the verdict and it might be argued that she therefore does not seek to impeach her verdict. But the rule should be applicable at least to the extent that she did participate, and beyond the extent of her participation it appears she had no positive knowledge. It has previously been held that dissenting jurors may not impeach their fellow jurors' verdict, although such verdict is not that of the dissenters. (Watson v. Los Angeles Transit Lines, 157 Cal.App.2d 112, 116, 320 P.2d 890.) And a statement, which must be considered as dictum appearing in People v. Henderson, 79 Cal.App.2d 94, at page 122, 179 P.2d 406, at page 424 limits the impeaching effect of affidavits of jurors who were excused "to matters not occurring while they were regular jurors."

[8] Defendant next asserts error in the trial court's ruling that a transcript of the testimony taken at the coroner's inquest was inadmissible. Distinction should be made herein between the coroner's report and the transcript at the inquest. The report, or register, consisting of the business record and conclusions of the coroner, was admitted. (See Pruett v. Burr, 118 Cal.App.2d 188, 257 P.2d 690.) But the transcript of the testimony given by witnesses at the inquest was not admitted upon the objection of the prosecution that the same was hearsay not falling within any of the exceptions to the hearsay rule. The ruling was correct. As stated in 20 American Jurisprudence, page 866, section 1027, "* * * a record of a primary fact made by a public official in the per⊥456formance of official duty is, or may be made by legislation, competent prima facie evidence as to the existence of that facts, *but records of investigations and inquiries conducted either voluntarily or pursuant to requirement of law* by public officers concerning causes and effects, and involving the exercise of judgment and discretion, expressions of opinion, and the making of conclusions, are not admissible in evidence as public records." (Emphasis added; see also Code Civ.Proc. §§ 1918, 1920, 1926.)

The transcript, containing the verbatim testimony of witnesses at the coroner's inquest, is not a written or prepared record of the coroner, and defendant has failed to justify its admission under the Uniform Business Records as Evidence Act (Code Civ.Proc. § 1953e), or any other exception to the hearsay rule. When the issue was presented during the trial the judge advised that he would receive the transcript into evidence if counsel for defendant, after research, could justify any ground for its admission. Defense counsel failed to again move for its admission. It further appears that the witnesses who testified at the coroner's inquest also were available and testified at the trial. The trial judge expressly indicated to counsel for defendant that he could use the transcript of testimony taken at the coroner's inquest to impeach the witnesses at the trial, but counsel did not seek to do so. (See People v. Devine, 44 Cal. 452.)

[9] Defendant finally contends that his attorney improperly advised him as to his testimony, and that defendant was thereby denied a fair trial. In this respect defendant contends, through an affidavit attached to his brief, that he had actually never been in the motel room; that he robbed the deceased of the latter's wallet while it was deposited in the glove compartment of deceased's automobile; that his defense counsel advised him to admit to having been in the motel room in order to make defendant's story more believable; that defendant followed his attorney's advice to his prejudice.

The foregoing contentions were also presented to the trial court on the motion for a new trial. There is nothing in the record which lends support to this current version of the theft of the wallet. The defendant's fingerprints were found in several places in the motel room, and his presence there must be deemed well established. Although he contends that the prints were "planted" there, the record shows that the prints were taken and preserved well in advance of the identification ⊥457 of defendant as the perpetrator of the crime. Moreover, even if defendant had been so advised by his attorney, and again there is no reason to believe that he was, it does not appear that any prejudice resulted therefrom. Whatever the story which defendant gives, there is still abundant, substantial, even though circumstantial, evidence that he committed the homicide. By either story he concedes that he stole the wallet; by either story he is identified as having been in the deceased's company shortly before the latter's death; by either story his fingerprints place him in both the motel room and the store wherein the knife was purchased; and by either story he made a quick departure from San Francisco on the evening of the murder. It should be noted here that the record is replete with inconsistencies in defendant's various accounts of his activities at the times involved, and it appears that expediency dictates the version currently deemed to be of advantage. We find no merit in defendant's last contention.

For the foregoing reasons the judgment should be, and is affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER, McCOMB, PETERS and TOBRINER, JJ., concur.

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58 Cal.2d 535, 375 P.2d 51

⊥535 **The PEOPLE, Plaintiff and Respondent,**
v.
Charles James GOLSTON, Defendant and Appellant.
Cr. 7110.

Supreme Court of California,
In Bank.
Oct. 9, 1962.

Prosecution for murder. From a judgment of the Superior Court, Los Angeles County, Fred Miller, J., an automatic appeal was taken. The Supreme Court, McComb, J., held that by waiving his right to trial by jury defendant had also consented to court making determination as to penalty without jury.

Affirmed.

1. Jury 🔑29(7)

Where defendant charged with murder waived trial by jury and where waiver was made in open court with advice of counsel, defendant was not entitled to jury trial as to penalty phase of case. West's Ann.Pen.Code, § 190.1.

2. Jury 🔑29(6)

Argument that waiver of jury trial was made without realizing its implications was without merit where defendant was represented by counsel and failed to show that either defendant or counsel was misled as to result which might occur from waiver of jury trial. West's Ann.Pen.Code, § 190.1.

3. Homicide 🔑135(1), 139

In charging murder it is not necessary to state the method or degree of the murder in the information.

4. Homicide 🔑253(6)

Evidence that defendant had entered decedent's apartment to commit rape was sufficient to support finding of first degree murder and it was not necessary to make an express finding that murder was committed during rape or burglary.

5. Criminal Law 🔑254

Trial court sitting without jury was required only to state that defendant was guilty of first degree murder and it was not necessary to make statement of facts upon which finding of degree had been based. West's Ann.Pen.Code, §§ 1151, 1157, 1167.

6. Criminal Law 🔑1144(11)

In absence of showing to contrary it will be presumed that constitutional provision giving defendant right to appear in person at trial was obeyed.

7. Criminal Law 🔑1144(11)

Where reporter's transcript of murder trial disclosed that a recess was taken but did not affirmatively state that defendant was present after recess, it would be assumed that law was followed and defendant was present at all stages of trial. West's Ann.Code Civ.Proc. § 1963, subd. 33; West's Ann.Const. art. 1, § 13.

8. Criminal Law 🔑1037(1)

Misconduct in argument may not be assigned on appeal if it is not assigned at trial, unless misconduct contributed to verdict or was so unredeemable that nothing whatever would have cured it.

9. Criminal Law 🔑723(1)

It was proper to argue to jury in criminal trial the possibility of parole.

Fitzgerald & Davis and Morrise Davis, Los Angeles, for defendant and appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and S. Clark Moore, Deputy Atty. Gen., for plaintiff and respondent.

⊥537 McCOMB, Justice.

This is an automatic appeal from a judgment of guilty of murder in the first degree. The trier of fact fixed the punishment at death.

Facts: Defendant was charged with murder and pleaded not guilty. At the time of the trial defendant and his counsel waived trial by jury. The trial judge found defendant guilty of murder in the first degree. He then found that the death penalty should be imposed.

These are the questions for us to determine:

First. *Was defendant entitled to a jury trial as to the penalty phase of the case?*

[1] *No.* On January 10, 1962, when the case was called for trial, the following occurred: "MR. MEAD [Deputy Public Defender]: Your Honor, the defendant desires to waive a trial by jury. He wishes the Court to hear the case. THE COURT: Is that true? THE DEFENDANT: Yes. THE COURT: Do you understand what that means? THE DEFENDANT: Yes, I do. THE COURT: I [sic] means that legally you have a right to have twelve citizens sit in a jury box and decide your case and that the verdict must be unanimous of all twelve of the ⊥538 people. You don't have to have that kind of a trial, if you don't want it. You may have the Court try it without a jury. If you waive the jury, it means you give up your right to have a jury try the case. Is that what you wish to do? THE DEFENDANT: Yes, sir. THE COURT: Have you thought about it and considered it and that is your decision; is that right? THE DEFENDANT: Yes, that's right. THE COURT: All right. MR. MEAD: May I just also inquire, Mr. Golston, this was the

decision you made by yourself; is that correct? THE DEFENDANT: That's right. MR. COMPTON: Does counsel join? MR. MEAD: I join the waiver, your Honor. MR. COMPTON: People waive. THE COURT: This case will be tried then without a jury."

After defendant had been found guilty of first degree murder, the penalty trial began. No mention was made of a jury trial by defense counsel.

Section 190.1 of the Penal Code reads, in part: "The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. *If such person has been found guilty of an offense punishable by life imprisonment or death,* and has been found sane on any plea of not guilty by reason of insanity, *there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty.* * * *

"*If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court.* If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty." (Italics added.)

The statute directs who shall make the determination as to the penalty. Such determination shall be made by the court when a defendant is convicted by the court sitting without a jury. (People v. Langdon, 52 Cal.2d 425, 433 [3], 341 P.2d 303; People v. Dessauer, 38 Cal.2d 547, 554 [10], 241 P.2d 238.)

[2] Defendant's argument that he waived a jury trial without realizing its implications is also without merit. The trial court in a criminal case is not required to explain to the defendant the nature and consequence of his action in waiving a jury trial where he is, as in the present ⌊539 case, represented by counsel and fails to show that either he or his counsel was misled as to the result which might occur from his waiving a jury trial. A defendant should not be allowed to waive a jury trial, take his chances before the trial court, and then when he finds himself dissatisfied with the result, be allowed to predicate error upon such a technicality or vague possibility of misunderstanding. (People v. Langdon, supra, 52 Cal.2d 425, 432 [2] et seq., 341 P.2d 303.)

There is nothing in the record in the present case which would indicate that defendant did not understand the nature of the waiver. In addition, he answered, when queried by the trial judge, that he understood what such a waiver meant. It is clear that his constitutional rights were not violated.

Second. *Was there sufficient evidence to sustain defendant's conviction of first degree murder?*

Yes. Defendant argues that he was not charged with rape or burglary and the court made no findings on these issues, and that therefore the court must have found first degree murder because of premeditation, deliberation, and malice aforethought, which, he alleges, were not present.

[3] Defendant was charged with murder, in that he "* * * did willfully, unlawfully, feloniously and with malice aforethought murder DORA CUTTING, a human being." This is the proper method of charging murder; it is not necessary to state the method or degree of the murder in the information. (People v. Mendez, 27 Cal.2d 20, 23 [2], 161 P.2d 929; People v. Superior Court, 202 Cal. 165, 167 [1], 259 P. 943; People v. Witt, 170 Cal. 104, 107 et seq., 148 P. 928; People v. Coffman, 105 Cal.App.2d 164, 167 [4], 233 P.2d 117.)

[4] Defendant concedes that there was evidence that he entered the decedent's apartment to commit rape. This being so, there was sufficient evidence to support a finding of first degree murder. It is not necessary for the trial judge to make an

express finding that the murder was committed during a rape or burglary.

Section 1167 of the Penal Code reads: "When a jury trial is waived, the judge or justice before whom the trial is had shall, at the conclusion thereof, announce his findings upon the issues of fact, which shall be in substantially the form prescribed for the general verdict of a jury and shall be entered upon the minutes."

Section 1151 of the Penal Code reads: "A general verdict ⊥540 upon a plea of not guilty is either 'guilty' or 'not guilty,' which imports a conviction or acquittal of the offense charged in the accusatory pleading. Upon a plea of a former conviction or acquittal of the offense charged, or upon a plea of once in jeopardy, the general verdict is either 'for the people' or 'for the defendant.' When the defendant is acquitted on the ground of a variance between the accusatory pleading and the proof, the verdict is 'not guilty by reason of variance between charge and proof.' "

Section 1157 of the Penal Code reads: "Whenever a defendant is convicted of a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime of which the defendant is guilty, shall be deemed to be of the lesser degree."

[5] It is clear from the foregoing Penal Code sections that all the trial judge, as a trier of fact, need state, under such circumstances as existed in the present case, is that the defendant was guilty of first degree murder. No statement of facts upon which the finding of degree is based is necessary. (People v. Fry, 137 Cal.App. 525, 532, 31 P.2d 204; People v. Barnnovich, 16 Cal. App. 427, 432, 117 P. 572.)

Third. *Is defendant's contention that he was not present at all stages of the proceedings tenable?*

No. Defendant points out that the reporter's transcript refers to a recess, and he contends that nothing thereafter shows he was present after the recess.

An examination of the reporter's transcript discloses that a recess was taken. When the recess was over, the playing of a tape began. Later, defense counsel asked for a five-minute recess. He stated, "There is a matter I would like to discuss with the defendant and give a little thought to at this point." A short recess was then taken.

The clerk's transcript for this day recites: "Deputy District Attorney Lynn Compton and the Defendant with counsel, Deputy Public Defender Hayes F. Mead, present." This statement, which is uncontradicted in the record, is controlling. (People v. Rozelle, 78 Cal. 84, 91, 20 P. 36.)

[6, 7] Also, the rule is here applicable that in the absence of a showing to the contrary, it will be presumed that the law was obeyed. (Code Civ.Proc. § 1963, subd. 33.) Article I, section 13, of the California Constitution gives a defendant the right to appear in person at his trial. It must therefore ⊥541 be assumed that the law was followed and that defendant was present at all stages of the trial.

Fourth. *Did the deputy district attorney commit prejudicial misconduct in his closing argument?*

No. During his argument to the judge on the penalty phase of the trial, the deputy district attorney referred to an incident where defendant removed the screens from the decedent's window. He then stated: "If this was a spur of the moment thing that he had gotten into a week before and if there was some rehabilitive [sic] potential there, I think that would have scared off the average man. He would have thought, 'Gee, I came awfully close, I now go free, I won't do it anymore.'

"But no, one week later he is back at this same building taking off screens again. He tries one apartment. Because somebody is moving around in there, he leaves that and goes to the next apartment and takes the screen off of there.

"This man has been possessed of these propensities and drives for sometime, and although we do not know that prior to this night they had manifested themselves overtly, we cannot say to ourselves, 'Oh, well, this is the first time he has ever been in trouble; so we will give him a break.'"

The deputy district attorney also stated in his argument: "But when you have a man who has manifested overtly the propensities which this defendant has manifested in the crime, the type of crime which he has committed, it is a calculated risk that I am not willing to take a gamble with the safety of other innocent persons, to send him to a prison where a board of seven men can sit down and say, 'Well, we think he is safe to be returned back out on the street,' and thereby gamble with the life of other innocent people."

Defendant contends that the deputy district attorney erred in stating that defendant had been "possessed of these propensities and drives for sometime" and that it was not proper for him to comment upon the possibility of parole.

[8] Misconduct in argument may not be assigned on the appeal if it is not assigned at the trial, unless the misconduct contributed to the verdict or was so unredeemable that nothing whatever would have cured it. (People v. Rosoto, 58 A.C. 309, 362 [52], 23 Cal.Rptr. 779, 373 P.2d 867; People v. Berryman, 6 Cal.2d 331, 337, 57 P.2d 136.)

Defendant made no objection in the trial court to the statements of the deputy district attorney, and it is clear that they were not such as to command a reversal of the judgment in the absence of an attempt to forestall or correct them.

⊥542 ⊥[9] Furthermore, we have consistently held that it is proper to argue to the jury the possibility of parole. (People v. Robillard, 55 Cal.2d 88, 102 [20], 10 Cal.Rptr. 167, 358 P.2d 295; People v. Turville, 51 Cal.2d 620, 636 [21], 335 P.2d 678.)

The record discloses that defendant had a fair and impartial trial before an able trial judge. There is no error in the record.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER, PETERS, WHITE and TOBRINER, JJ., concur.

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58 Cal.2d 501, 375 P.2d 55

⊥ **Mary Helen MACHADO, Plaintiff and Appellant,** ⊥501

v.

John R. MACHADO, Defendant and Appellant.

S. F. 21035.

Supreme Court of California,
In Bank.
Oct. 4, 1962.
As Modified Oct. 9, 1962.

Divorce action. From a judgment of the Superior Court, Merced County, R. R. Sischo, J., granting wife a divorce and determining the character of various items of property and granting alimony and custody of children to the wife, both parties appealed. The Supreme Court, Traynor, J., held that the court erred in awarding wife not simply the exclusive right to occupy dwelling owned by husband and wife as joint tenants but also the exclusive right to use it in any way she might see fit.

Judgment affirmed in part and reversed in part.

Opinion, 20 Cal.Rptr. 152, vacated.

1. Husband and Wife 🔑254, 257, 258

Profits from farming and dairy operations resulting from husband's full-time efforts in carrying out operations on three parcels of land which were owned by him at time of marriage and another leased parcel should have been apportioned between husband's separate property and the community property, and if expenditures for family living expenses did not exceed the amount apportioned to the community property, there was a community interest in real and personal property on which payments were made from the income from farming and dairy operations.

2. Husband and Wife ⇨14(3)

Presumption that family residence was held in joint tenancy under a joint tenancy deed was not overcome in the absence of a common understanding or agreement that the character of the property was to be other than joint tenancy.

3. Joint Tenancy ⇨3

Although a joint tenancy deed is not conclusive as to character of real property, it creates a rebuttable presumption that it is held in joint tenancy, and presumption cannot be overcome by testimony of hidden intentions of one of the parties, but only by evidence tending to prove a common understanding or agreement that character of property was to be other than joint tenancy.

4. Husband and Wife ⇨14(3)

Whether presumption that husband and wife, in establishing joint savings and loan account, did not intend to create a joint tenancy was overcome was a question of fact for trial court in divorce action. West's Ann.Financial Code, § 7602.

5. Divorce ⇨250

Husband, who withdrew all money from joint account without wife's consent immediately after parties separated, should have been required by divorce decree to account for half of amount of the joint account at time that account was closed.

6. Divorce ⇨249(3)

Court did not have authority in divorce action to award any of separate property of one spouse to the other and it could not award wife exclusive possession of real property owned by the spouses as joint tenants except as provided by statute authorizing court to make orders for temporary exclusion of either party from the family dwelling until final determination of the action. West's Ann.Civ.Code, § 157.

7. Divorce ⇨249(3)

Court erred in awarding wife not simply the exclusive right to occupy dwelling owned by husband and wife as joint tenants but also the exclusive right to use it in any way she might see fit. West's Ann.Civ.Code § 157.

8. Divorce ⇨308

Husband, whose average monthly income for six years after payment of federal income taxes averaged approximately $300 per month, had the financial ability to pay child support award of $75 per month for each of his two children.

9. Divorce ⇨87

Injunction restraining husband from molesting, annoying or "striking" wife was improper with respect to the quoted word when there was no evidence that husband struck or threatened to strike his wife.

10. Divorce ⇨87

Injunction restraining husband from "molesting" or "annoying" his wife was not so vague and uncertain as to render the injunction void.

11. Injunction ⇨208

Language of injunction must be interpreted in light of the record.

◆

Kane & Canelo and Thomas J. Kane, Jr., Merced, for plaintiff and appellant.

Natalie J. Holly, San Rafael, for defendant and appellant.

⊥TRAYNOR, Justice. ⊥504

The trial court entered an interlocutory decree of divorce in favor of Mary Machado on the ground of extreme cruelty and refused to grant a divorce to defendant and cross-complainant John Machado. The court determined the character of various items of property, and awarded plaintiff alimony, custody of the two minor children, $75 per month for each child as support and maintenance, and exclusive possession of the joint tenancy family residence property until further order of the court. The court also enjoined defendant from molesting, annoying, or striking plaintiff. No appeal was taken from the interlocutory decree of divorce, but both parties appeal from other parts of the judgment.

Property Rights

The parties were married in June 1950 and separated in March 1959. At the time of the marriage plaintiff owned no separate property. Defendant had title to three parcels of ranch land (40, 38 and 2 acres respectively), various items of farming equipment, cattle, an automobile, and a $40,000 savings account. Although he paid for the 40-acre and the 2-acre parcels before the marriage, he had paid only $3,000 of the $12,000 purchase price on the 38-acre parcel. It is conceded that after the marriage he paid $1,700 on this parcel with his separate funds.

During the marriage defendant devoted all of his working time and energy to farming and dairy operations on the three parcels and on another 40-acre parcel leased from his father. All income during the marriage was derived from these operations, except interest on the spouses' $8,500 joint savings and loan account and defendant's $40,000 account. The proceeds of the farm and dairy were deposited in a single commercial bank account. All expenditures were made from this account, including payments for the balance due on the 38-acre parcel ($7,300) and for the family residence property, household furniture, a 1959 Oldsmobile, farming and dairy equipment, and cattle.

[1] The trial court determined that the parties owned no community property, that they owned as joint tenants the family residence and the $8,500 savings account, and that defendant owned as his separate property the three parcels of ranch land, all farming equipment, tractors and cattle, the 1959 Oldsmobile, the household furniture, and the $40,000 savings account. In doing so the court relied on Estate of Pepper, 158 Cal. 619, 623–624, 112 P. 62, 31 L.R.A.,N.S., 1092, and held that the agricultural income of defendant's separate property and the property purchased with this income was entirely his separate property. In Estate of Neilson, 57 A.C. 780, 788, 22 Cal.Rptr. 1, 371 P.2d 745, we overruled the Pepper case and held that the part of the profits of a separate property enterprise attributable to the husband's efforts are community property, whether the enterprise be classified as "commercial" or "agricultural."

The spouses' federal income tax returns indicate that from the date of the marriage until the end of 1959 the net income of the enterprise after federal income taxes averaged approximately $170 per month.[1] This income should have been apportioned between defendant's separate property and the community property. Unless expenditures for family living expenses exceeded the amount apportioned to the community property,[2] community funds were used for some of the payments for real and personal property, thus giving the community an interest in one or more of the items found to be defendant's separate property.

[2] Plaintiff and defendant challenge the findings that the family residence and the $8,500 savings and loan association account are joint tenancy property. Both parties maintain that they did not intend to create joint tenancies and that the home and savings account have the same character as their source, i. e., the receipts from the farming and dairy enterprise.[3]

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[1] This figure includes the full amount of capital gains realized from the sale of cattle and excludes interest payments on the two savings accounts.

[2] No evidence of family living expenses was introduced at the trial.

[3] Plaintiff contends that these receipts were entirely community property because they represent defendant's earnings during the marriage; defendant contends that they were entirely separate property on the authority of Estate of Pepper,

Each party testified that when the family residence was purchased they did not instruct the bank handling the transaction to put the deed in joint tenancy. Plaintiff testified that she went to the bank and signed papers when defendant told her to do so. Defendant testified that he signed papers at the bank at a different time, that he did not see plaintiff's ⊥506 name on the deed, and that he did not intend to give her an interest in the house.

[3] Although a joint tenancy deed is not conclusive as to the character of real property, it creates a rebuttable presumption that it is held in joint tenancy. The presumption created by the deed cannot be overcome by testimony of the hidden intentions of one of the parties, but only by evidence tending to prove a common understanding or an agreement that the character of the property was to be other than joint tenancy. Since there was no evidence of a common understanding or an agreement the presumption was not overcome. (Gudelj v. Gudelj, 41 Cal.2d 202, 212–213, 259 P.2d 656; Socol v. King, 36 Cal.2d 342, 345–346, 223 P.2d 627.)

[4] Similar principles apply to the joint savings and loan account. Financial Code, section 7602 provides: "When shares or investment certificates are issued in the name of two or more persons whether minor or adult as joint tenants or in form to be paid to any of them or the survivors of them, such shares or certificates and all dues paid thereon become the property of such persons as joint tenants."[4] In Paterson v. Comastri, 39 Cal.2d 66, 71, 244 P.2d 902, we held that similar language applying to joint bank accounts now contained in Financial Code, section 852 created a rebuttable presumption of joint tenancy that may be overcome by proof that the owner of the funds, when making the deposit, did not intend to create a true joint tenancy. This holding applies also to section 7602. (See Pruyn v. Waterman, 172 Cal.App.2d 133, 136–137, 342 P.2d 87.) Whether the presumption was overcome was a question of fact for the trial court. (Gudelj v. Gudelj, supra; Paterson v. Comastri, supra, 39 Cal.2d at p. 73, 244 P.2d 902.)

[5] Defendant withdrew all the money from the joint account without plaintiff's consent immediately after the parties separated. He had the savings and loan association transfer $3,500 to a new account established in his and another person's name and received a check for the remainder of the funds. He offered no evidence as to the disposition of these funds. The trial court therefore should have provided in the judgment in accordance with its memorandum opinion that defendant ⊥507 account for half the amount of the parties' joint account at the time that account was closed.

Defendant contends, and plaintiff concedes, that the trial court had no jurisdiction to award plaintiff the exclusive use and possession of the family residence until further order of the court.

[6, 7] In a divorce action the court does not have the authority to award any of the separate property of one spouse to the other. (Fox v. Fox, 18 Cal.2d 645, 646, 117 P.2d 325.) Neither can it award the wife exclusive possession of real property owned by the spouses as joint tenants (Carter v. Carter, 148 Cal.App.2d 845, 848–849, 307 P.2d 630; Jenkins v. Jenkins, 110 Cal.App.2d 663, 665, 243 P.2d 79; Barba v. Barba, 103 Cal.App.2d 395, 396, 229 P.2d 465), except as provided in Civil Code, section 157. That section provides that in divorce proceedings "the court may make orders for temporary exclusion of either party from the family dwelling or from the dwelling of the other, until the final determination of

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supra. To the extent that these receipts were profits of the enterprise, neither contention can be sustained. (Estate of Neilson, supra.)

[4] This section did not become operative until 1953. At the time the spouses' account was opened in 1952, it was controlled by almost exactly the same language contained in Building and Loan Association Act, § 8.04, Stats.1931, ch. 269, p. 514, as amended by Stats.1951, ch. 451, p. 1472.

the action." (See also Code Civ.Proc. § 949a.) The purpose of this section is to protect the spouse's right to the exclusive occupancy of his or her or the family dwelling pending final determination of the action. The trial court therefore erred in awarding plaintiff not simply the exclusive right to occupy the dwelling but also the exclusive right to use it in any way she might see fit. Moreover, its order was not limited in time to the final determination of the action.

Child Support Award

[8] There is no merit in defendant's contention that he does not have the ability to pay the child support award of $75 per month for each child. His total income from 1954 through 1959 averaged approximately $300 per month after the payment of federal income taxes, and he owns assets of substantial value.

The Injunction

[9] Defendant attacks the injunction that restrains him from molesting, annoying, or striking plaintiff. The word "striking," as conceded by plaintiff, must be deleted from the order because there is no evidence that defendant struck or threatened to strike plaintiff. (De Haviland v. Warner Bros. Pictures, 67 Cal.App.2d 225, 238, 153 P.2d 983; People v. Robin, 56 Cal.App.2d 885, 887, 133 P.2d 436.)

[10, 11] There is no merit in defendant's contention that the words "molesting" ⊥508 and "annoying" are so vague and un⊥certain as to render the injunction void. (See People v. Moore, 137 Cal.App.2d 197, 199, 290 P.2d 40; People v. Pallares, 112 Cal.App.2d Supp. 895, 901, 246 P.2d 173.) The language of the injunction must be interpreted in the light of the record (City of Vernon v. Superior Court, 38 Cal.2d 509, 514, 241 P.2d 243; Gelfand v. O'Haver, 33 Cal.2d 218, 222, 200 P.2d 790) which discloses the kind of conduct enjoined. (Compare Gottlieb v. Superior Court, 168 Cal.App.2d 309, 312, 335 P.2d 714.) On several occasions defendant made unfounded accusations that plaintiff had committed adultery and used abusive language in her presence; he twice parked his truck within sight of the family home and a strange man came from the truck to the front door of the house and asked plaintiff if a "sporting girl" was there; and he sometimes locked plaintiff out of the house late at night so that once she was required to have a policeman help her gain entry.

The judgment is affirmed insofar as it awards alimony and child support, adjudges that the family residence is held in joint tenancy, adjudges that the savings and loan account was held in joint tenancy, and enjoins defendant from molesting or annoying plaintiff. In all other respects the parts of the judgment appealed from are reversed. Defendant shall bear the costs of these appeals.

GIBSON, C. J., and SCHAUER, McCOMB, PETERS, WHITE, TOBRINER, JJ., concur.

208 Cal.App.2d 433

433 **D. Clay BROADBENT and J. R. Broadbent, Copartners Doing Business as Broadbent Livestock Company, a Copartnership, Plaintiffs, Cross-defendants and Respondents,**

v.

MODERN IMPERIAL CATTLE COMPANY, Defendant, Cross-complainant and Appellant.

Civ. 6763.

District Court of Appeal, Fourth District, California.

Oct. 11, 1962.

Action for balance owing on contract for sale of cattle to defendant, who counterclaimed for breach of contract, misrepresentation of ages of cattle, and failure to deliver a portion of them. From an adverse judgment of the Superior Court, Imperial County, Elmer W. Heald, J., the defendant appealed. The District Court of Appeal, Griffin, P. J., held that evidence sustained findings that age warranty clause as to age of cattle written on bottom of contract by defendant's agent was no part of the agreement of purchase, that gate run delivery of 1,000 head of cows from a range herd of 3,000 was fair and in accordance with contract of sale and conditions of contract of sale as orally agreed to, and that defendant was liable for balance of purchase price.

Judgment affirmed.

1. Sales 🔑359(1)

Evidence sustained findings that age warranty clause as to age of cattle written on bottom of contract by defendant's agent was no part of agreement of purchase, that gate run delivery of 1,000 head of cows from range herd of 3,000 was fair and in accordance with contract of sale and conditions of contract of sale as orally agreed to, and that defendant was liable for balance of purchase price.

2. Appeal and Error 🔑989

Where findings are attacked for insufficiency of evidence, reviewing court's power begins and ends with determination as to whether there is any substantial evidence to support them, and reviewing court has no power to judge the effect or value of the evidence, to weigh it, to consider credibility of witnesses, or to resolve conflicts in evidence or any reasonable inferences that may be drawn therefrom.

3. Evidence 🔑333(7)

Court was not required to consider a chart purporting to be a test record taken on certain date for brucellosis of cows on blank forms of United States Department of Agriculture indicating age of each cow tested thereon as an authentic record of United States Department of Agriculture in determining whether plaintiff had complied with oral agreement concerning age of cattle sold to defendant.

◆

Joseph Henry Wolf and Paul Wyler, Los Angeles, for appellant.

Horton, Knox & Carter, El Centro, for respondents.

GRIFFIN, Presiding Justice. 434

Plaintiffs, cross-defendants and respondents D. Clay Broadbent and J. R. Broadbent, brothers and copartners, doing business as Broadbent Livestock Company, a copartnership, brought this action against Modern Imperial Cattle Company, a corporation, alleging that on April 16, 1958, plaintiffs entered into a contract in writing with defendant whereby plaintiffs sold and delivered to defendant 974 head of cows and 43 head of bulls for which defendant agreed to pay plaintiffs $175 per head, or a total of $177,975; that no part of said sum has been paid to plaintiffs except $163,925, and that there is still due to plaintiffs the sum of $14,050. Two other counts seek said amount based on an account stated and an agreement to pay.

[1] The claimed contract sued upon is set forth and is attached to the complaint. It provides generally that:

> "Seller [plaintiff Broadbent Livestock Company] is now the owner of a 435
> certain range herd, consisting of ap-

> proximately three thousand head of cows and bulls, now located on the Matador Cattle Co., Trujillo Ranch, Amarillo, Texas.
>
> "Seller hereby agrees to sell to Buyer [Modern Imperial Cattle Company] and Buyer hereby agrees to purchase from Seller, One Thousand (1,000) head of cows, and fifty-five (55) head of bulls, from said range herd. It is mutually agreed that said cows and bulls shall be *gate run,* from said herd * * *
>
> "Seller agrees to pay to Buyer, the sum of One Hundred Seventy-five Dollars ($175.00) per head * * * payable Twenty Thousand Dollars ($20,000.00) upon the execution of this Contract of Sale * * *." (Italics ours.)

The contract of sale was signed for Broadbent Livestock Company by Clay Broadbent and for Modern Imperial Cattle Company by James Delfino. Delfino was the authorized agent for defendant.

The terms "gate run" and "range herd" are commonly known and understood in the cattle business and the parties here agree that "range herd" means a herd of cows maintained for breeding purposes, including cows of all ages within the approximate range of three to 10 years. The term "gate run" is synonymous with the term "gate cut" and means that a selection is made at random, with no attempt to classify or grade the cattle as to quality or age, the identity of the particular animals received by such process being purely a matter of chance. If it is desired to separate one-third of an entire herd, a "gate run" would mean that all the animals would be run through a chute and one of each three would be selected at random and set aside for the purchaser of the one-third portion.

Defendant cross-complained against plaintiff and sought damages for claimed breach of the contract, for misrepresentation of the ages of the cattle and failure to deliver a portion of them. Defendant also seeks interpretation of the contract as finally agreed upon and for a declaration of rights. After hearing the evidence, the trial court found generally in favor of plaintiffs and against defendant on his cross-complaint, and rendered judgment for plaintiffs for $14,050.

FACTS

Jay Broadbent testified that in April of 1958 the Broadbents purchased a range herd of cattle consisting of approximately 3,000 cows and 125 bulls, which was located on the 90,000-acre Matador Ranch near Adrian, Texas; that in March ⊥436 of 1958, when he was reasonably sure that he was going to buy the cattle, he first contacted Delfino by telephone to see if Delfino would be interested in buying some cattle from the Broadbents if the Broadbents bought the entire herd; that he next talked with Delfino after the herd had been purchased in April 1958 and offered to sell a gate cut or gate run on the cattle of 1,000 head of cows at $175 per head and one-third of the bulls at the same price. He stated to Delfino that the cattle had been represented to him as being in the majority between three and six years of age, with some older cattle in the herd; that Delfino said he would take 1,000 head of cows and one-third of the bulls; that after this conversation with Delfino, Jay Broadbent took an ocean voyage, returning approximately May 1; that before leaving on the trip, Jay related to his brother Clay Broadbent the substance of the conversation with Delfino as previously related.

Clay Broadbent testified that he had never seen the cattle and that he first learned that his brother had purchased them in a telephone conversation with Jay; that he was instructed as to the terms of the agreement with Delfino and was told to have a written contract prepared for Delfino's signature and to receive a deposit of $20,000 on the purchase price; that he then caused to be prepared the typewritten portion of plaintiff's exhibit one, attached to the complaint, and presented it to Delfino for signature on April 16, 1958; that at that time he knew his brother Jay had embarked on an ocean voyage and would be unavailable for approximately two weeks; that he handed the contract to Delfino and Delfino stated that the contract was not correct and that the cows were to be mostly two, three and four years of age, with none over six years of age, and that Jay had agreed to such a condition; that he said to Delfino that if Jay had agreed to such a condition, then it could be added to the typewritten portion of the contract; that thereupon Delfino's bookkeeper wrote by hand at the bottom of page one of plaintiff's exhibit one the age warranty clause:

> "Seller also warrants that the cows shall be native hereford cows not to exceed six years old, the bulk of the cows to be two, three and four year olds."

The written contract was thereupon executed by Clay Broadbent and Delfino.

Jay Broadbent testified that he first saw the written contract early in May; that immediately he telephoned Delfino and told him that the handwritten age warranty clause was not in accordance with their agreement and that the contract 437 was impossible to fulfill; that Clay told Delfino that if he insisted on the age warranty the Broadbents had no alternative but to void the contract and return the $20,000 deposit, to which Delfino replied that the deal was okay and that he would buy the cattle; that he (Jay) next talked with Delfino in October of 1958 and he again told Delfino that no cattle would be delivered unless the age warranty clause was removed from the contract; that he again offered to return the $20,000 deposit and Delfino stated that it wasn't necessary; that he next talked with Delfino on October 19, 1958, immediately prior to the time when delivery of the cattle was to commence and he again advised Delfino that no cattle would be delivered unless the handwritten warranty was stricken and again offered to return Delfino's $20,000 deposit.

Thereupon defendant company penned in ink on the typewritten contract the words:

> "I hereby release the partys [sic] concerned from warranty of age clause written on contract of sale dated April 16, 1958 by and between Imperial Cattle Co. and Broadbent Livestock Co. and hereby release them from any liability under this clause.
>
> Modern Imperial Cattle Co.
> By James Delfino. * * *"

The age warranty clause was crossed out and initialed and delivery of the cattle was effected to defendant and two other purchasers by the one-third "cut out" method.

Plaintiff Clay Broadbent claims that defendant's agent, Delfino, wrongfully and knowingly misrepresented to him that his brother Jay agreed that the cows would not exceed six years in age and that the bulk of the cows would be "two, three and four year olds," and accordingly the insertion of that clause, which was subsequently cancelled, was not enforceable. The trial court so found. Defendant claims that he was compelled to cancel the age warranty clause because plaintiffs had him in a position where he could not refuse, because he had already sold these cattle to another purchaser and was therefore forced to sign the waiver or release of plaintiffs as to the warranty of age.

The evidence as to the age of the cattle varied. Plaintiffs produced testimony of one Veigh Cummings, who was in the livestock business, that he went to the ranch in March 438 1958, prior to the sale to plaintiffs, to inspect the cattle because he had heard they were for sale; that the then owner described the cattle to him and said that the bulk of the cows were three to six years old, with maybe 10 to 15 percent over six years of age; that he inspected them on two different occasions (about 2,000 head) and he concluded that the bulk of the animals were three to six years of age, with approximately 10 to 15 per cent over six years of age. He said he was also present when the cattle were rounded up for delivery to defendant in the manner indicated.

One Johnny Cavitt, employed by the Matador Ranch from 1948 to January 1960, testified that it was the practice, in maintaining the herd on the Matador Ranch, to "cull" it each year, taking out all old cows and bad cows and putting in replacement heifers; that in January and February of 1958 all cattle were gathered and culled and the old cows and bad cows were sold off the ranch in February; that the Broadbents purchased approximately 3,050 head of cows in April of 1958 and that there were no two-year-old animals in the herd; that the age make-up of the herd was between 560 and 570 three-year-olds, between 400 and 500 four-year-olds, between 400 and 500 five-year-olds and between 1,228 and 1,250 six-year-olds, and the balance of the cows in the herd were over six years of age. He also testified that the herd was uniform and that if one could see as many as 20 head of the herd he would have a good idea of what the entire herd was like in age and quality. His testimony with respect to the age of the cattle is summarized on cross-examination to the effect that between 2,588 and 2,820 of the animals were six years of age or less.

A livestock appraiser for the bank testified that he appraised more than 100,000 head of cattle per year and that he appraised the Broadbent cattle on the Matador ranch in July of 1958; that he counted the animals from the air and personally examined between 500 and 600 cows, plus calves and bulls, from the ground; that it was his opinion that approximately 90 per cent of the cows were six years of age and under and the balance were seven, eight and nine years of age. He made a written report of this appraisal, which was introduced in evidence without objection. He testified that he could tell, within two years, the age of an animal by looking at it, and that he inspected at least 100 actual age brands and concluded that they were properly marked as to age. He described in detail the manner in which he determines the age of an animal by observing it and that the teeth of an animal are not a reliable index to age if the animal is more than four years old.

439 One Benjamin Snure testified that he inspected the animals on the Matador Ranch in September 1958 and saw approximately 700 head at that time; that during the two-hour inspection approximately 600 head of good quality cows were indicated; that they were of various ages, from three years on up, and that after inspecting them he contracted to purchase 1,000 head from Delfino by a contract dated October 10, 1958.

One Kelly Owens testified that he has been in the livestock business all his life; that he purchased 1,000 head of cows from the 3,000 in the Matador Ranch herd; that he took delivery of the cows he purchased commencing in October of 1958; that the cows were being delivered to him, Delfino and one Gene McCart; that the delivery was accomplished by sending the cows down a chute, one cow going to one pen and two cows to another pen; that he and McCart divided the cows going into the other pen and the remainder were delivered to Delfino; that he paid $195 per head for the cows he purchased; that he purchased the cows after seeing a representative group of 300 or 400 from the entire herd, after an inspection of an hour and a half or two hours; that he did not make any age count on the cattle, but only observed that they were "threes to eights" with possibly some a little older, and he felt that he could make more money doing something else than counting the ages of various cows.

Delfino testified that the cattle were delivered to him by plaintiffs as being from three to six years old, with approximately 10 per cent over six years old; that he and his foreman saw the cattle on the ranch in September and that he then saw about 600 head of all ages.

Defendant produced a chart (exhibit B) which purports to be a test record taken on December 10, 1958 for brucellosis of cows, on blank forms of the U. S. Department of Agriculture. The age of each cow tested is indicated thereon. The test was conducted by Ben Snure, the re-sale buyer of the cattle from defendant, and one Dr. R. E. Simmons, of the 974 cows received by Snure. Eight hundred eighty-six were tested for brucellosis. They examined both the brand marks, which indicated the year of birth of the cow, and also the condition of the teeth. They listed the ages of the 883 cows tested as four cows aged two years, 54 cows aged three years, 119 cows aged four years, 88 cows aged five years, 155 cows aged six years, 152 cows aged seven years, 126 cows aged eight years, 102 cows aged nine years, 51 cows aged 10 years, 25 cows aged 11 and eight cows aged 12 years.

440 Defendant claims that this chart affirmatively shows that a majority of the tested cows were seven years of age or over and accordingly the testimony of plaintiffs' witnesses was inaccurate and should be rejected and that it would not support the findings of the court in this respect.

In reply, plaintiffs point out that exhibit B should never have been received in evidence over objections, since no proper foundation was ever laid for its competency and that it consists largely of hearsay; that there is nothing official about the exhibit and it is not an official record of the Arizona Department of Agriculture; that Dr. Simmons, who participated in its preparation with defendant's witness Snure, was not an official of the Arizona Department of Agriculture, but was only a veterinarian who then resided in Arizona. He did not testify as a witness and no showing was made as to why he was not produced. Snure testified that in making the examination as to how the ages were ascertained, either Dr. Simmons observed the age brand and told Snure to write it down, or vice versa, and that if Dr. Simmons made the observations Snure had no way of knowing whether he observed correctly or not; that without the testimony of Dr. Simmons, there was no way of determining any of the ages set down by Snure.

The court found generally that the age warranty clause of the contract was no part of the agreement; that the portion of the contract waiving and releasing the age warranty clause was duly executed by Delfino on behalf of defendant; that it would be practically impossible to "gate run" 1,000 head of cows from a herd of 3,000 and meet the requirements of the age warranty clause; that the clause is repugnant to and irreconcilable with the other provisions of the contract of sale which require only gate-run delivery from a range herd; that the only oral representations made to defendant by plaintiffs, as to the age of the cattle in question, was to the effect that the bulk of the cows were from three to six years of age, with approximately 10 per cent or thereabouts over six years of age; that the herd of cows in question was in fact as thus represented; that the cattle were divided fairly and in accordance with the terms of the contract of sale and plaintiffs in all respects complied with all the terms and conditions of the contract of sale as orally agreed to and as represented by the typewritten portion of the contract of sale; that the cattle delivered were in fact as represented by plaintiffs; and that the fair market value thereof exceeded the agreed purchase price. Judgment was entered accordingly.

It appears that defendant also prepared 441 and submitted proposed findings, which the trial court rejected. Defendant claims error in this respect and argues that the trial court's denial of his motion to vacate the signed findings, and its denial of his motion for a new trial, were equally erroneous. The evidence fully supports the findings made.

[2] We are here again confronted with the too-often ignored rule that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is any substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to weigh it, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. (Overton v. Vita-Food

Corp., 94 Cal.App.2d 367, 370, 210 P.2d 757; Brewer v. Simpson, 53 Cal.2d 567, 583, 2 Cal.Rptr. 609, 349 P.2d 289.)

The trial court was justified in finding that the age warranty clause was inserted in the contract by reason of fraud and deceit practised by Delfino. (Civ.Code, sec. 1572.)

The written contract was presented to Delfino by Clay Broadbent in the absence of his brother Jay and Delfino took advantage of the situation by telling Clay that Jay had agreed to the age warranty clause, when in fact he had not. Delfino knew that Clay would have no means of immediately checking the truth of Delfino's representation because Jay was on an ocean voyage and not expected to return for approximately two weeks.

The release striking that clause might well support this finding as well as declaring defendant's intention to strike it from the contract. If this age warranty provision had been left in the contract, it would have been repugnant to the provision therein that the selection of the cattle would be by means of a "gate run," as that term is here understood. (12 Cal.Jur.2d 361 sec. 147; Burns v. Peters, 5 Cal.2d 619, 55 P.2d 1182.)

As to defendant's exhibit B, even though received in evidence, it might well have appeared to the trial court that the method of keeping tally of the count there recorded did not establish as a conclusive fact that the ages of the cattle thus recorded were correct. The corroborating testimony of Dr. Simmons was lacking. In any event, it merely created a conflict.

[3] The court, from the evidence, was not obligated to consider ⌊442 the report as an authentic record of the U. S. Department of Agriculture, of which the court must take judicial notice. Regardless of this, the question of the weight of the evidence was for the trial court to determine. (Silva v. Patterson, 195 Cal.App.2d 714, 719, 16 Cal.Rptr. 22.) The trial court was authorized to reject defendant's proffered findings and deny its motion to set aside the findings and its motion for a new trial.

Judgment affirmed.

SHEPARD and COUGHLIN, JJ., concur.

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208 Cal.App.2d 256

⌊256 **The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Harold WILSON, Defendant and Appellant.

Cr. 3351.

District Court of Appeal, Third District, California.

Oct. 5, 1962.

The defendant was convicted, after guilty plea, in the Superior Court, Yolo County, C. C. McDonald, J., of auto theft and arson, but probation was granted; probation was later revoked and judgment was entered accordingly, and an appeal followed. The District Court of Appeal, Peek, P. J., held that revocation of probation and imposition of judgment on original offense was not abuse of discretion where evidence clearly established violation of terms of probation, court heard testimony for two days, during which defendant was represented at all times by counsel, and revocation of probation and imposition of sentence did not occur until after report from medical facility had been received and considered.

Affirmed.

1. Criminal Law ⚷982.9

Probation is not a matter of right; it is act of clemency which may be withdrawn if privilege is abused.

2. Criminal Law ⚷982.9(6)

Convicted defendant had neither constitutional nor statutory right to hearing preceding revocation of probation. West's Ann.Pen.Code, § 1203.1.

3. Criminal Law 🔑982.3(3)

Although court has wide range of discretion in imposing or modifying terms of probation, it may not act arbitrarily or capriciously.

4. Criminal Law 🔑982.9(6, 7)

Revocation of probation and imposition of judgment on original offense was not abuse of discretion where evidence clearly established violation of terms of probation, court heard testimony for two days, during which defendant was represented at all times by counsel, and revocation of probation and imposition of sentence did not occur until after report from medical facility had been received and considered.

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Harold Wilson, appellant, in pro. per.

Stanley Mosk, Atty. Gen., by Doris H. Maier, Asst. Atty. Gen., Raymond M. Momboisse and Edward A. Hinz, Jr., Deputy Attys. Gen., Sacramento, for respondent.

⊥257 ⊥PEEK, Presiding Justice:

By information defendant was charged in Count One with a violation of section 10851 of the Vehicle Code (auto theft) and in Count Two with a violation of section 449a of the Penal Code (arson). He pleaded guilty to both counts and applied for probation. His application was granted subject to certain conditions and imposition of judgment was suspended.

Shortly thereafter, proceedings were instituted to revoke defendant's probation upon the grounds that he had committed certain acts in violation thereof. Pursuant to a motion made by the district attorney a somewhat lengthy hearing was held. At the conclusion of the state's case, counsel for defendant requested that defendant be referred to the California Medical Facility at Vacaville for diagnosis and treatment, in accordance with the provisions of section 1203.03 of the Penal Code. His motion was granted and the case continued until the report of the Medical Facility was received.

When the case was again called, the court stated that after consideration of the evidence which had been produced and the report of the Medical Facility, it was the conclusion of the court that probation should be revoked and that defendant be confined for the term prescribed by law on each count as charged in the information. Judgment was entered accordingly and this appeal followed.

Defendant's request for counsel to represent him on his appeal was denied after this court had made independent investigation of the record and concluded that appointment of counsel would neither be advantageous to defendant nor helpful to the court.

The appeal of defendant, who now appears in pro. per., ⊥258 ⊥is solely an attack upon the action of the court in revoking his probation. No question is raised concerning the judgment.

For all practical purposes, the case thus poses a problem comparable to that which was before the court in People v. Robinson, 43 Cal.2d 143, 271 P.2d 872. There, as here, there was a guilty plea, a revocation of probation, an entry of judgment on the original offense, and, in effect, an appeal from the revocation of probation. The court noted that in the interest of justice the rules of appeal should be liberally construed to permit a hearing on the merits and therefore considered the appeal as from the judgment, thereby allowing it to review the revocation as an intermediate order.

[1–4] The record herein reveals that defendant assaulted jail officers, causing personal injuries, and destroyed county property, all of which was admitted by him while testifying in his own behalf. It is well established that probation is not a matter of right; it is an act of clemency which may be withdrawn if the privilege is abused. (In re Bine, 47 Cal.2d 814, 306 P.2d 445.) There is neither a constitutional nor a statutory right to a hearing preceding the revocation of probation. (In re Bine, supra; Penal Code, sec. 1203.1.) Thus, "The court may revoke probation solely on the basis of the probation officer's report." (In re Levi, 39 Cal.2d 41, 44, 244 P.2d 403, 404.) Although the court has a wide range of discretion in imposing or modifying the terms of probation, "it may not act arbitrarily or capriciously." (In re Bine, supra, 47 Cal.2d at p. 817, 306 P.2d at 446.) However, here the court heard testimony for two days, during which defendant was represented at all times by counsel, and then not until after a report from the Medical Facility had been received and considered was his probation revoked and sentence imposed. Therefore where, as here, the evidence clearly establishes that defendant has violated the terms of his probation, it cannot be said that the court has abused its discretion in revoking the probation and imposing judgment.

The judgment is affirmed.

SCHOTTKY and PIERCE, JJ., concur.

208 Cal.App.2d 125

125 **CITY AND COUNTY OF SAN FRANCISCO, a municipal corp., Plaintiff and Respondent,**

v.

John MEYER, Defendant and Appellant.

Civ. 20346.

District Court of Appeal, First District, Division 2, California.

Oct. 2, 1962.

Action brought by the city and county against a property owner wherein the Superior Court, County of San Francisco, Clarence W. Morris, J., rendered a judgment declaring property divided into twenty-three residential units to be a public nuisance, enjoining further use except as three units or three "flats" and ordering that the building be demolished unless restored properly. The property owner appealed. The District Court of Appeal, Agee, J., held that the evidence sustained the findings of public nuisance and fire hazard and that the court, upon finding public nuisance, could order abatement, irrespective of violation of State Housing Act or ordinances and that the city was not estopped from maintaining the action.

Affirmed.

1. Municipal Corporations ⚿623(4)

Count of complaint alleging that defendant's premises constituted public nuisance, and that, after public hearing, premises were condemned and ordered restored to original use was not defective for failing to contain express allegation that defendant failed to comply with order for restoration where action was filed four years after order was made and complaint alleged that premises "are not" structurally safe and constitute fire hazard in violation of law. West's Ann.Civ.Code, § 3494; West's Ann.Health & Safety Code, §§ 15024, 15290 et seq.

2. Judgment ⚿18(2)

Even if city's first cause charging that housing premises existed in violation of statute and constituted fire hazard and nuisance and that premises had, after public hearing, been condemned as public nuisance would fail because of failure to allege noncompliance with order, second cause for public nuisance, wholly apart from administrative hearing, was sufficient to support judgment declaring property a public nuisance and enjoining use except as three "flats". West's Ann.Civ.Code, §§ 3479, 3480, 3494.

3. Municipal Corporations ⚿623(4), 628

Evidence produced by parties together with evidence adduced by trial judge upon viewing premises supported finding that there was alteration or conversion of premises, found to constitute public nuisance and fire hazard and ordered to be restored from use as twenty-three apartments to three flats or demolished. West's Ann. Civ.Code, §§ 3479, 3480, 3494; West's Ann. Health & Safety Code, §§ 15024, 15290 et seq.

4. Nuisance 🔑79

Court may order abatement of public nuisance wholly apart from statute or ordinance.

5. Municipal Corporations 🔑623(4)

Finding that housing premises constituted fire and health and safety hazard and were public nuisance which should be abated forthwith was alone sufficient to support judgment ordering that premises used as twenty-three apartments be restored to use for three flats or demolished, without reference to any violations of State Housing Act. West's Ann.Civ.Code, §§ 3479, 3480, 3494; West's Ann.Health & Safety Code, §§ 15024, 15290 et seq.

6. Appeal and Error 🔑110, 113(5)

Orders denying a motion to amend the judgment and motion for new trial were not appealable.

7. Estoppel 🔑62(8)

City could not be estopped from maintaining action for judgment declaring that housing premises used for twenty-three apartments were public nuisance, absent any showing that city was apprised of facts of which owner was ignorant, that city intended that its conduct in assertedly failing to take action with respect to alleged violations for a number of years be acted upon in such manner that owner had right to believe it so intended, or that owner relied on city's conduct to his prejudice.

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Howard I. Paulson, San Francisco, for appellant.

Thomas M. O'Connor, City Atty. of the City and County of San Francisco, Beatrice Challiss, Deputy City Atty., San Francisco, for respondent.

⊥126 ⊥ AGEE, Justice.

Defendant appeals from a judgment declaring his property, located at 914–916–918 Haight Street, San Francisco, to be a public nuisance, enjoining further use of the premises except as three units or three "flats," and ordering that the building thereon be demolished. The judgment further provided for a 60 day stay of execution of the order of ⊥ demolition so as to give defendant an opportunity to return the structure to a condition suitable for occupancy as a three unit or three "flat" building or, in the alternative, to commence authorized alterations of the premises so as to increase the permitted occupancy thereof. ⊥127

Plaintiff's complaint was in two counts. The first count alleged, insofar as relevant to this appeal, that the premises constituted a fire hazard; that the premises existed in violation of the State Housing Act in 19 specified respects; that, with the knowledge of defendant, the premises had been maintained for some time as a public nuisance; that on March 1, 1955, after a public hearing before the Director of Public Health of the City and County of San Francisco, the premises were condemned as a public nuisance and ordered restored to their original use and occupancy as three "flats"; and that, by reason of the aforesaid allegations, the premises constituted a fire and health hazard and a public nuisance. The second count was in all respects the same as the first count except that the allegation relating to the public hearing before the Director of Public Health was omitted. The complaint concluded with a prayer that the nuisance be abated, that defendant be enjoined from permitting the conditions to exist, that the premises be brought into conformity with law or demolished and for such further relief as deemed just.

Defendant's answer denied the foregoing allegations except those relating to the public hearing before the Director of Public Health and the order made following the hearing, which were admitted; defendant alleged that he and the Director thereafter entered into an "agreement" and the order was never executed.

Findings of fact and conclusions of law adverse to defendant were made as to all material issues. These findings are supported by the evidence and the judgment is supported by the findings. The trial judge, accompanied by the defendant and counsel for both sides, viewed the premises. This was done at the conclusion of the evidence produced by the parties, pursuant to an agreement made in open court, and gave the judge an excellent opportunity to take evidence of the condition of the property by direct observation.

The premises consisted of a wooden frame building of three stories exclusive of the basement and attic. It was originally constructed and used as a three family dwelling, with one family on each floor. Each flat had a separate front door entrance from a common street porch, and each had a separate ⊥128 street number. The original room arrangement for each floor was the same, the kitchen and dining room being in the rear. Each kitchen had at one time opened onto an open back porch and each had access to the back yard by means of a common rear stairway.

The original construction occurred shortly prior to April 29, 1901, when application to turn on the water was made. This application described the premises as a three family dwelling, which description was reiterated in three subsequent inspection reports of plaintiff's water department, dated April 21, 1914, April 25, 1915, and August 3, 1917, respectively. Prior to 1919, when water meters were first installed, water rates varied according to the number of families in a structure, and this was the reason why the water department inspected the occupancy of those buildings on which reports were made. The records of the plaintiff's permit bureau are complete from the year 1906 to the present time and there was no permit on file for the alteration or conversion of the premises from three units to any greater occupancy. From the foregoing, plaintiff established that the structure was maintained as a three family dwelling until at least August 3, 1917 (the date of the last water inspection), and that the conversion of use and structural alterations found to be in existence at the time of trial had taken place without the issuance of a building permit as required under applicable law.

It was shown at the trial that, in order to create 12 apartments, kitchens had been installed in bedroom closets, community baths were constructed across the hallways from the original bathrooms and the original bathroom in each flat turned into a kitchen, an extra water closet was placed on the rear porch, the rear porches were enclosed, a kitchen window opened into a vent serving toilet areas, cooking and sleeping facilities were provided in the same rooms and openings were made just inside the front doors to permit the occupants of one floor to have access to the other floors.

Of the 19 specific conditions which were alleged in the complaint to constitute violations of the State Housing Act and the Municipal Code of the City and County of San Francisco, 16 were shown to be in existence. The other 3 were stipulated at the commencement of the trial to be not in issue.

There was also testimony demonstrating that there were other conditions which constituted a health or fire hazard or a public nuisance, such as stove pipe going through a wall at a point where no "fire wall" existed, lack of fire resistive mat⊥129erial for walls and stairwells, a side court too narrow for proper lighting of the side rooms used as apartments, and rear kitchens cut off from proper ventilation and light.

The pertinent findings made by the trial court may be summarized as follows: since April 1, 1954, defendant has been the owner of the premises in question; these premises were originally constructed as a three-unit or three "flat" building; at some time after August 3, 1917, and prior to April 1, 1954, said premises were converted into an apartment house consisting of 12 units; no permit was obtained or issued for said alteration; said premises are presently used and occupied as an apartment house consisting of 11 apartments and have been so used and occupied since and prior to April 1, 1954; that the premises are structurally unsafe and constitute a fire hazard and a hazard to safety by reason of inadequate maintenance and the 16 violations of law (specified) referred to above; that these violations consist of: The alteration of the three "flat" building into a twelve-unit apartment building, without obtaining a building permit; failure to meet minimum requirements of the State Housing Act relating to an apartment house; the only window in a room utilized as a kitchen opens into a vent shaft; food is prepared in sleeping rooms; kitchens are installed in closets without required windows or floor area; all front apartments lack two means of egress; a stair railing is loose; a water-closet is not contained within each apartment; there is less than one bath for each three apartments; the basement is without any bath or toilet facilities; sash doors are broken and windows cannot be properly operated; cord wiring and other unlawful wiring is used; plug receptacles are lacking in rooms; gas appliances are improperly and unlawfully installed; gas appliances are improperly vented and not connected to approved flues; that on March 1, 1955 a public hearing was held before the Director of Public Health, at which defendant was present; that after a full hearing said premises were condemned and declared to be a public nuisance; that the premises were further ordered restored to their original use and occupancy as a three-unit or three "flat" building; that the premises now constitute, and for a long period of time have constituted, a fire hazard and a hazard to the health and safety of the public and by reason thereof constitute a public nuisance.

Conclusions of law were made in conformance with these findings and the judgment thereafter entered is in accord with such findings and conclusions.

⊥130 ⊥ None of the points raised on appeal have any merit. Each is answered conclusively in respondent's brief. Appellant has not filed any reply brief. However, we will take up each of the points made.

[1] *Pleading.* The first count of the complaint alleges a public hearing in 1955 before the Director of Public Health and his order to restore the structure to its original use and occupancy as three "flats." Defendant asserts that there is a fatal defect in that this cause of action does not contain an express allegation, that defendant failed or refused to comply with this order. However, this action was filed over four years later, on February 29, 1960. The first count alleges that the premises *"are now"* structurally unsafe and a fire hazard and in violation of the applicable law in that the building "* * * originally constructed as a three unit building or 'flats,' has been subsequently altered into twelve units or apartments." It is also alleged that defendant has been maintaining the premises in a manner to constitute a public nuisance "*now*" and "for a considerable period of time heretofore." (Emphases ours.) Even if defendant's contention were valid, these additional allegations would cure the claimed defect.

[2] Moreover, the complaint contains two separate counts, and the second count, which states a cause of action for public nuisance wholly apart from any administrative hearing, does not incorporate the allegation relating thereto. Accordingly, even if it were true that plaintiff's first cause of action must fail because of the failure to allege noncompliance by defendant with the order of the Director of Public Health, the second cause of action is sufficient to support the judgment. (2 Witkin, California Procedure [1954], Pleading, § 486, p. 1473.)

[3] *Sufficiency of the evidence to support finding that there was an alteration or conversion of the premises.* In addition to the evidence produced by the parties, which has been set forth above in some detail, we have the evidence adduced by the trial judge

upon his viewing of the premises. As stated in Stegner v. Bahr & Ledoyen, Inc., 126 Cal.App.2d 220, 225, 272 P.2d 106, 109: "There is no record of what the judge observed upon this occasion other than as reflected in the findings of fact and conclusions of law which he later signed and filed. Under the circumstances there can be no doubt of the applicability of the rule that the trial judge's view of the property 'with the consent of counsel is evidence in the case and "may be used alone or with other evidence to support the findings." (Citations.)'" See also: McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 889, 264 P.2d 932; ⊥131 Wilkins v. City of San Bernardino, 29 Cal.2d 332, 338, 175 P.2d 542; People v. Oliver, 86 Cal.App.2d 885, 888, 195 P.2d 926.

[4] *Application of State Housing Act.* Defendant states that the State Housing Act has no retroactive application. The judgment is not dependent upon this premise. Where the court finds that a public nuisance exists, abatement of the nuisance may be ordered wholly apart from applicable statutes or municipal ordinances. (See Civ.Code § 3494; Health & Saf.Code §§ 15024, 15290 et seq.; Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83, 66 S.Ct. 850, 90 L.Ed. 1096; Knapp v. City of Newport Beach, 186 Cal.App.2d 669, 681, 9 Cal.Rptr. 90; Takata v. City of Los Angeles, 184 Cal.App.2d 154, 164–165, 7 Cal.Rptr. 516; Perepletchikoff v. City of Los Angeles, 174 Cal.App.2d 697, 699, 345 P.2d 261; Stoetzner v. City of Los Angeles, 170 Cal.App.2d 394, 396, 338 P.2d 971.)

[5] The trial court specifically found that "the said premises now constitute, and at all times mentioned in the complaint have constituted, a fire hazard and a hazard to health and safety of the public and now constitute, and at all times mentioned in the complaint have constituted, a public nuisance." The court concluded: "That the premises aforesaid by reason of the fact that they constitute a fire and health and safety hazard are a public nuisance and that said public nuisance should be abated forthwith."

The above finding alone is sufficient to support the judgment without reference to any violations of the State Housing Act. This finding cannot be successfully challenged. As stated above, the trial judge's view of the premises is evidence in the case and his observations alone constitute sufficient evidence to support the finding. (McCarthy v. City of Manhattan Beach, supra; Wilkins v. City of San Bernardino, supra; People v. Oliver, supra.)

What has been said on this point is also applicable to defendant's complaint that plaintiff offered no proof as to the legal requirements for securing permits for alterations of premises prior to the enactment of the State Housing Act.

The applicable definition of a public nuisance as set forth in sections 3479 and 3480 of the Civil Code has been in effect, without change, since 1874. The evidence and the trial court's findings therein bring the subject property clearly within this definition.

Defendant's request that court amend its findings and judgment. Under a document title "Defendant's Objections to ⊥132 Proposed Findings of Fact and Conclusions of Law," defendant objects to certain findings of fact proposed by plaintiff. Under a document titled "Notice of Motion to Amend Judgment or For New Trial," defendant moved to amend the judgment (apparently, so that it would be in his favor) and, in the alternative, for a new trial. The objections were overruled and the motions denied.

[6] There is nothing to indicate that any points were raised other than those covered herein under other headings. The purported appeal from the orders denying the "Motion to Amend the Judgment" and the motion for a new trial, not being appealable, is dismissed. (Code Civ.Proc. § 963; Simmons v. Santa Barbara Ice etc. Co., 162 Cal.App.2d 23, 28–29, 327 P.2d 141; Rodriguez v. Barnett, 52 Cal.2d 154, 156, 338 P.2d 907.)

[7] *Estoppel.* The city's first cause of action included a recitation that, in 1955, an

administrative hearing was held before the city's Director of Public Health on the specific violations of statute and codes which were set forth in the complaint, at which time an order was rendered condemning the premises, declaring them to be a public nuisance, and requiring that the building be restored to its original use and occupancy. This fact was admitted by the answer, in which the defendant further alleged that upon the submission by him of certain documents to the office of the director, the order was never executed. At the trial, the defendant stated that these documents were affidavits attesting that the building had been operated as an apartment house prior to 1919, and that after their presentation he heard no more about the alleged violations until the commencement of this action.

On the basis of this pleading and this evidence, the defendant contends before this court that the city is estopped to prosecute the instant action. There is nothing in the record to indicate that the issue of estoppel was litigated below. Neither in terms nor substance is the doctrine mentioned in the reporter's transcript, and no finding thereon was made by the trial court. There is no pleading or evidence that the city was apprised of facts of which the defendant was ignorant; that the city intended that its conduct be acted upon or acted in such a manner that defendant had a right to believe it so to intend; or that the defendant relied upon the city's conduct to his prejudice. (See Peck v. City of Modesto (1960) 181 Cal.App.2d 465, 468, 5 Cal. Rptr. 482; Safeway Steel Products, Inc. v. Lefever (1953) 117 Cal.App.2d 489, 491, 256 P.2d 32; Cruise v. City & County of 133 San Francisco (1951) 101 Cal.App.2d 558, 565, 225 P.2d 988.) There are simply no facts shown to which the elements of the doctrine relate.

The defendant urges the installation in 1956 of a fire escape in the building as an element of reliance upon the city's conduct. However, his own evidence shows that he was required by city authorities to install the fire escape, and did not do so on his own account. Moreover, as our Supreme Court stated in California Cigarette Concessions, Inc. v. City of Los Angeles (1960) 53 Cal. 2d 865, at 869, 3 Cal.Rptr. 675 at 678, 350 P.2d 715 at 718: "* * * There are occasions for departure from the general rule that a city may not be estopped by the conduct of its officers or employees. Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323. But such departure is justified only when the facts clearly establish that a grave injustice would be done if an equitable estoppel were not applied. County of San Diego v. California Water etc. Co., 30 Cal.2d 817, 826, 186 P.2d 124, 175 A.L.R. 747." (See also City & County of San Francisco v. Burton (1962) 201 A.C.A. 824, 831, 20 Cal.Rptr. 378.) There is no such showing in the instant case.

Defendant raised a question at the trial as to whether the license fee charged by plaintiff's Tax Collector was of any significance as to whether the city regarded the premises as an apartment house, a hotel, or as "flats." The record indicates that the defendant showed the trial judge some kind of a license for 23 rooms. The judge then asked counsel for plaintiff to look into the matter and advise him. There was no objection to this by defendant or his counsel. Counsel for plaintiff advised the court by letter, with a copy to defendant's then counsel. Defendant's present counsel complains that "the record fails to show that this was done." However, the original letter is on file and a copy is attached to plaintiff's brief. The misunderstanding is undoubtedly due to the change in defendant's counsel.

The letter, with an enclosure from the Department of Public Health, sets forth that the license fee is based on the total number of rooms per building and in no way indicates compliance with pertinent building and housing codes, this being a matter for determination by the Department of Public Health. What characterization of the premises is used by the Tax Collector has no bearing at all upon the court's determination that the building constituted a public nuisance.

Judgment affirmed.

KAUFMAN, P. J., and SHOEMAKER, J., concur.

208 Cal.App.2d 62

62 **Lee B. WILSON, Plaintiff and Respondent,**

v.

Charles E. ANDERSON, Defendant and Appellant.

Civ. 20165.

District Court of Appeal, First District, Division 2, California.

Oct. 1, 1962.

Rehearing Denied Oct. 17, 1962.

Action on oral third party beneficiary contract made with owners under which defendant agreed to pay ⅓ of commission from sale of property to plaintiff if the property was sold to the party to whom defendant had shown it while property was listed with the plaintiff. From a judgment of the Superior Court, Mendocino County, Lilburn Gibson, J., in favor of the plaintiff, the defendant appealed. The District Court of Appeal, Kaufman, P. J., held that admission of evidence relating to an oral promise by defendant, who had a written listing agreement with owners, to pay ⅓ of commission to plaintiff with whom property had previously been listed if defendant sold the ranch to any party to whom he had shown the property while it was listed with the other plaintiff did not violate the parol evidence rule.

Judgment affirmed.

1. Evidence 🔑441(1)

Admission of evidence relating to an oral promise by defendant, who had a written listing agreement with owners, to pay ⅓ of commission to plaintiff with whom property had previously been listed if defendant sold the ranch to any party to whom he had shown the property while it was listed with plaintiff, did not violate the parol evidence rule.

2. Evidence 🔑441(1)

A collateral oral agreement may be shown where it is not inconsistent with the terms of written agreement.

3. Appeal and Error 🔑204(1)

Objection to introduction of evidence is waived when not made in the trial court.

4. Brokers 🔑86(1)

Evidence sustained finding that defendant-broker had entered into an oral agreement with property owners to pay plaintiff-broker ⅓ of any commission if he sold property to party to whom he had shown the property while it was listed with the plaintiff, in consideration of owner's employment of defendant to sell the property.

5. Brokers 🔑66

Oral third party beneficiary agreement between owners and defendant-broker whereby defendant was to pay ⅓ of any commission he received to plaintiff if he sold property, which was listed with him under a written listing agreement, to any person to whom he had shown the property while it was listed with the plaintiff-broker was supported by adequate consideration.

6. Brokers 🔑66

Oral third party beneficiary agreement under which defendant-broker agreed with owners to pay ⅓ of commission which he received to plaintiff-broker if property was sold to any party to whom defendant had shown it while it was listed with the plaintiff did not violate the statute of frauds.

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Hale McCowen, Jr., Ukiah, for appellant.

Leo M. Cook, Ukiah, for respondent.

KAUFMAN, Presiding Justice. 63

In this appeal from a money judgment rendered on an oral third party beneficiary contract, the appellant contends that: (1) the evidence does not establish the alleged agreement; (2) lack of consideration; and (3) the agreement is barred by the statute of frauds. We have concluded that there is no merit in any of these contentions.

The record reveals the following: Appellant and respondent are duly licensed real estate brokers in the County of Mendocino. On April 26, 1956, respondent was employed by Mr. and Mrs. Buck to sell their ranch, pursuant to a written agreement which was renewed and extended from time to time, and was in full force and effect from April 26, 1956, to August 26, 1957. Shortly thereafter, the appellant and respondent verbally agreed that they would cooperate as brokers in the sale of the ranch and that in the event that the appellant obtained a purchaser, the commission would be divided between them, ⅔ and ⅓, respectively. This oral agreement was in full force and effect during the period that the Bucks had listed the property with the respondent. In the summer of 1957, appellant showed the ranch to the Guntley Brothers. In December, 1957, appellant sought a written contract from the Bucks to employ him as a broker. However, the Bucks were reluctant to enter into such an agreement because of their previous agreement with the respondent. The appellant then orally promised the Bucks that in consideration of their employment of him to sell the ranch, he would pay the respondent ⅓ of the commission if he sold the ranch to any party to whom he had shown the property while the listing with the respondent was in effect. In reliance on this promise of the appellant, the Bucks entered into a written contract, employing the appellant as broker. On May 14, 1958, appellant sold the property to the Guntley Brothers and received a commission of $4,700. The trial court ⌊64 found the facts substantially as stated above, and concluded that the respondent was entitled to his commission on the basis of the oral agreement between the appellant and the owners.

[1–4] The first contention on appeal is that the evidence does not support the findings, and that the findings are based on evidence introduced in violation of the parol evidence rule. We cannot agree with appellant's contention that the evidence relating to the appellant's promise to pay ⅓ of the commission to the respondent violated the parol evidence rule as the written listing agreement between the owners and the appellant did not contain this provision. A collateral oral agreement may be shown where it is not inconsistent with the terms of the written agreement (Simmons v. Cal. Institute of Technology, 34 Cal.2d 264, 274, 209 P.2d 581). Also, as no objection was made to this evidence below, it has therefore been waived (Pao Ch'en Lee v. Gregoriou, 50 Cal.2d 502, 506, 326 P.2d 135). We have examined the record and can only conclude that the findings are amply supported therein. There is no question that the respondent was the creditor beneficiary of the agreement between the appellant and the owners (1 Witkin, Summary, § 207, p. 237).

[5] The next contention is that the oral third party beneficiary agreement between the owners and the appellant was not supported by consideration. The uncontroverted evidence, however, establishes that the owners entered into the written agreement with the appellant in reliance on appellant's promise. The record also indicates that appellant made no request for a special finding on the issue of consideration as required by section 634 of the Code of Civil Procedure.

[6] The final contention on appeal is that the alleged agreement is barred by the statute of frauds. However, as stated in Goossen v. Adair, 185 Cal.App.2d 810 at 819, 8 Cal.Rptr. 855 at 861: "There is no doubt that real estate brokers may make valid and enforceable oral contracts for the division of commissions between themselves and that the provisions of Civil Code § 1624, subdivisions 4 and 5 and Code of Civil Procedure, section 1973, subdivision 5, requiring agreements authorizing or employing an agent or broker to sell real estate to be reduced to writing, are for the protec-

tion of real estate owners against unfounded claims of brokers; and were never intended to be applied to contracts between brokers agreeing to share commissions. Johnson v. ⊥65 Porter, 21 Cal.App. 97, 131 P. 69." We think the same reasoning applies to the instant situation.

No prejudicial error appearing in the record before us, the judgment must be affirmed.

Judgment affirmed.

SHOEMAKER and AGEE, JJ., concur.

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208 Cal.App.2d 65

⊥65 **Evelyn McDOUGALL and Thomas D. McDougall, on behalf of themselves and other persons similarly situated, Plaintiffs and Appellants,**

v.

COUNTY OF MARIN, Defendant and Respondent.

Civ. 20324.

District Court of Appeal, First District, Division 2, California.

Oct. 1, 1962.

Hearing Denied Nov. 28, 1962.

Action for refund of alleged illegal property taxes. The Superior Court, County of Marin, Thomas F. Keating, J., sustained the general demurrer and dismissed the third amended complaint without leave to amend, and the taxpayers appealed. The District Court of Appeal, Kaufman, P. J., held that even if officers of county negligently advised general public that action of state board of equalization in ordering county to increase assessed value of property by 26% was valid and such advice was given wide publicity in local newspaper, county was not estopped from asserting three-year statute of limitations on filing of claim for refund of allegedly illegally collected taxes.

Affirmed.

1. Taxation 🔑543(9)

Reviewing court was required to assume that taxpayers seeking refund of taxes collected for fiscal years 1955–1956 had paid final installment on or before April 10, 1956, and that refund claim filed June 30, 1959 was not made within the statutory three-year period, where complaint alleged payment on or before due date, and statutes required payment of second of two installments on February 1 and made it delinquent, if unpaid, on April 10. West's Ann.Rev. & Tax.Code, §§ 2605, 2606, 2617, 2618, 5097.

2. Estoppel 🔑62(3)

Even if officers of county negligently advised general public that action of state board of equalization in ordering county to increase assessed value of property by 26% was valid, and such advice was given wide publicity in local newspaper, county was not estopped from asserting three-year statute of limitations on filing of claim for refund of allegedly illegally collected taxes.

3. Taxation 🔑450(1)

Constitution empowered state board of equalization to issue order directing county to raise property assessments for purpose of equalizing taxes throughout state independent of any legislative enactment. West's Ann.Const. art. 13, § 9.

4. Constitutional Law 🔑29

Constitutional provision will be presumed to be self-executing and will be given effect without legislation unless it clearly appears that this was not intended.

5. Taxation 🔑450(2)

That order of state board of equalization directing county to increase by 26% assessed value of property for purpose of equalizing assessment throughout state applied only to secured roll did not make such order invalid, where tax on property on unsecured roll was payable long before board could act on inter-county equalization matters. West's Ann.Const. art. 13, §§ 9, 9a.

A. Leonard Bjorklund, Jr., Sausalito, for appellants.

E. Warren McGuire, County Counsel of Marin County, San Rafael, for respondent.

Stanley Mosk, Atty. Gen., Dan Kaufmann, Asst. Atty. Gen., Edward P. Hollingshead, Deputy Atty. Gen., Sacramento, for amicus curiæ State Board of Equalization of California.

⌊66 ⌊KAUFMAN, Presiding Justice.

This is an appeal from a judgment of dismissal entered after the trial court sustained the respondent's general demurrer to the appellants' third amended complaint without leave to amend. On this appeal, ⌊67 appellants⌊argue that the trial court erred in its actions because: (1) their claims for refund of illegal property taxes erroneously collected were timely filed within the three year period allowed by section 5097, subparagraph (b), of the Revenue and Taxation Code, and in the alternative, their complaint sets forth facts legally adequate to excuse and justify the late filings; (2) their claims were in the proper form prescribed by section 5097, subparagraph (a), of the Revenue and Taxation Code, and in the alternative, that the respondent is estopped from contending that the claims were not in proper form; (3) their complaint states facts sufficient to constitute a cause of action for the refund of taxes collected during all three of the fiscal years, as alleged. There is no merit to any of these contentions and as we have concluded that the appellants' claims were not timely filed, it will not be necessary for us to discuss all of the remaining arguments in detail.

A summary of the origin of the controversy is necessary for a complete understanding of the issues presented. On August 15, 1955, the State Board of Equalization issued its order directing the respondent county to increase by 26 per cent the assessed value of all taxable property contained in the local assessment roll for the fiscal year 1955–1956. The purpose of this order was to equalize the assessment throughout the State, pursuant to section 9, article XIII of the state Constitution. On receipt of this order, the respondent county increased only the assessed value of property contained in the local secured roll and left the unsecured roll untouched. The taxes with the 26 per cent increase were subsequently levied and collected from the appellants.

Thereafter, on June 30, 1959, appellants and 319 other persons filed claims with the respondent county's Board of Supervisors for the refund of illegal property taxes erroneously collected pursuant to sections 5096 and 5097 of the Revenue and Taxation Code, for the 1955–1956, 1956–1957, 1957–1958 fiscal years. Appellants claimed that the State Board of Equalization had no legal authority to issue the order of August 15, 1955 as: 1) the Legislature had suspended the board's power to undertake inter-county equalization; 2) at the time of the order, the county board had adjourned for the year so that appellants were deprived of the right provided by law to protest the order and seek redress; 3) the respondent's Board of Supervisors erred in applying the increase only to the secured roll and not to the unsecured roll; and 4) the 26 per cent increase ordered by the state board was based on an⌊erroneous and insufficient sampling of property values within the county. ⌊68

On September 1, 1959, the respondent's Board of Supervisors rejected all of the above claims. Thereafter, on November 6, 1959, appellants commenced their action for the refund of the taxes, alleging the grounds set forth above. Respondent answered and demurred, generally and specifically. The trial court sustained respondent's demurrer, in part, and concluded that no cause of action had been stated for the 1956–1957 and 1957–1958 fiscal years. Thereafter, following further amended complaints and demurrers, the trial court on August 10, 1961, sustained the respondent's demurrer to the appellants' third amended complaint, without leave to amend. The demurrer was apparently sustained on the theory that appellants' claims for refund had not been timely filed under the provisions of section 5097, subparagraph (b), of the Revenue and Taxation Code. The judgment of dismissal which is the subject of this appeal was entered on the demurrer to the third amended complaint.

Section 5097 of the Revenue and Taxation Code, so far as relevant, provides: "No order for a refund under this article shall be made except on a claim: * * *. (b) Filed within three years after making of the payment sought to be refunded."

The first question presented is whether appellants' claims for refund filed on June 30, 1959, were filed within three years after "making of the payment sought to be refunded." The question appears to be one of first impression as the issue in this precise form has not heretofore been raised. Appellants contend that the only reasonable interpretation of the above quoted language of the statute is that the claim for a refund can be filed within three years after the end of the fiscal year in question. The code provides that one-half of the real property taxes on the secured roll and all the personal property taxes are due on November 1 (Rev. & Tax.Code § 2605), and if unpaid are delinquent on December 10 (Rev. & Tax.Code § 2617); the second half of the real property taxes are due on February 1 (Rev. & Tax.Code § 2606) and if unpaid are delinquent on April 10 (Rev. & Tax. Code § 2618). As pointed out in Fellowship of Humanity v. Alameda County, 153 Cal.App.2d 673 at 701, 315 P.2d 394 at 411, the claim procedure is silent as to when the payment must be made but merely provides that the claim for a refund must be filed "within 3 years after [making of] the payment sought to be refunded."

⊥69 ⊥Appellants' complaint in the instant case alleges payment of the taxes due on or before the due date, and has not indicated whether the taxes were paid in one installment or two installments. Therefore, it must be assumed that the taxes in question were paid sometime between November 1 and December 10 or February 1 and April 10. Appellants contend that to give literal interpretation to subparagraph (b) of section 5097 by making the three year period of limitation for the purposes of filing for a refund run from the date of making of the payment, would create a different period for each installment of the tax, if the tax is paid in installments; that this interpretation would contradict section 2615 of the Revenue and Taxation Code, which provides that the receipt given to the taxpayer on the payment of the property taxes indicates only the beginning and ending of the fiscal year and not the date on which the tax is paid. However, section 2609 provides that the notice to pay taxes shall specify the dates when the taxes on the secured roll will be due and the time when delinquent. Appellants urge a fair and reasonable construction of the statute and one with a uniform date easily ascertainable by the taxpayer.

We have not been able to find any authority in this State on the relation of the claim date to the installment payment procedure. However, United States v. Clarke, 3 Cir., 69 F.2d 748, appears to us to be in point and to indicate a fair way of interpreting the statute in accordance with its expressed legislative intent. In that case, the taxpayer sought a refund of a tax paid in three installments; the relevant statute [then § 319(b) of the Revenue Act of 1926, 26 U.S.C. § 1120(b)] provided: "All claims for the refunding of the tax imposed by this chapter alleged to have been erroneously or illegally assessed or collected must be presented to the commissioner within three years next after the payment of such tax." The lower court held that the three year statute of limitations did not begin to run until the time of the payment of the last installment, and that this was the controlling date of the purpose of the statute of limitations on filing for the refund. The Third Circuit Court of Appeals affirmed this view, which has been followed since by the federal courts in interpreting similar statutory provisions. (See cases collected in 94 A.L.R. 978 et seq.; cf. Plankinton v.

United States (D.C.Wis.1958) 164 F.Supp. 912.)

[1] In this case, we must assume that the final installment paid by the appellants was paid on or before April 10, 1956, and ⊥70 their claims filed on June 30, 1959, more than three years after "the making of the payment sought to be refunded." Thus, we can only conclude that the appellants failed to comply with the claims statute and are unable to assert a valid cause of action against the respondent county unless the respondent is estopped from asserting the provisions of the statute.

[2] We have found no basis for an estoppel in the matter set forth by the appellants in their second and third amended complaints. Appellants attempt to argue that the respondent's officers negligently advised the general public that the action of the State Board of Equalization was valid and that these assertions were given wide publicity in the local newspaper. Appellants contend that the existence of an estoppel is a question of fact. However, estoppel is a question of fact unless only one inference can be drawn from the evidence or pleadings, such as in the instant case, where the respondent county in effect admitted the facts pleaded for the purposes of the demurrer (Sawyer v. City of San Diego, 138 Cal.App.2d 652, 292 P.2d 233). We think the trial court properly concluded that these facts do not, as a matter of law, constitute an estoppel (Skidmore v. County of Solano, 154 Cal.App.2d 449, 316 P.2d 646; Cal. Cigarette Concessions v. City of L. A., 53 Cal.2d 865, 3 Cal.Rptr. 675, 350 P.2d 715).

[3, 4] Having concluded that the trial court properly sustained the demurrer without leave to amend on the basis of the three year statute of limitations discussed above, we will briefly address ourselves to the merits of the controversy, i. e., the validity of the state board's inter-county equalization order. Appellants contend that the state board was without power to issue this order as its power to effect inter-county equalization was changed by the suspension of its powers. However, appellants' argument overlooks the fact that the State Board of Equalization's duty to equalize the level of assessments in the various counties throughout the State is derived from section 9, article XIII of the state Constitution, independent of any legislative enactment (Baldwin v. Ellis, 68 Cal. 495, 9 P. 652). In 1949 (Stats.1949, c. 1466), the Legislature enacted certain provisions which outlined in detail some of the procedures to be followed by the state board in executing these powers; however, before these new procedures could be implemented, an emergency measure was adopted postponing their operation until 1953 (Stats. 1951, c. 1554) and after several subsequent postponements, the 1949 enactment ⊥71 was repealed in 1959 (Stats.1959, c. 1682). A constitutional provision will be presumed to be self-executing and will be given effect without legislation unless it clearly appears that this was not intended (Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505; Chesney v. Byram, 15 Cal.2d 460, 101 P.2d 1106; Winchester v. Howard, 136 Cal. 432, 64 P. 692).

[5] Appellants also argue that the order of the state board was invalid because it was applied only to the secured roll. However, property on the unsecured roll consists almost exclusively of personal property and does not constitute a lien against any real property. Apparently, because of this lack of security, taxes on the unsecured roll have always been due and payable either on the lien date, the first Monday in March (Rev. & Tax.Code, § 2901) or immediately upon assessment by the assessor. The equalization of the local secured roll by the Board of Supervisors is not completed until the third Monday in July (Rev. & Tax.Code, § 1603), and no action can be taken by the Board of Equalization until after that day. The State Board of Equalization sits on the third Monday in July to and including the third Monday in August, during which time it is required to equalize the valuation of the taxable property in

several counties of the State.[1] Thus, it would appear that the taxes on the unsecured roll must be and are collected long before the State Board of Equalization can act on inter-county equalization matters. Furthermore, section 9a, article XIII of the state Constitution provides that the taxes on the unsecured roll are to be based on the previous year's tax rate (Abrams v. San Francisco, 48 Cal.App.2d 1, 119 P.2d 197). It would thus appear that contrary to appellants' argument, the August 15 order of the state board could not constitutionally be applied retroactively to the unsecured roll.

In their argument on this point, appellants rely heavily on People v. County of Tulare, 45 Cal.2d 317, 289 P.2d 11, and County of Tulare v. State Board of Equalization, Tulare County Superior Court No.
72 47678. Tulare County, in 1955, ⌊instead of complying with the order of the State Board of Equalization, instituted an action in its local superior court to invalidate the order and succeeded at the trial level, on the ground that the order was not made applicable to the unsecured roll (County of Tulare v. State Board of Equalization, No. 47678). The matter, however, did not reach the appellate courts and appellants here have not provided us with any reasons for following that case. While the Tulare County action was still pending in the superior court, the State instituted an independent and original proceeding in the Supreme Court for a writ of mandate directing Tulare County and its officers to increase the assessment roll as directed by the State Board of Equalization. The Supreme Court, however, refused to issue the writ on the ground that the action involved the same issues between the same parties as was then pending in the superior court (People v. County of Tulare, supra). Furthermore, in 1959, chapter 2, division 1, part 3 of the Revenue and Taxation Code was revised and renumbered (Stats.1959, c. 1682), and it was made clear that inter-county equalization applied only to the secured roll (Rev. & Tax.Code § 1821).

In view of the foregoing, it is not necessary to further discuss the remaining contentions raised by the appellants.

Judgment affirmed.

SHOEMAKER and AGEE, JJ., concur.

208 Cal.App.2d 321

⌊ **The PEOPLE of the State of California, Plaintiff and Respondent,** 321
v.
Beatrice VILLALOBOS, Defendant and Appellant.

District Court of Appeal, Third District, D. California.
Oct. 9, 1962.

Prosecution for involuntary manslaughter. The Superior Court of Tehama County, Curtiss E. Wetter, J., entered a judgment of conviction and the defendant appealed. The District Court of Appeal, Schottky, J., held that evidence disclosing, according to defendant's version, that she placed her three-year-old daughter in washbasin, turned on hot water tap which she knew would send scalding water into basin and left child knowing that child was incapable of protecting herself from obvious harm sustained conviction for involuntary manslaughter of child, who died from result of burns that occurred five to six hours before the child was taken to the hospital.

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[1] Any county seeking a review of the actions of the state board must make a written application for a hearing before the third Monday in July or within two weeks after the completion of the local roll, whichever is later (Rev. & Tax. Code, § 1821). The action of the state board becomes final on September 10 if no hearing is requested and no later than September 25 if a hearing is requested (Rev. & Tax.Code, § 1823). These procedures, enacted by chapter 682, Statutes, 1959, became effective on September 18, 1959.

Affirmed.

1. Homicide ⚷228(1)

Corpus delicti in murder charge consists of death of alleged victim and existence of some criminal agency as cause.

2. Criminal Law ⚷409

Corpus delicti must be proved by evidence independent of extrajudicial statements of accused.

3. Criminal Law ⚷406(1)

As prerequisite to reception of defendant's extrajudicial statement in evidence, corpus delicti need not be established by proof as clear and convincing as necessary to establish guilt and prima facie showing that alleged victim met death by criminal agency will suffice.

4. Criminal Law ⚷563

Corpus delicti may be established wholly by circumstantial evidence and by inferences reasonably derived therefrom, and such evidence need not connect defendant with commission of crime.

5. Homicide ⚷228(1)

Evidence disclosing that defendant's three-year-old daughter died as result of burns received five to six hours prior to time child was taken to hospital and that it was unlikely that burns could have been self-inflicted was sufficient to establish corpus delicti.

6. Homicide ⚷31

"Manslaughter" is unlawful killing of human being. West's Ann.Pen.Code, § 192.

See publication Words and Phrases for other judicial constructions and definitions.

7. Homicide ⚷34

If person commits unlawful act that does not amount to a felony there must be showing that unlawful act was committed with criminal intent or criminal negligence in order for person to be guilty of crime of "involuntary manslaughter."

See publication Words and Phrases for other judicial constructions and definitions.

8. Homicide ⚷34

To be an "unlawful act" within meaning of involuntary manslaughter statute act must be dangerous to human life or safety and meet conditions of statute which requires that in every crime there must exist union, or joint operation of act and intent, or criminal negligence. West's Ann.Pen. Code, §§ 20, 192.

See publication Words and Phrases for other judicial constructions and definitions.

9. Homicide ⚷34

To convict person of involuntary manslaughter there must be an unlawful killing of human being in commission of lawful act which might produce death without due caution and circumspection, and words "due caution and circumspection" are equivalent of "criminal negligence". West's Ann.Pen. Code, §§ 20, 192.

See publication Words and Phrases for other judicial constructions and definitions.

10. Homicide ⚷74

Generally, act is "criminally negligent" when man of ordinary prudence would foresee that act would cause high degree of risk of death or great bodily harm and whether conduct of accused was wanton or reckless so as to warrant conviction of manslaughter must be determined from conduct itself and not from resultant harm. West's Ann.Pen.Code, § 192.

See publication Words and Phrases for other judicial constructions and definitions.

11. Homicide ⚷255(2)

Evidence disclosing, according to defendant's version, that she placed her three-year-old daughter in washbasin, turned on hot water tap which she knew would send scalding water into basin and left child knowing that child was incapable of protecting herself from obvious harm sustained conviction for involuntary manslaughter of child, who died from result of burns that occurred five to six hours before child was taken to the hospital. West's Ann.Pen. Code, §§ 20, 26, 192.

12. Homicide ⚷74

Failure to use due care in treatment of another, where duty to furnish such care exists, is sufficient to constitute that form of manslaughter which results from act of omission. West's Ann.Pen.Code, § 192.

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Edward J. Allen, Red Bluff, under appointment by the Third District Court of Appeal, for appellant.

Stanley Mosk, Atty. Gen., by Doris H. Maier, Asst. Atty. Gen., and Raymond M. Momboisse, Deputy Atty. Gen., Sacramento, for respondent.

323 SCHOTTKY, Justice.

Beatrice Villalobos was accused by indictment with the crime of involuntary manslaughter, it being alleged that "she did unlawfully kill, without malice, one CHARLOTTE RAMERIZ in the commission of an unlawful act, not amounting to felony, and in the commission of a lawful act which might produce death in an unlawful manner and without due caution and circumspection." The jury found her guilty as charged, her motion for a new trial was denied, and she has appealed from the judgment entered on such verdict and from the order denying her motion for a new trial.

In arguing for a reversal of the judgment, appellant makes two major contentions. (1) That the evidence was insufficient to justify the verdict; and (2) that the court erred in allowing the introduction of appellant's statements because of the failure to establish the corpus delicti of the crime. Before discussing these contentions, we shall give a brief summary of the evidence as shown by the record.

Beatrice Villalobos, referred to hereafter as the appellant, was residing in a small five-room cottage with her paramour, Octavio Gomez, her six children, her sister, Irene Fuentes, and her sister's two children. 324 About 4:30 p. m. on November 5, 1961, Irene and Octavio left the house to gather firewood. Appellant remained in the house, as did her daughter Charlotte, a three-year-old child who was usually kept in a small open recess in a bedroom. Appellant discovered that the child had soiled herself. She took the child into the bathroom where she removed the child's diaper and partially cleaned her. She then placed the child in the washbasin and went into the kitchen to get a pan of cold water. The washbasin had only a single spigot which discharged hot water. Appellant poured the cold water into the washbasin and opened the tap a bit and returned to the kitchen. When she came back she removed the child from the washbasin and put her in the shower. She noticed that the child's skin seemed wrinkled and pinkish but she did not think anything of it. After she had bathed the child, she saw that the child's feet, ankles, thighs, buttocks and genitals were scorched by hot water. She then put the child in bed. Appellant admitted the skin was sloughing from the burns the child received. After Octavio and Irene returned, appellant, who was pregnant, was taken to the hospital by Octavio. Irene remained in the house. About 10:00 p. m. she heard Charlotte crying and after investigating discovered that the child's legs were red and the skin was peeling. The child was taken to the hospital. Upon her arrival, it was ascertained that the child had first and second degree burns. The feet and ankles were quite red, the skin had sloughed off, and the burns were dry. The burns around the buttocks and the left thigh had blisters on them. Charlotte died. The autopsy report stated the child had severe second or third degree burns involving the lower legs, the back of the thighs, the region around the perineum and high up on the buttocks. The area of the burns covered 20 to 25 per cent of the body. The cause of death was severe swelling of the brain. The pathologist testified that the burns set off the chain of events which caused death. He also testified that it would be very difficult to see how burns of the particular distribution could have been self-inflicted.

In addition to the above, there was evidence that appellant disliked Charlotte and had treated her cruelly.

We shall first discuss appellant's contention that the corpus delicti of the crime was not established before appellant's admissions were introduced in evidence.

[1-4] "In a murder charge the corpus delicti consists of two elements: the death of the alleged victim and the existence ⌊325 of some criminal agency as the cause. (People v. Cullen, 37 Cal.2d 614, 624, 234 P.2d 1, and cases cited.) The corpus delicti must be proved by evidence independent of the extrajudicial statements of the accused. But, as a prerequisite to the reception of a defendant's extrajudicial statement in evidence, the corpus delicti need not be established by proof as clear and convincing as is necessary to establish guilt. (25 Cal.Jur.2d 510-513, and cases cited.) The corpus delicti need only be shown by some evidence, and a prima facie showing that the alleged victim met death by a criminal agency will suffice. (People v. Corrales, 34 Cal.2d 426, 429, 210 P.2d 843; People v. Mehaffey, 32 Cal.2d 535, 545, 197 P.2d 12, and cases cited.) Furthermore, the corpus delicti may be established wholly by circumstantial evidence and by inferences reasonably derived therefrom. (People v. Corrales, supra, 34 Cal.2d 426, 429, 210 P.2d 843; People v. Mehaffey, supra, 32 Cal.2d 535, 545, 197 P.2d 12.) And such evidence need not connect defendant with the commission of the crime. (People v. Amaya, 40 Cal.2d 70, 76, 251 P.2d 324.)" (People v. Misquez, 152 Cal.App.2d 471, 477, 313 P.2d 206; see also People v. Ogg, 159 Cal.App.2d 38, 323 P.2d 117.)

[5] The evidence discloses that Charlotte died as the result of burns which covered 20 to 25 per cent of her body. The autopsy surgeon testified that it was unlikely the burns could have been self-inflicted. There was evidence that the burns were incurred some five or six hours prior to the time the child was received at the hospital. There was also evidence that the child was kept in a recess in a room away from the kitchen or the bathroom. Appellant and the child were in the home. We believe that a prima facie case was established that the burns were inflicted on the child other than by accident. There was no fire and the burns were not self-inflicted.

A more difficult question is whether the evidence supports the judgment.

[6] Manslaughter is the unlawful killing of a human being. It is of three kinds: "2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; * * *." (Pen.Code, sec. 192.)

Section 20 of the Penal Code requires that "In every crime ⌊326 or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."

Section 26 of the Penal Code provides in part that a person is incapable of committing a crime if the act charged was done through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence.

[7, 8] Even if a person commits an unlawful act not amounting to a felony, there must be a showing that the unlawful act was committed with criminal intent or criminal negligence in order for the person to be guilty of the crime of involuntary manslaughter. (People v. Stuart, 47 Cal.2d 167, 173, 302 P.2d 5, 9.) "To be an unlawful act within the meaning of section 192 * * *, the act in question must be dangerous to human life or safety and meet the conditions of section 20." (People v. Stuart, supra, p. 173, 302 P.2d p. 9)

The unlawful act relied on by respondent is found in section 273a of the Penal Code, which reads: "Any person who willfully causes or permits any child to suffer, or who inflicts thereon unjustifiable physical pain or mental suffering, and whoever, having the care or custody of any child, causes or permits the life or limb of such child to be endangered, or the health of such child to be injured, and any person who willfully causes or permits such child to be placed in such situation that its life or limb may be endangered, or its health likely to be injured, is guilty of a misdemeanor."

The evidence was sufficient for the jury to determine that defendant committed an act which endangered the life or limb of the child by placing her in the washbasin and turning on the hot water spigot. The jury could find from the evidence that defendant violated section 273a of the Penal Code.

[9] But in addition to evidence of the violation of the statute, we must find evidence of criminal intent or criminal negligence. As stated in People v. Penny, 44 Cal.2d 861, at page 879, 285 P.2d 926, at page 937: "The statute, Pen.Code, § 192, subd. 2, provides (in part) that in order to convict a person of involuntary manslaughter, there shall be an unlawful killing of a human being in the commission of a lawful act which might produce death without due caution and circumspection. The words lack of 'due caution and circumspection' have been heretofore held to be the equivalent of 'criminal negligence', Pen.Code § 20. The general rule is set forth in 26 Am. ⊥327 Jur., Homicide, § 210, page 299, as follows: 'The authorities are agreed, in the absence of statutory regulations denouncing certain acts as criminal, that in order to impose criminal liability for a homicide caused by negligence, there must be a higher degree of negligence than is required to establish negligent default on a mere civil issue. The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences.' The article continues thus: "'Aside from the facts that a more culpable degree of negligence is required in order to establish a criminal homicide than is required in a civil action for damages and that contributory negligence is not a defense, criminal responsibility for a negligent homicide is ordinarily to be determined pursuant to the general principles of negligence, the fundamental of which is knowledge, actual or imputed, that the act of the slayer tended to endanger life. The facts must be such that the fatal consequence of the negligent act could reasonably have been foreseen. It must appear that the death was not the result of misadventure, but the natural and probable result of a reckless or culpably negligent act.'"

[10] As stated in People v. Rodriquez, 186 Cal.App.2d 433, 440, 8 Cal.Rptr. 863, 868: "It is generally held that an act is criminally negligent when a man of ordinary prudence would foresee that the act would cause a high degree of risk of death or great bodily harm. The risk of death or great bodily harm must be great. See cases collected 161 A.L.R. 10. Whether the conduct of defendant was wanton or reckless so as to warrant conviction of manslaughter must be determined from the conduct itself and not from the resultant harm. Commonwealth v. Bouvier, 316 Mass. 489, 55 N.E.2d 913. Criminal liability cannot be predicated on every careless act merely because its carelessness results in injury to another. People v. Sikes, 328 Ill. 64, 159 N.E. 293, 297. The act must be one which has knowable and apparent potentialities for resulting in death. Mere inattention or mistake in judgment resulting even in death of another is not criminal unless the quality of the act makes it so. The fundamental requirement fixing criminal responsibility is knowledge, actual or imputed, that the act of the ⊥328 accused tended to endanger life. State v. Studebaker, 334 Mo. 471, 66 S.W.2d 877, 881."

[11] Applying the rationale of the foregoing authorities to the facts of the instant case, we are convinced that the jury was

justified in concluding that the facts in this case clearly establish that the act of the appellant, even if we accept her version of what occurred, was a lawful act performed in a criminally negligent manner, for that evidence shows that she placed the victim, a three-year-old child, in a washbasin and turned on a hot water tap which she knew would send scalding water into the washbasin; and after doing this, she left the child in the washbasin, knowing full well that the child was incapable of protecting herself from the obvious harm which would follow.

[12] The failure to use due care in the treatment of another where a duty to furnish such care exists is sufficient to constitute that form of manslaughter which results from an act of omission. (People v. Chavez, 77 Cal.App.2d 621, 628, 176 P.2d 92; People v. Montecino, 66 Cal.App.2d 85, 100, 152 P.2d 5.)

The burns inflicted upon the victim would have resulted in blistering within minutes after they were inflicted and would have caused the skin to slough off. The appellant herself admitted that before putting the child to bed she had become aware of the horrible burns which had been inflicted. As the mother of the victim and the only adult then present she had the duty to see that some action was taken to protect that child's life.

We are convinced that the question of whether or not appellant was guilty of acting without due caution and circumspection was a question for the jury to determine, as was also the question of whether the actions and conduct of appellant amounted to criminal negligence. The jury was fully and correctly instructed as to the law applicable to the offense with which appellant was charged, and the trial court, apparently with some reluctance, denied her motion for a new trial. As an appellate tribunal, we would not be justified in holding that the evidence does not support the judgment because we cannot say that the verdict of the jury is without substantial support in the record. Under such circumstances, finding no error in the record, it is our duty to affirm the judgment and order.

The judgment and order are affirmed.

PEEK, P. J., and PIERCE, J., concur.

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208 Cal.App.2d 98

Dane COOK, Petitioner, 98

v.

Tom BRIGHT, as Director of the Department of Motor Vehicles, Respondent.

Civ. 26655.

District Court of Appeal, Second District, Division 2, California.

Oct. 1, 1962.

Proceeding by a motorist for a writ of mandate directing Department of Motor Vehicles to vacate and set aside an order revoking motorist's driver's license for a period of three years. The District Court of Appeal, Herndon, J., held that Department of Motor Vehicles was not precluded from following mandatory statute requiring revocation of a motorist's driver's license following his conviction for driving while under the influence of intoxicating liquor, a third offense within a period of 10 years, even if in last prosecution, prosecuting officer and the court failed to plead and adjudicate facts concerning prior convictions.

Petition denied, alternative writ discharged.

1. Automobiles ⚿144.1(3)

Suspension of a motorist's driver's license by the Department of Motor Vehicles because of his conviction of driving while under the influence of intoxicating liquor, a third offense within a period of 10 years, was not invalid, even if defendant had not been adjudged guilty of a third violation by a court of law, and even though court in last conviction of motorist did not pass upon his prior offenses. West's Ann.Vehicle Code, § 13352.

2. Automobiles ⚿144.1(3)

Department of Motor Vehicles was not precluded from following mandatory statute requiring revocation of a motorist's driver's license following his conviction for driving while under the influence of intoxicating liquor, a third offense within a period of 10 years, even if in last prosecution, prosecuting officer and the court failed to plead and adjudicate facts concerning prior convictions. West's Ann.Vehicle Code, § 13352.

3. Automobiles ⚿132
Constitutional Law ⚿52, 292

Statute setting forth prescribed periods of suspension of driver's license to be applied in instances of first, second, third or subsequent offenses was not unconstitutional as invasion of province of the judiciary, nor was Department of Motor Vehicles' determination of facts upon which its revocation action was based a denial of due process in that no hearing was allowed, in view of fact suspension of license was subject to subsequent judicial review. West's Ann.Vehicle Code, § 13352; West's Ann.Const. art. 3, § 1, art. 6, § 1.

4. Automobiles ⚿144.1(3)

Whatever right a motorist had to vehicular use of the public highways ended when he abused it for the third time within 10 years by driving a vehicle while under the influence of intoxicating liquors. West's Ann.Vehicle Code, § 23102.

5. Automobiles ⚿144.2(8)

A motorist convicted of drunken driving and whose driver's license is revoked does not have a constitutional right to a restricted license to permit him to drive in the course of his employment.

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James L. Hay and Leonard B. Hankins, Long Beach, for petitioner.

Stanley Mosk, Atty. Gen., Warren H. Deering, Calvin W. Torrance, Deputy Attys. Gen., for respondent.

⊥99 HERNDON, Justice.

Petitioner herein seeks a writ of mandate directing respondent Bright, as Director of the Department of Motor Vehicles, to vacate and set aside an order revoking petitioner's driver's license for a period of three years.

The facts, as they appear from the record before us, indicate that on March 13, 1962, petitioner pleaded guilty to a charge of violating section 23102 Vehicle Code, misdemeanor drunk driving. The complaint did not contain a charge that petitioner had suffered any prior convictions for driving a motor vehicle while under the influence of intoxicating liquor. Imposition of sentence was suspended and petitioner was granted summary probation for two years upon the following conditions: (1) that he pay a specified fine; (2) that he obey all laws; and (3) that he should not drive a motor vehicle after consuming any alcoholic beverage. The only reference made to petitioner's license is found in what purports to be condition number (4) of his probation and this is the simple statement "defendant may retain license."

The record before us shows that prior to its rendition of the order here under attack, the respondent department had ⊥100 received abstracts of the above-mentioned judgment and of two previous judgments convicting petitioner of the same offense; said prior judgments were dated March 16, 1953, and September 11, 1953, respectively. On May 7, 1962, petitioner received from respondent department an "Order of Revocation" dated May 3, 1962, and indicating that his driving privileges had been revoked for a period of three years under the authority of section 13352(e) Vehicle Code because of his conviction on March 13, 1962, of "driving while under the influence of intoxicating liquor, a third or subsequent offense within a period of ten years."

On May 21, 1962, petitioner's attorney wrote respondent department a letter requesting a hearing under section 14100, Vehicle Code, on the ground that petitioner needed his license in his employment and was "covered by liability insurance." This letter also states that petitioner "was tried as a first offender * * * and * * * sentenced as such * * * [and] it is therefore submitted that this case *more properly* falls within the provisions of Section 13352(a) rather than (e) * * *" (Emphasis added.) Said letter further states "that for over *eight* years [petitioner] was completely free of any traffic violations whatsoever * * *" (Emphasis added.)

On June 15, 1962, the department replied advising that petitioner had suffered prior convictions on March 16, 1953, and on September 11, 1953; and that since the revocation of his license was *mandatory* under these circumstances, there being no provision in the Vehicle Code which would permit the issuance of a license before said revocation ended, "a hearing would not be in order at this time."

Petitioner alleges that his counsel traveled to Sacramento to discuss the matter with the department personally "for the purpose of securing a modification of Respondent's order *so that Petitioner would be able to drive a motor vehicle during the course of his employment.*" (Emphasis added.) The department again advised him that no such modification was possible under the provisions of Vehicle Code and that a hearing seeking to secure same would therefore serve no useful purpose.

It should be noted that petitioner does not assert that he was ever denied a hearing on the question whether or not he had or had not suffered the prior convictions, or whether the department had mistakenly confused his record with that of some other party. No such assertion has ever been made nor has any such hearing been requested. Both petitioner and ⊥101 respondent appear to agree that the prior convictions *had* in fact occurred, and that the only ground asserted as a basis for altering the department's order would be either (a) petitioner's alleged hardship, or (b) the invalidity of the order itself as asserted by the petition herein.

[1] Petitioner's first claim of invalidity is based upon the fact that he "has not been *adjudged* guilty of a third violation * * * *by a Court of Law*" and that the court in his latest conviction did not *pass upon* his priors. As the result of this circumstance, petitioner apparently has been spared the payment of the minimum fine and the five days incarceration required by section 23102, Vehicle Code. Obviously, this was not prejudicial to petitioner, and if he had desired a *judicial* determination of the question of priors, the court undoubtedly would have granted it if he had presented the true facts at the time of his trial and sentencing.

[2] Petitioner, however, asserts that because the prosecuting officer and the court failed, for whatever reasons, to plead and adjudicate the facts concerning his past convictions, the department was precluded from following the mandatory statute which governed its action following his latest conviction. For this unusual proposition he cites People v. Ratner, 67 Cal.App.2d Supp. 902, 153 P.2d 790, and 39 Ops.California Atty.Gen. Advance sheet 13. However, the issue discussed in both these citations is the limited one involving the punishment to be administered to a defendant *by the court* and not the related but separate duties of the Department of Motor Vehicles. Even the striking or dismissal of a charge of prior convictions is not the equivalent of a determination that a defendant did not in fact suffer the conviction. (People v. Burke, 47 Cal.2d 45, 51, 301 P.2d 241.)

Section 13352, Vehicle Code, provides: "The department *shall immediately* suspend or revoke the privilege of any person to operate a motor vehicle upon receipt of *a duly certified abstract of the record of any court showing that the person has been convicted of driving a motor vehicle while* *under the influence of intoxicating liquor.* The suspension or revocation shall be as follows: * * *." Thereafter follow the prescribed periods of suspension or revocation to be applied in instances of first, second, third or subsequent offenses.

The only precedent event required as a basis for action by the department is receipt by it of "*a record*" of conviction. There is no requirement that the record of any conviction must indicate the number of convictions which ⊥102 preceded it. This is, of course, in keeping with the other provisions of the Vehicle Code in this regard, for it is the *department* that is to advise the *court* of prior convictions (section 13209) and not that the *court* advise the *department* (section 13210). Further, section 1807, Vehicle Code, provides that "The department is not required to maintain records relating to drivers of motor vehicles after the records are, in the opinion of the director, no longer necessary, *except that records of convictions* shall be maintained so long as *they may form the basis of license suspensions or revocations as prior convictions* * * *." (Emphasis added.)

[3] Petitioner also argues that if it can be said that the statutes purport to give the power to count the number of convictions without a counting by the court, this constitutes an "invasion of the province of the judiciary in violation of the California Constitution." This contention, however, has been determined against petitioner by our Supreme Court in Escobedo v. State of California, 35 Cal.2d 870, at page 877, 222 P.2d 1, at page 6, when it stated: "Giving to the Department of Motor Vehicles the power and duty to find the facts on which suspension of license depended, and to exercise limited 'judgment,' did not violate section 1 of article III or section 1 of article VI of the state Constitution [citations]."

Petitioner next contends that the order is invalid because, even if the department could determine the facts upon which its mandatory action is based, it is a denial of "due process" not to allow him a hearing thereon. This also was decided contrary to petitioner's contention in Escobedo v. State of California, supra, when the court stated at page 876, 222 P.2d at page 5: "Suspension of the license without prior hearing but subject to subsequent judicial review did not violate due process if reasonably justified by a compelling public interest."

In DiGenova v. State Board of Education, 45 Cal.2d 255, at page 260, 288 P.2d 862, at page 865, in dealing with the summary revocation of a teacher's license, the court stated: "In the revocation of a license for the conviction of a specified crime under statutes like section 12756 [of the Education Code] there is no real necessity for the board to 'examine the facts, resolve any conflicts in the evidence, and exercise its judgment with respect thereto' [citation]. There can be little dispute as to the conviction as it is a matter of public record and the question of identity is not likely to arise. * * * Revocations on such grounds constitute ministerial action by the board rather than quasi judicial action." Further, at page 262, 288 P.2d at page 867, the ⊥103 court quoted Ratliff v. Lampton, 32 Cal.2d 226, 227, 195 P.2d 792, 793, 10 A.L.R.2d 826, as follows: "'We are not concerned with those provisions which make it mandatory upon the department to revoke or suspend the privilege of any person to operate a motor vehicle upon the highway upon receipt of a record showing that he has been convicted of certain specified offenses. [Citations.] In such cases the facts have already been determined in the criminal proceeding.'"

Because of the public importance of this problem, the following language of Hough v. McCarthy, 54 Cal.2d 273, 285, 5 Cal.Rptr. 668, 676, 353 P.2d 276, 284, also deserves repetition: "Suspension or revocation of a driver's license without a prior hearing does not violate due process where the action is justified by a compelling public interest. [Citation.] Such a public interest in the immediate suspension of licenses of persons convicted of drunk driving is shown by the factors which the director has taken into consideration. The order suspending petitioner's license shows that the director relied upon the administrative determination that ordinary methods of persuasion have failed to stop the increase in accidents due to drunk driving and that the frequency of such accidents will be enhanced by increased congestion on the highways. In 1959 there were 31,763 convictions of first offense drunk driving in California * * *. The incidence of death and serious injury on the highways has undeniably assumed tragic dimensions and has been due in a significant degree to the effects of alcohol upon drivers. So long as the measures adopted do not amount to a substantial invasion of individual rights, society must not be prevented from seeking to combat this hazard * * *. [Citation.]"

[4] Petitioner's final argument is that "the arbitrary action of respondent has deprived petitioner of a right as well as a privilege." As previously indicated, the action of the department was not *"arbitrary"*, but by law was *"mandatory"*. The gist of petitioner's argument herein, however, is that today the vehicular use of the public highways by a man in his occupation is a necessity, and that he has a *"right"* thereto as well as a *"privilege"*. Without being drawn into semantic niceties, it is sufficient to say that whatever "right" petitioner had ended when he thrice abused it. It is also argued that "his violation of Section 23102 of the Vehicle Code upon which Respondent has based its action occurred on a Sunday while he was driving his pleasure vehicle and not engaged in his employment." He further submits that any record possessed by respondent "which 104 could possibly be identified with Petitioner through judicial procedure would reveal that he has never been guilty of such a violation while driving during the course of his employment."

[5] We are wholly unable to perceive what consolation a victim of a drunken driver would derive from the fact that he had been maimed by a driver in quest of pleasure rather than one engaged in his employment. Since the Legislature has seen fit not to trust repeated drunken drivers to operate their vehicles under restricted licenses while engaged in their employment, this court certainly will not determine that such persons have a constitutional right to be thus trusted.

The petition is denied. The alternative writ is discharged.

FOX, P. J., and ASHBURN, J., concur.

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208 Cal.App.2d 291

David B. EVERETT, Plaintiff and Appellant, 291

v.

CALIFORNIA TEACHERS ASSOCIATION, Southern Section, an Association, et al., Defendants and Respondents.

Civ. 26059.

District Court of Appeal, Second District,
Division 2, California.
Oct. 9, 1962.

An action was brought for alleged libel. The Superior Court of Los Angeles County, Frank S. Balthis, J., rendered a judgment of dismissal, and the plaintiff appealed. The District Court of Appeal, Fox, P. J., held that complaint alleging that defendants, who were teachers' association and members thereof, were requested to make study and report of problems in elementary schools in certain school district by chapter of association in that district, and that defendants made study and published report, which was critical of plaintiff's qualifications for position of acting superintendent and of performance of plaintiff's duties, disclosed existence of privilege, no malice on part of defendants, and no abuse of privilege.

Judgment affirmed.

1. Libel and Slander 🔑93

Normally, privilege is affirmative defense which must be pleaded in answer in libel action. West's Ann.Civ.Code, § 47, subd. 3.

2. Libel and Slander 🔑83

If libel complaint discloses existence of qualified privilege, complaint must allege malice to state cause of action. West's Ann. Civ.Code, § 47, subd. 3.

3. Libel and Slander 🔑48(1)

Publication seeking to convey pertinent information to public in matters of public interest comes within purview of "privilege" which is defense in libel action. West's Ann.Civ.Code, § 47, subd. 3.

See publication Words and Phrases for other judicial constructions and definitions.

4. Libel and Slander 🔑100(5)

To destroy privilege plaintiff in libel action was required to allege and prove that defendants entertained toward him feeling of hatred or ill will going beyond that which occasion apparently justified and different from that which prima facie rendered communication privileged, and motive contrary to good morals. West's Ann.Civ.Code, §§ 47, subd. 3, 48a, subd. 4(d).

5. Pleading 🔑8(2)

Allegations in complaint that defendants' report contained false, libelous, malicious and defamatory statements concerning plaintiff, and that defendants maliciously and with intent to injure, disgrace, and defame plaintiff and to bring him into public discredit published report and statements therein were nothing more than mere conclusions of pleader that defendants were guilty of malice, unless defendants' report lent support to conclusions. West's Ann. Civ.Code, §§ 47, subd. 3, 48a, subd. 4(d).

6. Libel and Slander 🔑83

Complaint alleging that defendants, who were teachers' association and members thereof, were requested to make study and report of problems in elementary schools in certain school district by chapter of association in that district, and that defendants made study and published report which was critical of plaintiff's qualifications for position of acting superintendent and of performance of plaintiff's duties disclosed existence of privilege, no malice on part of defendants, and no abuse of privilege. West's Ann.Civ.Code, §§ 47, subd. 3, 48a, subd. 4(d).

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Alexander Lloret Mazzia, Torrance, for appellant.

Tanner, Odell & Taft, Donald W. Odell, Sackett & Francoeur, Harry Sackett, Los Angeles, Johnson & Stanton, Gardiner Johnson, Thomas E. Stanton, Jr., San Francisco, for respondents.

FOX, Presiding Justice. 292

The plaintiff in this action was Acting Superintendent of the Wiseburn School District from July 1959 to May 1960, at which time he became the Assistant Superintendent, Curriculum, of the same school district. 293 He held this latter position at the time of the filing of the complaint.

In June 1960, the defendants published a certain report entitled "A Report on a Professional Problem in the Wiseburn Elementary Schools."[1] Plaintiff brought this action for libel against the California Teachers Association, Southern Section, and twelve named individuals. All of the defendants filed a general demurrer which was sustained by the trial court without leave to amend.[2] Plaintiff appeals from the ensuing judgment of dismissal.

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[1] No useful purpose would be served in setting out the alleged defamatory statements verbatim. Suffice it to say that they are critical of plaintiff's qualifications for the position of Acting Superintendent and of the performance of his duties in that position.

[2] The trial court's rationale in sustaining the demurrer is indicated in its minute order wherein it was stated: "From the face of the complaint, the matter is privileged, Section 47(3) Civil Code, as being a report of a professional nature; no facts of malice are shown and exhibit

[1, 2] "Normally, privilege is an affirmative defense which must be pleaded in the answer [citation]. However, if the complaint discloses existence of a qualified privilege, it must allege malice to state a cause of action (Locke v. Mitchell, 7 Cal.2d 599, 602, 61 P.2d 922, [923])." (Morris v. National Federation of the Blind, 192 Cal.App.2d 162, 164–165, 13 Cal.Rptr. 336, 338; see cases collected in 51 A.L.R.2d 552, 557–559.) The first issue to be decided on this appeal therefore is: Does the complaint disclose the existence of a privilege? The answer to this inquiry is in the affirmative.

The following allegations in the complaint assert facts which show a qualified privilege under Civil Code section 47(3):[3] Paragraph II of the complaint names one of the defendants as the "California Teachers Association, Southern Section." Plaintiff alleges in paragraph III that the other defendants "were members of the Commission on Personnel Standards and Ethics of said association and were members of the association; that said defendants were duly appointed by said association and were acting on behalf of the association, and on behalf of themselves in the preparation ⊥294 and publication of a certain report entitled 'A REPORT ON A PROFESSIONAL PROBLEM IN THE WISEBURN ELEMENTARY SCHOOLS; * * *'" And in paragraph IV, it is alleged: "That plaintiff was at all times hereinafter mentioned and is now an employee of the Wiseburn School District, County of Los Angeles, State of California; that, during the period from July 10, 1959, to May 16, 1960, plaintiff was Acting Superintendent of said district; that plaintiff now is and since May 17, 1960, has been Assistant Superintendent, Curriculum, of said district; that plaintiff is qualified and duly accredited by the State of California to serve in the capacities of Acting Superintendent, Assistant Superintendent, Curriculum, and Curriculum Director."

[3] A publication seeking to convey pertinent information to the public in matters of public interest comes within the purview of the privilege in Civil Code section 47(3). (Howard v. Southern California etc. Newspapers, 95 Cal.App.2d 580, 213 P.2d 399.) "We may take judicial notice of the fact that the overwhelming majority of the citizens of this country are interested in such matters and in questions which affect the education and proper training of our youth." (Harris v. Curtis Publishing Co., 49 Cal.App.2d 340, 350, 121 P.2d 761, 766.)

In Heuer v. Kee, 15 Cal.App.2d 710, p. 715, 59 P.2d 1063, p. 1065, in upholding a similar claim of privilege, the court said: "The conduct of appellant in the discharge of her duties as a teacher was a matter of public concern, and there was sufficient evidence to justify the trial court in concluding that the publication of the matter complained of was, in the instant case, for the public benefit."

In addition to the public's interest and concern in these matters, certificated public school employees and their associations have a legitimate interest in investigating and reporting on the conduct of an individual certificated employee.

The report, therefore, *if without malice,* was a privileged communication within the meaning of section 47(3), Civil Code. "In such a case malice becomes the gist of the action and it must exist *as a fact* before the cause of action will lie. * * * Hence, where the complaint discloses a case of

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'A' prevails over the general allegations; See Loche [sic] vs. Mitchell, 7 Cal.2d 599 [61 P.2d 922]."

[3] Civil Code section 47(3) provides: A privileged publication or broadcast is one made "in a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

qualified privilege, no malice is presumed[4] and in ⌊295 order to state a cause of action the pleading must contain affirmative allegations of *malice in fact*." (Locke v. Mitchell, 7 Cal.2d 599, 602, 61 P.2d 922, 923.) (Emphasis added.)

Plaintiff in the instant case has set forth *no facts* showing that malice existed at the time the communication was published. It is alleged in the complaint that the report contains certain "false, libelous, malicious and defamatory" statements concerning plaintiff and "[t]hat defendants and each of them wickedly and maliciously and with intent and design to injure, disgrace, and defame plaintiff and to bring him into public discredit published said report and statements therein complained of and that said published statements as quoted in paragraphs VI through XVI herein were false, libelous, malicious, defamatory, and unprivileged; that defendants and each of them intervened in Wiseburn School District affairs and intentionally and maliciously defamed plaintiff in an attempt to cause the dismissal of plaintiff from his employment; that because of said wilful and malicious publication, plaintiff is entitled to recover exemplary and punitive damages in the sum of $200,000.00."

[4, 5] To destroy the privilege plaintiff must allege and prove that defendants entertained toward him a feeling of hatred or ill will "'* * * going beyond that which the occasion apparently justifies * * * '" and "'"* * * different from that which *prima facie* rendered the communication privileged, and being a motive contrary to good morals."'" (DeMott v. Amalgamated Meat Cutters, 157 Cal.App.2d 13, 27, 320 P.2d 50, 58; cf. Civil Code, sec. 48a 4(d).) The above allegations appear to be nothing more than mere conclusions of the pleader *"unless the article itself lends support to such a conclusion."* (Locke v. Mitchell, supra, 7 Cal.2d 599, 603, 61 P.2d 922, 924; Taylor v. Lewis, 132 Cal.App. 381, 384, 22 P.2d 569.) (Emphasis ours.)

The report in the case *sub judice* does not support the conclusion that it was maliciously published. The report shows:

Defendants are the California Teachers Association, Southern Section, an incorporated professional organization of teachers, and the members of the Commission on Personnel Standards and Ethics of that organization.

The Commission was requested to make its study and report by the Wiseburn Faculty Association, a chartered chapter of the California Teachers Association, all but one of whose members in 1960 were members of the California Teachers ⌊296 Association. Prior to requesting the study, the Faculty Association had conducted a survey which showed that 83.5% of the teachers in the district "felt that the teacher morale was unsatisfactory," 74.7% felt that "the general working conditions in the Wiseburn District were unsatisfactory" and 83% "believed that the acting superintendent [plaintiff] was not doing a satisfactory job."

The cooperation of the plaintiff in the study was sought but the Commission was advised by him that "he would not meet for an interview."

Subsequently a letter was mailed to plaintiff stating, *inter alia*: "I would like to assure you that the Commission is doing everything possible to maintain a neutral position on all issues involved in the Wiseburn School District. It is the Commission's sincere hope and objective to gather all information that will permit the Commission to objectively pinpoint the issues, their origin and possible solutions. Any assistance you, as an individual, can give in an interview with the Commission will be greatly appreciated."

Defendants' findings, which contain six of the eleven statements alleged to be libelous, merely summarize the evidence presented to the defendants. Since plaintiff was the acting superintendent of the district during the period under study, much of the evidence related to his qualifications and manner of performance of duties. There was other evidence, however, which was critical of the board members, and it cannot be fairly said that plaintiff was singled out for special, vindictive treatment. Plaintiff and the board members had the opportunity to present rebuttal or explanatory evidence, but they refused to do so, and such refusal should not bar defendants from making a fair report of the evidence they did receive, as a necessary basis for their conclusions and recommendations.

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[4] Civil Code section 48 provides that in the case provided for in Civil Code § 47 (3), "malice is not inferred from the communication." (Footnote ours.)

Defendants' conclusions and recommendations dealt impartially with the board members, plaintiff as the acting superintendent and the regular superintendent. Like the evidence defendants heard, the conclusions and recommendations were critical of all of these individuals, but all of the criticism dealt with matters which invited public attention and called for public comment and none of it was of the sort which would follow the individuals into their private lives or pry into their domestic concerns. The board members were public officers and the plaintiff was a public employee and a member of the teaching profession, and public policy and the interest ⊥297 and necessities of society require that they be freely subject to the critical appraisal of a professional commission such as the one defendants constituted.

The statement in Eva v. Smith, 89 Cal. App. 324, 328–329, 264 P. 803, 804, is here apropos: "Taking the article as a whole, it seems clear to us that it amounts to no more than a criticism of plaintiff's qualifications for office and one which defendant was entitled to make. No malversation on the part of plaintiff is charged. * * * Nor does the article charge that plaintiff was guilty of dishonest conduct with reference to any public contracts. An individual who seeks or accepts public office invites and challenges public criticism so far as it may relate to his fitness and qualifications, and it is a proper subject of comment. * * * The distinction between criticism and defamation is that the former deals only with such things as invite public attention or call for public comment, and does not follow a public man into his private life or pry into his domestic concerns, but only his work. [Citations.] The right of criticism rests upon public policy, and those who seek office should not be supersensitive or too thin-skinned concerning criticism of their qualifications [citation]. * * * The purpose of the rule permitting fair and honest criticism is that it promotes the public good and hence is based upon public policy. [Citation.]"

[6] Since the privilege is not shown to be abused on the face of the complaint, it follows that the sustaining of the demurrer was not error. (Taylor v. Lewis, supra, 132 Cal.App. 381, 22 P.2d 569.)

In his brief plaintiff makes no argument on the theory that the court abused its discretion in sustaining the demurrer without leave to amend. Nor does he suggest that he had any additional facts to allege.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

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208 Cal.App.2d 360

⊥ **The PEOPLE of the State of California, Plaintiff and Respondent,** ⊥360

v.

Donald R. HEAD and Richard A. Padilla, Defendants and Appellants.

Cr. 8028.

District Court of Appeal, Second District, Division 4, California.

Oct. 10, 1962.

Hearing Denied Dec. 5, 1962.

Prosecution on charge of selling and furnishing a narcotic. From adverse judgments of the Superior Court, Los Angeles County, J. Howard Ziemann, J., the defendants appealed. The District Court of Appeal, Jefferson, J., held that where police officer and defendant and another person stalked a known narcotic dealer at defendant's request and officer gave defendant money on request and defendant got out of automobile and later returned and handed officer a red balloon containing heroin, criminal intent originated with the defendant and he was not entrapped into buying the heroin.

Judgments affirmed.

1. Criminal Law 🔑566

Officer's identification of defendant, who was 10 to 20 feet away from officer at time of narcotic transaction and who had had a prior narcotic transaction with the officer, was sufficient to sustain such defendant's conviction of selling and furnishing a narcotic. West's Ann.Health & Safety Code, § 11501.

2. Criminal Law 🔑566

It was not necessary that prosecution call a witness to corroborate identification testimony of police officer in prosecution for selling and furnishing a narcotic. West's Ann.Health & Safety Code, § 11501.

3. Criminal Law 🔑572

Alibi testimony of defendant need not be accepted as true by the court although not directly contradicted by another witness.

4. Criminal Law 🔑1035(1)

Claim raised for first time on appeal that defendant was denied his right to a speedy trial came too late.

5. Criminal Law 🔑576(5)

The right to a speedy trial may be waived by a defendant.

6. Criminal Law 🔑576(5)

When a defendant fails to object at time a cause is set for trial beyond the statutory period, consent is presumed.

7. Criminal Law 🔑330, 739(1)

Entrapment is an affirmative defense imposing upon accused burden of proving that he was induced to commit crime of which he is charged, and existence or nonexistence of entrapment is a question of fact for trier of fact.

8. Criminal Law 🔑739(1)

Entrapment as a matter of law is not established where there is any substantial evidence in record from which it may be inferred that criminal intent to commit particular offense originated in mind of accused.

9. Criminal Law 🔑37

Where police officer and defendant and another person stalked known narcotic dealer at defendant's request and officer gave defendant money on request and defendant got out of automobile and later returned and handed officer a red balloon containing heroin, criminal intent originated with defendant and he was not entrapped into buying heroin. West's Ann. Health & Safety Code, § 11501.

◆

Donald R. Head, defendant and appellant, in pro. per.

David C. Marcus, Los Angeles, for defendant and appellant Richard A. Padilla.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and A. Wallace Tashima, Deputy Atty. Gen., for the People.

⌊362 JEFFERSON, Justice.

The Los Angeles County Grand Jury returned a secret indictment on February 20, 1961, in which defendant Donald R. Head was charged in Count I with a violation of section 11501 of the Health and Safety Code, selling and furnishing a narcotic, heroin. Defendants Head, Ernest C. Madrano and Richard A. Padilla (John Doe "Danny") were charged in Count II with a violation of the same section, selling and furnishing a narcotic, heroin. The indictment was subsequently amended to show defendant Padilla's true name. The indictment was again amended to charge two prior felony convictions against defendant Head and was further amended to charge a prior misdemeanor narcotic conviction against Padilla.

Defendants pleaded not guilty. Trial was by the court, trial by jury having been duly waived by defendant and all counsel. Each defendant and all counsel waived trial by jury on the issue of the determination of truth or falsity of the priors as alleged in the indictment.

Defendant Head was found guilty as charged in Counts I and II.

Defendant Padilla was found guilty as charged in Count II. The court made no findings on the priors. Probation was denied as to each defendant. Motions for new trial were denied. Defendant Head was sentenced to state prison for the term prescribed by law on each count and, absent an order making them run consecutively, it will be presumed the court intended that they run concurrently. Defendant Padilla was sentenced to state prison for the term prescribed by law.

Defendant Head applied to this court for appointment of counsel to assist him on appeal. This court, having made an independent investigation of the record and having determined that it would be neither advantageous to defendant nor ⌊363 helpful to this court to have counsel appointed, denied the application whereupon defendant prosecutes this appeal in propria persona. Defendant Head has filed, and the court has considered, both an opening and reply brief.

James R. Martin testified that he was an undercover officer for the narcotic division of the Los Angeles Police Department. At approximately 11:00 a. m. on January 19, 1961, he saw defendant Head walking down Broadway between 5th and 6th Streets in the City of Los Angeles. He called to defendant Head who got into his car. They picked up another person and they drove to 4th and Los Angeles Streets. Defendant Head said to the officer, "There's Johnny. Give me your bread." He gave defendant two $5 bills. Defendant got out of the officer's car and got into Johnny's car. Defendant told the officer to drive around the block twice and then pick him up. The officer followed these directions. Defendant re-entered the officer's car and stated: "Let's get out of here. Those guys are hot." The officer asked defendant, "Did you get the gram?" Defendant replied, "Yes, I tried to get it for $8 but he wouldn't go, so I gave him $20." The officer then asked for his half and the defendant removed a pink balloon from his mouth and handed it to the officer.

On the next day, January 20, 1961, officer Martin was approached by defendant at 7th and Broadway and inquired of the officer "Have you seen anybody around?" The officer indicated that he had not. Defendant said "There should be somebody at the El Paso by now, so let's go up there." They drove to the El Paso, which is located at 3rd and Hill Streets, Los Angeles, and made inquiry concerning the purchase of narcotics, but they could find no one selling. They drove to the Grand Central Market and were approached by co-defendant Madrano (not appealing), and he inquired of them, "If you want to score, I'll make it for you." Defendant Head told the officer "Give me your money." The officer gave him two $5 bills and defendant passed some currency to co-defendant Madrano. Madrano left the car and went into the Grand Central Market and approached defendant Padilla and gave him some currency. Defendant Padilla removed two red balloons from his mouth and gave them to Madrano and Madrano gave the balloons to the officer.

Defendant Head asked the officer, "Did you get the stuff?" The officer replied "Yes" and showed him the two red balloons. Defendant Head took one of the balloons from the officer's hand and co-defendant Madrano told the officer and ⌊364 defendant Head "Come and fix with us." They refused. During this transaction the officer testified he was standing between 10 and 20 feet from defendant Padilla when the balloons and currency were passed between Madrano and defendant Padilla. He recognized Padilla from a prior narcotic transaction.

Defendants and all counsel stipulated that K. R. Druley was an expert forensic chemist employed by the police department; that he may have been deemed to have been called, sworn and testified that he made an examination of the two exhibits received in evidence; that each contained five capsules of white, powdery substance and that in his opinion the powdery substance in both of the exhibits was heroin. Defendant took the stand in his own behalf. He testified that he left Los Angeles by Greyhound bus on January 18, 1962, at approximately 8:30 p. m. for Mexico City. He went with one Cistos Monteyes; their first stop was Tijuana and from there they took another bus for Mexico City. He remained in Mexico about 30 days and returned to Los Angeles during the latter part of February 1961. Prior to leaving, he obtained a visa from the Mexican consul and was given some shots by the Health Department on January 18, 1961. He has never had a mole on his left cheek (one of the identification items mentioned by officer Martin) or on his right cheek. He does have a little mole up by his eyebrow, close to the temple. He was not at the Grand Central Market on January 20, but was somewhere in Mexico at that time.

Albert E. Baker, senior communicable disease investigator of Los Angeles County Health Department testified he made a search of the county records to determine whether or not defendant Padilla had received an inoculation sometime during the month of January. He found a recorded certificate signed by one Richard Padilla who had received a smallpox immunization on January 31, 1961.

[1] Defendant Padilla contends that the evidence of his identification was insufficient to sustain his conviction. This contention is without merit. The officer testified he was 10 to 20 feet away from defendant at the time of the narcotic transaction and he recognized him; he had had a prior narcotic transaction with defendant on January 13, 1961; he had seen him prior to his arrest with his wife and child and at the time of the arrest he was with his wife and child; he was positive of his identification.

[2] "It was not necessary that the prosecution call a ⌊365 corroborating witness to support the testimony of [the officer] because this is not the type of case in which the law requires corroboration [citations]." (People v. McCrasky, 149 Cal.App.2d 630, 635, 309 P.2d 115, 118).

[3] As stated in People v. Baserto, 162 Cal.App.2d 123, 125, 327 P.2d 558, 560, "Aside from the question of rejecting [the officer's] testimony, it is also true that the court was not required to accept the alibi testimony though not directly contradicted by another witness. In other words, the judge had the prerogative of disbelieving defendant and his witness. [Citations.]"

"The uncorroborated testimony of the officer is sufficient to sustain the implied finding as to defendant's identity. [Citations.]" (People v. Shepherd, 200 A.C.A. 305, 310, 19 Cal.Rptr. 234, 237; See also People v. Smith, 174 Cal.App.2d 129, 134, 344 P.2d 435, 437.)

[4] Defendant Padilla next contends that he was denied his right to a speedy trial pursuant to the United States Constitution and the California Constitution. This contention is also without merit. Defendant raises this contention for the first time on appeal. He comes too late. He waived any right he had to insist that he be tried at an earlier date when he failed to object at the time the cause was set for trial. Defendant not only did not raise an objection at the time the matter was called for trial but requested a continuance of the trial date.

[5] "The right to a speedy trial is one which defendants can waive. [Citations.]" (People v. Weiss, 50 Cal.2d 535, 558, 327 P.2d 527, 541.)

[6] "When a defendant fails to object at the time a cause is set for trial beyond the statutory period, consent is presumed. [Citations.]" (People v. Contrerai, 172 Cal.App.2d 369, 371, 341 P.2d 849, 851.)

[7] Defendant Head contends he was entrapped into committing the crime as charged in Count I of the indictment. We find no merit in this contention. "Entrapment is an affirmative defense imposing upon the accused the burden of proving that he was induced to commit the crime of which he is charged, and the existence or nonexistence of entrapment is a question of fact for the trier of fact who is the sole judge of the weight and worth of the evidence. [Citations.]" (People v. Castro, 167 Cal.App.2d 332, 337, 334 P.2d 602, 605.)

Defendant further urges in his brief that entrapment was shown as a matter of law.

⊥366 ⊥ [8] "Entrapment as a matter of law is not established where there is any substantial evidence in the record from which it may be inferred that the criminal intent to commit the particular offense originated in the mind of the accused. [Citation.]" (People v. Terry, 44 Cal.2d 371, 372, 282 P.2d 19, 20.)

[9] While we have reviewed the evidence at some length, we will discuss it briefly further. The officer with defendant and another person stalked a known narcotic dealer at this defendant's request; defendant apparently knew the narcotic dealer for he stated to the officer, "There's Johnny. Give me your bread." (Which in narcotic parlance means, "Give me your money.") The officer complied and gave him two $5 bills. Defendant got out of the car, later joined the officer and handed him a red balloon containing heroin. It is to be noted that defendant asked the officer for the money as soon as he saw the dealer. Here the evidence shows defendant was not reluctant in making the buy. A review of the record here shows there was substantial evidence to support the trial court's implied finding that the criminal intent originated not with the officer but with defendant. There was substantial evidence before the trial court and he drew a reasonable inference from the evidence that the undercover agent did not entrap defendant to buy the heroin.

A further review of the evidence in this matter would serve no useful purpose. We conclude the evidence was sufficient to justify the conviction on both Counts I and II and the defendant was not entrapped as a matter of law.

Judgments of conviction affirmed.

BURKE, P. J., and FORD, J.,* concur.

Hearing denied; WHITE, J., sitting pro tem.

* * *

208 Cal.App.2d 443

⊥ **The PEOPLE of the State of California, Plaintiff and Respondent,** ⊥443

v.

Richard M. GALVAN, Defendant and Appellant.

Cr. 1815.

District Court of Appeal, Fourth District, California.

Oct. 11, 1962.

Hearing Denied Dec. 5, 1962.

Defendant was convicted in the Superior Court, San Diego County, William P. Mahedy, J., of sale of narcotics with prior conviction of felony and he appealed from judgment and from order denying new trial. The District Court of Appeal, Stone, J., held that two months' delay in arresting defendant after alleged sale of narcotics did not constitute suppression of evidence or denial of due process on theory that it permitted informer to leave state so that defendant was deprived of material witness, where there was no design by enforcement officers or prosecution to prevent appearance of informer whose whereabouts and identity were disclosed to defendant, arrest was delayed to preserve anonymity of undercover agent and informer could have been subpoenaed by defendant.

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* Assigned by Chairman of the Judicial Council.

Affirmed.

1. Constitutional Law 🔑262
Witnesses 🔑216

Two months' delay in arresting defendant after alleged sale of narcotics did not constitute suppression of evidence or denial of due process on theory that it permitted informer to leave state so that defendant was deprived of material witness, where there was no design by enforcement officers or prosecution to prevent appearance of informer whose whereabouts and identity were disclosed to defendant, arrest was delayed to preserve anonymity of undercover agent and informer could have been subpoenaed by defendant. West's Ann.Pen. Code, § 1334 et seq.

2. Criminal Law 🔑577

Defendant could not in good conscience argue that he was allowed insufficient time to prepare for trial, where trial, which was originally set for July 31, was continued to October 6 at his request.

3. Criminal Law 🔑598(5)

In absence of defendant showing diligent attempt to locate and subpoena informer who was outside state, it was not error to deny his request for continuance in order to locate informer. West's Ann.Pen. Code, § 1334 et seq.

4. Criminal Law 🔑608

Defendant's offer of proof concerning his efforts to locate informer, who was outside state, was properly denied, where defendant failed to show due diligence in effort to locate informer and subpoenas secured two days before trial were issued to agencies which had no control over informer, although defendant knew that informer was under supervision of third agency. West's Ann.Pen.Code, § 1334 et seq.

5. Criminal Law 🔑778(10)

Refusal of defendant's requested instruction pertaining to inference arising from failure of party controlling witness to call witness to testify was proper, where evidence did not support assumption that informer, who was outside state and was not called by prosecution, was within control of prosecution and it was not duty of prosecution to call informer as witness. West's Ann.Pen.Code, § 1334 et seq.

6. Criminal Law 🔑661

Prosecution is not required to call any particular witness, nor to put on all evidence relating to charge so long as all material evidence bearing thereon is fairly presented in such manner as to accord to defendant fair trial.

7. Criminal Law 🔑829(4)

Refusal to give defendant's proffered instruction on entrapment was not improper, where substance of defendant's proposed instruction was fully covered by two instructions given by court.

8. Criminal Law 🔑834(2)

Court is not bound to give particular instruction submitted by party simply because it is applicable to case.

9. Criminal Law 🔑834(1)

Appropriate instructions may be selected by court from those submitted by parties, or court may use its own instructions, provided instructions given by court embrace and fairly state all points of law on all material elements of case.

◆

Peter J. Hughes, San Diego, under appointment by the District Court of Appeal, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Richard S. Cohen, Deputy Atty. Gen., for respondent.

⊥STONE *, Justice. ⊥445

Defendant was charged by indictment with two counts of sale of narcotics, violation of Health and Safety Code, section 11501, and, by a supplement to the indictment, with a prior conviction of a felony. Defendant admitted the prior conviction but pleaded not guilty to each count of the indictment. A jury found him guilty on each count. His motion for a new trial was denied; judgment was entered pursuant to the jury verdict; and he was sentenced to the state prison on each count, the sentences to run concurrently. Defendant has appealed from the judgment and from the denial of his motion for a new trial.

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* Assigned by Chairman of Judicial Council.

Fernando A. Maldonado was an agent for the Bureau of Narcotic Enforcement of the State of California, doing undercover work in the San Diego area between January and May, 1961. One Effrem Tucker was a "special employee" of the Bureau. Maldonado described a special employee as "a person employed and is paid, in this case was paid $10 per day for giving us information and introducing me to narcotic users and peddlers here in the San Diego area." On March 5 Maldonado, with Tucker as a passenger, parked a State automobile next to a curbing in the San Diego area. Prior to ⊥446 that Tucker had "set-up" a rendezvous at this location with defendant, who was waiting. He approached on the passenger's side, Tucker informed him that he and Maldonado were looking for "stuff," referring to heroin; Maldonado passed Tucker $20 and Tucker handed it to defendant. In return defendant handed four papers to Tucker, who passed them on to Maldonado. The four papers contained heroin. Two days later Maldonado, with Tucker as his passenger, parked his car at the rear of defendant's car on a public street in San Diego. The meeting had been prearranged by Tucker. Defendant walked back to the car, approaching Tucker on the passenger's side. Again Maldonado gave Tucker $20, Tucker passed the money to defendant who, in turn, handed four white papers to Tucker and Tucker passed them to Maldonado. They contained heroin.

Maldonado testified that he masqueraded as a fisherman from San Pedro looking for a source of narcotics; that he enlisted Tucker's aid to make contact with a seller; that Tucker arranged for him to meet defendant. Although the narcotic sales occurred on March 5 and March 7, defendant was not arrested until May 12. The delay in defendant's arrest was occasioned by Maldonado's operations as an undercover agent. His relations with persons trafficking in narcotics required that Maldonado retain his anonymity until May 12.

The record is not clear whether defendant learned of Tucker's identity on May 12, at the time he was arrested, or on May 16, when he was arraigned and served with a transcript of the proceedings before the grand jury. In any event, on May 16 the transcript revealed to defendant that Tucker had acted as an informer. It also revealed that Tucker had been arrested for burglary prior to his participation in the narcotics sales on March 5 and 7; that Tucker pleaded guilty to the charge of burglary; that on March 24, by proceedings in the Superior Court of San Diego County, he was placed on five years' probation; that as a condition of probation Tucker was committed to the United States Public Health Service Hospital in Texas for treatment as a narcotics addict.

Defendant does not challenge the sufficiency of the evidence to prove that the sales were made. His appeal is centered upon his defense of entrapment, his contention being that Tucker furnished him the narcotics and induced him to sell them to Maldonado as a favor. Defendant testified that he simply acted as a "front" for Tucker. This he did after Tucker explained that Maldonado had purchased narcotics ⊥447 from him in the past but that he would not buy from him now because Maldonado claimed the narcotics had been of poor quality. Tucker persuaded defendant to make the sales for him and allay Maldonado's doubts.

It is not denied by the prosecution that defendant's arrest was delayed in order to preserve Maldonado's anonymity. This delay, argues defendant, permitted Tucker to leave California between the time the alleged crimes were committed and the time of defendant's arrest, so that defendant was deprived of a material witness at his trial. This, it is asserted, constitutes suppression of evidence by the prosecution, a denial of due process, and reversible error.

[1, 2] The record reflects that defendant at the time of his arraignment May 16, was aware of the identity and whereabouts of the informer, Tucker. However, the record discloses no effort on the part of defendant to locate Tucker prior to October 4, two days before the trial. Furthermore, defendant cannot in good conscience argue that he was allowed insufficient time to prepare for trial since the trial, which was originally set for July 31, was continued to October 6 at his request.

Defendant relies largely upon the reasoning of the court in People v. Kiihoa, 53 Cal. 2d 748, 3 Cal.Rptr. 1, 349 P.2d 673. The case at bar is distinguishable from the Kiihoa case in three important respects. First, the informer here was not sent out of the State by the police or the prosecution, as in Kiihoa. There was no design by enforcement officers or the prosecution to prevent the informer from appearing as a witness for the defendant. The Superior Court ordered the informer committed to a Federal hospital for narcotics addicts in Texas as one of the conditions of his five-year term of probation.

Second, the delay in defendant's arrest was not for the purpose of preventing his learning the identity of the informer, but to preserve the anonymity of the undercover agent, Maldonado, who was working on other cases. To have arrested defendant and disclosed the identity of the agent would have destroyed the efficacy of preliminary work by the agent with other persons suspected of trafficking in narcotics.

The third distinction is that in Kiihoa when the defendant was arrested the police disclaimed any knowledge of the informer's whereabouts. The police, by design, made it impossible for Kiihoa to locate the informer to seek his assistance in preparing his defense. In the case before us the whereabouts of the informer and his identity were disclosed to ⌊448 defendant. Furthermore the informer, although in a Government hospital in the State of Texas, was under the supervision of the San Diego County Probation Office. There is nothing in the record indicating that the informer could not have been subpoenaed pursuant to Penal Code, section 1334 et seq.

The three critical circumstances just related not only distinguish the case at bar from People v. Kiihoa, supra, but they also bring the case within the ambit of People v. Sauceda, 199 A.C.A. 47, 56, 18 Cal.Rptr. 452; People v. Wilburn, 195 Cal.App.2d 702, 705, 16 Cal.Rptr. 97; People v. Castedy, 194 Cal.App.2d 763, 768, 15 Cal.Rptr. 413; People v. McKoy, 193 Cal.App.2d 104, 110, 13 Cal.Rptr. 809; People v. Givens, 191 Cal.App.2d 834, 840, 13 Cal.Rptr. 157. The rationale of these cases is summarized in People v. Sauceda, supra, page 56, 18 Cal. Rptr. page 457 as follows:

> "In all of these cases, as in People v. Kiihoa, supra, the suspect was not arrested until after the informant had left the jurisdiction. Yet, the cases have uniformly held that in the void of specific testimony that the police encouraged the informer to disappear [as was the case in Kiihoa], the courts cannot infer improper motives or activities on the part of the officers, but must presume that the officers regularly and lawfully performed their duties (People v. Farrara, 46 Cal.2d 265, 294 P.2d 21), as well as that the payment for and termination of an informer's employment is not in and of itself 'encouraging him to disappear.' (People v. Wilburn, supra.)"

[3] If we understand defendant's argument, it is that intentional delay in making an arrest for the purpose of withholding the identity of an informer, cannot be justified upon the ground of public interest if the delay deprives a defendant of a substantial right. It is apparent that defendant's argument paraphrases the reasoning expressed by the Supreme Court in People v. McShann, 50 Cal.2d 802, 330 P.2d 33; Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39; and Mitchell v. Superior Court, 50 Cal.2d 827, 330 P.2d 48. It cannot be de-

nied that two fundamental judicial concepts, public interest and the right of an accused to defend himself, are here in conflict. However this case is not a suitable vehicle for pursuing the interesting question of when the right of an accused to defend himself outweighs public interest in delaying an arrest to protect an informer, because defendant has made no showing that by the exercise of a reasonable ⊥449 amount of effort he could not have secured the presence of the informer as a witness. Defendant's own lack of due diligence contributed largely to the circumstance about which he now complains. The record reveals no excuse for the failure to attempt to locate and subpoena the informer pursuant to Penal Code, section 1334 et seq., nor does defendant's brief offer any explanation for this neglect. Also it follows from defendant's failure to make a showing of due diligence that it was not error to deny his request for a continuance in order to locate the informer. (People v. McShann, 177 Cal.App.2d 195, 200, 2 Cal.Rptr. 71.)

[4] The foregoing discussion of defendant's first ground of appeal disposes of his second contention that the court erred in denying his offer of proof concerning his efforts to locate the informer. The trial court was justified in not permitting this evidence to go to the jury because the offer of proof showed, in addition to the facts hereinabove set forth, that the subpoenas secured two days before the trial were issued to agencies which had no control over the informer. Counsel for defendant had knowledge that the informer was under the supervision of the Probation Office, yet he had subpoenas issued in care of the State Bureau of Narcotics, and in care of San Diego Police Department Narcotics Detail. Each agency returned the subpoena, denying knowledge of Tucker's whereabouts. Thus defendant's offer of proof failed to support his charge that the prosecution was guilty of willful suppression of evidence.

[5, 6] Likewise defendant's failure to make an adequate offer of proof that there was suppression of evidence negates his argument that the court erred by refusing to give his instruction on the subject. Defendant offered the following:

> "DEFENDANT'S REQUESTED INSTRUCTION NO. 6 If the evidence demonstrates that a witness could give material and relevant testimony on the issues in question and that the ability to have such a witness available at trial was within the control of one of the parties but such witness was not called to testify, then you may infer that if such witness were called to testify, that he or she would give testimony adverse to the side failing to call such witness."

The court chose to give CALJIC No. 23, which reads:

> "Neither the prosecution nor the defense is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence, or who ⊥450 may appear to have some knowledge of the matters in question in this trial; nor is the prosecution or defense required to produce as exhibits all objects or documents that have been referred to in the testimony, or the existence of which may have been suggested by the evidence."

We believe defendant's argument is untenable, first, because his instruction assumes that Tucker was within the control of the prosecution. The instruction recites "that the ability to have such a witness available at trial was within the control of one of the parties * * *" The evidence does not support this assumption. Second, defendant's argument presupposes that it was the duty of the prosecution to call the informer as a witness. The prevailing rule is stated in People v. Kiihoa, supra, 53 Cal. 2d page 752, 3 Cal.Rptr. page 3, 349 P.2d page 675, as follows:

> "The prosecution is not required to call any particular witness, nor to put on all the evidence relating to a charge so long as all material evidence bearing thereon is fairly presented in such a

> manner as to accord to the defendant a fair trial. People v. Tuthill, 31 Cal.2d 92, 98, 187 P.2d 16; People v. Parry, 105 Cal.App.2d 319, 232 P.2d 899."

(See also People v. McShann, supra, 177 Cal.App.2d 195, 199, 2 Cal.Rptr. 71; People v. Castedy, supra, 194 Cal.App.2d 763, 769, 15 Cal.Rptr. 413.)

And again in Kiihoa, page 752, 3 Cal. Rptr. page 4, 349 P.2d page 675, the Supreme Court said:

> "The denial by the prosecution of *an opportunity for the defendant to seek out the informer* and to defend by these means, where the testimony of the informer would be material to the issues, is unfair and oppressive to the defendant, and deprives him of due process of law. See Roviaro v. United States, 353 U.S. 53, 63–64, 77 S.Ct. 623, 1 L.Ed. 2d 639; People v. McShann, supra, 50 Cal.2d 802, 809, 810, 330 P.2d 33." (Emphasis added.)

Defendant failed to take advantage of his opportunity to seek out the informer. As we have noted, defendant put off subpoenaing Tucker until two days before the trial, although he had both ample time to locate him and the means of compelling his attendance by following the procedure provided by Penal Code, section 1334 et seq. Furthermore, the tardy attempt to subpoena Tucker was misdirected and inadequate. Defendant cannot avoid the consequences of his failure to seek out the informer when he had the opportunity to do so, and likewise he cannot shift to the prosecution the burden of calling the informer as a witness for the defense.

Defendant's final contention is that the court erred ⊥451 in instructing the jury on his defense of entrapment because insufficient emphasis was placed on the role of persons other than law enforcement officers. The court gave CALJIC Instructions 851 and 854, as follows:

> "The law does not tolerate a person, particularly a law enforcement officer, generating in the mind of a person who is innocent of any criminal purpose, the original intent to commit a crime thus entrapping such person into the commission of a crime which he would not have committed or even contemplated but for such inducement; and where a crime is committed as a consequence of such entrapment, no conviction may be had of the person so entrapped as his acts do not constitute a crime.
>
> "If the intent to commit the crime did not originate with the defendant and he was not carrying out his own criminal purpose, but the crime was suggested by another person acting with the purpose of entrapping and causing the arrest of the defendant, then the defendant is not criminally liable for the acts so committed."
>
> "It is important in considering the defense of entrapment to ascertain whether the acts charged as constituting the offense were the result of the intent of some other person to place the accused in a position where he might be charged with the offense, in which event the defendant may not be convicted or whether the defendant, acting in pursuance of his own intent, committed the acts, such other person merely affording him the opportunity of doing so, in which latter event the defense of entrapment would not relieve the defendant from responsibility."

[7, 8] In our opinion the foregoing instructions completely and adequately cover the defense of entrapment, including a situation where a person other than a law enforcement officer is involved. We find no merit in appellant's contention that the court erred in refusing to give his proffered instruction, which reads as follows:

> "DEFENDANT'S REQUESTED INSTRUCTION NO. 7 In order to make the defense of entrapment available to a defendant, the person doing the entrapping need not be a law enforcement officer. If the offense was suggested by another person with the

purpose of entrapping and causing the arrest of the defendant, then the defendant is not criminally liable for the acts committed, whether or not this other person was a law enforcement officer."

⌊452 ⌊[9] The substance of defendant's proposed instruction is fully covered by the two instructions which were given. A court is not bound to give a particular instruction submitted by a party simply because it is applicable to the case. Appropriate instructions may be selected by the court from those submitted by the parties, or the court may use its own instructions, provided the instructions given by the court embrace and fairly state all points of law on all the material elements of the case. (People v. Clark, 116 Cal.App.2d 219, 224, 253 P.2d 510; People v. Latona, 2 Cal.2d 714, 727, 43 P.2d 260; People v. Young, 70 Cal.App.2d 28, 160 P.2d 132; 2 Witkin, California Procedure, § 52(b), p. 1780.)

The judgment and the order denying motion for new trial are affirmed.

GRIFFIN, P. J., and COUGHLIN, J., concur.

Hearing denied; WHITE, J., sitting pro tem.

Reba WEAVER, Plaintiff and Appellant,

v.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, Defendant and Respondent.

Civ. 26206.

District Court of Appeal, Second District, Division 1, California.

Oct. 15, 1962.

For Opinion on Hearing, see 30 Cal.Rptr. 4, 380 P.2d 644.

Action against a bank by a checking accounting depositor for damages resulting from bank's negligent and wilful refusal to honor depositor's check although depositor had on deposit with the bank at time check was presented a sum in excess of amount of the check. The Superior Court, Santa Barbara County, Percy C. Heckendorf, J., sustained bank's demurrer and entered judgment for bank and depositor appealed. The District Court of Appeal, Fourt, J., held that complaint stated a cause of action in tort.

Judgment reversed with directions.

1. Appeal and Error ⚷917(1)

In considering an appeal from a judgment entered on sustaining of a demurrer to the complaint it is assumed that facts alleged are true and can be proved; defects in the complaint which do not affect substantial rights of the parties are disregarded; and allegations are liberally construed with a view to substantial justice between the parties.

2. Negligence ⚷62(1)

Where risk of harm was reasonably foreseeable an independent intervening force does not break the chain of causation, and tortfeasor may be held liable for the harm or injury caused by his negligent act.

3. Banks and Banking ⚷143(1)

Arrest of a depositor under a bad check law might be a foreseeable risk attendant to a bank's wrongful dishonor of a check, and therefore a bank may be held liable to a depositor for negligence based on wrongful dishonor of depositor's check.

4. Banks and Banking ⚷143(4)

Complaint by checking account depositor against bank for damages sustained because of bank's negligent and wilful refusal to honor depositor's check at time when depositor had on deposit with bank a sum in excess of amount of the check stated a cause of action in tort.

◆

Gerald B. Parent and Louis J. Renga, Santa Barbara, for appellant.

Samuel B. Stewart, Robert H. Fabian and George L. Beckwith, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from the judgment entered after defendant's demurrer was sustained and plaintiff declined to amend the complaint.

On October 10, 1961, plaintiff filed a complaint for damages, wherein it was alleged in pertinent part as follows:

"II

"That at all times hereinafter mentioned, the plaintiff was a depositor in the Santa Maria Branch of the Bank of America, hereinafter referred to as 'Defendant Bank', and Defendant Bank agreed at all times to pay out the amount so deposited by plaintiff, in accordance with checks drawn by plaintiff on said * * * Bank when duly presented.

"III

"That on December 15, 1960, the plaintiff drew a check in the sum of $32.68 wherein and whereby she directed Defendant Bank to pay to the order of J and E Tire Shop said sum of $32.68 and delivered said check to said J and E Tire Shop.

"IV

"That at the time of the delivery of said J and E Tire Shop, and when same was presented to Defendant Bank as hereinafter alleged plaintiff had on deposit with Defendant Bank a sum in excess of $32.68 and Defendant Bank was justly indebted to plaintiff in said amount.

"V

"That on the 15th day of December, 1960, said check duly endorsed by J and E Tire Shop was presented to Defendant Bank for payment and although plaintiff at said time had on deposit with Defendant Bank a sum in excess of the amount of said check, Defendant Bank wrongfully refused to pay the same, and said check was returned to said J and E Tire Shop with a bank marking of 'account closed' thereon.

"VI

"That Defendant Bank at the time of wrongfully refusing to pay said check, marked, or caused to be marked upon the face of said check in conspicuous characters the letters 'account closed'; that said letters or characters when written upon the face of a check by a banker means that the maker of the check has no account in the bank, and said letters and characters were so understood by J and E Tire Shop, the payee of said check when the same was returned to him from Defendant Bank.

"VII

"That said J and E Tire Shop did upon receipt of said check marked 'account closed', and in reliance upon and as a proximate result of said markings, take said check to the Police Department of the City of Taft, County of Kern, State of California, and did swear out a warrent [sic] for the arrest of plaintiff.

"VIII

"That thereafter, the police of the City of Santa Maria did cause the plaintiff to be arrested, imprisoned and brought before a majestrate [sic] for arrignment [sic] on a charge of petty theft.

"IX

"That at the time of the heretofore mentioned wrongful dishonor, Defendant Bank and its employees knew or should have known that the issuance of a check upon a bank when the maker thereof has no account is a public offense which notoriously and frequently results in the arrest and imprisonment of the maker of the check.

"X

"That notwithstanding said knowledge on the part of Defendant Bank and its employees said Defendant Bank wrongfully, negligently and wilfully refused to honor said check.

"XI

"That as a direct and proximate result of Defendant Bank's wrongful and negligent dishonor of said check, plaintiff's reputation was damaged, her health impaired, and plaintiff was arrested and imprisoned causing injury to plaintiff in the sum of $50,000.00."

Plaintiff prayed for damages in the sum of $50,000.00, costs of suit, and for such other and further relief as to the court might seem proper.

On October 20, 1961, defendant filed its demurrer on the grounds that said complaint failed to state facts sufficient to constitute a cause of action. (Code Civ.Proc. § 430, subd. 6.)

By minute order dated October 30, 1961, defendant's demurrer was sustained without leave to amend. The judgment from which this appeal is taken was entered November 1, 1961.

[1] The rules relating to the trial court's determination of a demurrer on the ground that a complaint does not state facts sufficient to constitute a cause of action and which govern a reviewing court in considering an appeal from a judgment entered on the sustaining of a demurrer on that ground are as follows: it is assumed that the facts alleged are true and can be proved; defects in the complaint which do not affect the substantial rights of the parties are disregarded; the allegations must be liberally construed with a view to substantial justice between the parties; and, all that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief. (Hill v. City of Santa Barbara, 196 Cal.App.2d 580, 585, 16 Cal.Rptr. 686.)

In support of the trial court's determination, defendant bank relies upon two cases —Hartford v. All Night and Day Bank (1915) 170 Cal. 538, 150 P. 356, L.R.A. 1916A, 1220, and Bearden v. Bank of Italy (1922) 57 Cal.App. 377, 207 P. 270.

In the Hartford case plaintiff had a savings account with defendant bank but *did not* have a commercial checking account. Plaintiff drew an ordinary commercial check in favor of himself. He then negotiated it through the endorsement of Maphet and Jones. Defendant bank refused payment, endorsing upon a slip of paper which it attached to said check, "No Account." Following the rejection, Maphet swore to and filed a criminal complaint charging plaintiff with a violation of Penal Code section 476a. Plaintiff was arrested and at the hearing the charge was dismissed and plaintiff exonerated. Subsequently plaintiff brought an action against defendant bank alleging that he had sustained injury to his reputation and good name, and that grievous mental suffering was inflicted upon him by reason of the arrest and detention. Judgment was rendered in favor of plaintiff. The Supreme Court in reversing the judgment first indicated that the bank was not negligent. It then stated at pages 540–541 of 170 Cal. at page 357 of 150 P. in part as follows:

"But, setting aside from our consideration the question of the negligence of the bank, and assuming further that it was the duty of the bank to have paid this check when and as it was presented, nevertheless for two quite independent reasons this judgment may not be sustained. *We have adverted to the fact that the bank is charged merely with the negligent failure to pay a money demand. Section 3302 of the Civil Code in express terms lays down the measure of damage for such a failure.* The applicability of this section to cases like this has by this court upon more than one occasion been declared and made, * * *. The second legal principle, whose application necessarily works a reversal of this judgment is that the damages claimed are in no legal sense the proximate result of the act of negligence complained of. It did not necessarily follow that plaintiff would be arrested and charged with a felony because of the bank's act. There was no direct casual connection between the two things. There was an interruption and the intervention of an entirely separate cause, which cause was an independent human agency acting with an independent mind." (Emphasis added.)

The second case relied upon by defendant, Bearden v. Bank of Italy, supra, 57 Cal.App. 377, 207 P. 270, is in the words of *plaintiff* "factually on all fours with the instant case." The court in the Bearden case cited and relied upon the Hartford case for the proposition that the arrest of the plaintiff for the offense of issuing a check without sufficient funds was not the proximate result of the defendant bank's wrongful refusal to honor the check.

Plaintiff attempts to avoid the impact of the Hartford and Bearden cases by asserting that the above two cases sounded in contract while his complaint sounds in tort. He relies upon Abramowitz v. Bank of America, 131 Cal.App.2d Supp. 892, 281 P.2d 380.

In Abramowitz plaintiff brought action to recover damages for the wrongful dishonor of a check drawn by him upon his account with defendant bank at a time when he had standing to his credit an amount in excess of the face of the check. The check was drawn in favor of the vendor under a conditional sales contract, pursuant to which plaintiff was purchasing an automobile, in payment of a monthly installment due thereunder, and as a result of the dishonor of the check the vendor repossessed the automobile and sold it pursuant to the terms of the contract. In affirming the judgment in favor of plaintiff it is aptly stated at page 895, 281 P.2d at page 382 as follows:

"[3] While it is true that plaintiff might have brought his action upon contract, he was not restricted to this remedy. The prevailing view and that obtaining in this State is that in such circumstances he may, as plaintiff has done here, sue for damages for the injury resulting from the refusal to pay the check, in which case the action sounds in tort. (Citations.)" (See Allen v. Bank of America, 58 Cal.App.2d 124, 127, 136 P.2d 345.)

Similar to the case at bar, defendant in the Abramowitz case placed reliance upon the Hartford case and the Bearden case. In rejecting the applicability of the two cases the learned judge stated at page 897 of 131 Cal.App.2d Supp. at page 383 of 281 P.2d as follows in pertinent part:

"* * * [T]he Hartford case was decided prior to the enactment of section 3320 [i. e. Civil Code], and the District Court of Appeal, in the Bearden case, seemingly was not mindful of the fact that section 3320 had been enacted in the meantime, for no mention thereof appears in its opinion. Moreover, it would appear that both courts assumed that the action before it was one in contract, for otherwise section 3302 [i. e. Civil Code] could in no event be applicable as it was there held. We need not, however, undertake to consider the soundness of the conclusion there reached, see, however, Collins v. City Nat. Bk. & Tr. Co., 1944, 131 Conn. 167, 38 A.2d 582, 153 A.L.R. 1030 in view of section 3320, which is a legislative recognition that a depositor whose check is wrongfully dishonored may thereby sustain 'actual damage' beyond the amount of the check."

[2] The older concept that an independent intentional intervening act necessarily breaks the chain of causation has been replaced by a more enlightened view. The modern approach is predicated upon the test of foreseeability—where the risk of harm was reasonably foreseeable the independent intervening force does not break the chain of causation. (See Mosley v. Arden Farms Co., 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872; Richardson v. Ham, 44 Cal.2d 772, 285 P.2d 269; Terrell v. Key System, 69 Cal.App.2d 682, 688, 159 P.2d 704.)

[3, 4] We are not prepared to hold as a matter of law that a bank cannot foresee the risk of harm attendant to its wrongful dishonor of a check. On the contrary, as stated by Dean Prosser in his article "Proximate Cause in California" in 38 California Law Review 369, 411, "Arrest under a bad check law appears to be an obvious risk against which the bank has undertaken to protect the depositor."

For the reasons stated the judgment is reversed with directions that defendant be permitted to answer within 10 days after issuance of remittitur.

WOOD, P. J., and LILLIE, J., concur.

Hearing granted; McComb, J., not participating.

208 Cal.App.2d 305

⌊305 ⌊ **Ernest FLYNN and Fabienne Flynn, Plaintiffs and Appellants,**

v.

Susie P. MIKELIAN, Defendant and Respondent.

Civ. 25915.

District Court of Appeal, Second District, Division 3, California.

Oct. 9, 1962.

Lessees' action against lessor for damages for withholding possession of leased premises. The Superior Court of Los Angeles County, Burnett Wolfson, J., rendered judgment for defendant, and an appeal was taken. The District Court of Appeal, Ford, J., held that lessees, as assignors, retained no interest in premises in nature of right of reentry which lessees could exercise in event of abandonment of premises by assignee, and when assignee vacated premises, there was no obligation on part of lessor to accept check from lessees for rent due instead of terminating that lease.

Affirmed.

1. Landlord and Tenant 🔑20

Lease was primarily conveyance to lessee of interest in real property, but it was also contractual in nature.

2. Landlord and Tenant 🔑20

Two distinct sets of rights and obligations were created by lease, one set arising out of relationship of landlord and tenant, and being based on privity of estate, and other set arising out of express provisions of lease and being based on privity of contract.

3. Landlord and Tenant 🔑79(3)

By assignment, lessee transfers all of his title and interest in leasehold estate and retains no reversionary interest or right of reentry.

4. Landlord and Tenant 🔑79(3)

Lessee's privity of estate with lessor is divested by assignment but, ordinarily, his contractual obligations to lessor are not released, even though lessor consents to assignment and assignee expressly assumes obligations of lease.

5. Landlord and Tenant 🔑79(2)

After assignment by lessee, there is privity of estate between lessor and assignee who enters premises pursuant to assignment.

6. Landlord and Tenant 🔑110(1)

Abandonment occurs when lessee vacates premises with intent to relinquish all rights therein.

7. Landlord and Tenant 🔑109(4), 110(2)

If landlord accepts surrender or abandonment which has already taken place with intent to thereby terminate lease, lease is terminated as effectually as if there were a valid agreement of surrender in advance.

8. Landlord and Tenant 🔑112½

In lessee's action against lessor for withholding possession of premises vacated by lessee's assignee and reentered by lessor, evidence presented question of fact as to abandonment.

9. Landlord and Tenant 🔑79(3)

Assignment passed all of lessee's title and interest in leasehold estate to assignee and subsequent conduct on part of assignee could result in surrender or abandonment of premises.

10. Landlord and Tenant 🔑112½

Evidence would support determination that lessee's assignee had abandoned premises and that lessor had treated such abandonment as surrender and accepted same with intent thereby to terminate lease.

11. Landlord and Tenant 🔑79(3)

Lessee, as assignor, retained no interest in premises in nature of right of reentry which lessee could exercise in event of abandonment of premises by assignee, and when assignee vacated premises, there was no obligation on part of lessor to accept check from lessee for rent due instead of terminating that lease.

12. Landlord and Tenant 🔑79(3)

Where lessor, for purpose of bringing lease to end, treated acts of lessee's assignee as surrender of premises, purported subsequent rescission of assignment could not revive lessee-assignor's interest.

13. Common Law 🔑9

The law always respects form less than substance.

Carroll, Pares, Blakey & Battin, and David Howard Battin, Long Beach, for appellants.

Y. B. Arsen, for respondent.

⊥307 ⊥ FORD, Justice.

The primary question involved on this appeal is the nature of the rights of the plaintiffs, assignors of a lease of real property, at the time of the acts of the defendant lessor of which complaint is made. The appeal is from a judgment for the defendant.

On November 6, 1957, the defendant leased the premises involved to certain persons who thereafter assigned the lease to Zelman Soskin. On July 2, 1958, Soskin sold the business being operated on the property to the plaintiffs, Mr. and Mrs. Flynn, and assigned the lease to them. The lease contained a provision which was in part as follows: "Lessee shall not assign this lease * * * without the written consent of lessor first had and obtained, and a consent to one assignment * * * shall not be deemed to be a consent to any subsequent assignment * * *." Such written consent to the assignment to the plaintiffs was obtained. In the document in which such consent was evidenced was an agreement executed by the plaintiffs whereby they did "agree to be bound by the terms, conditions and covenants [of the lease] * * *, the same as if originally executed by them as Lessees." On March 24, 1959, the plaintiffs sold the business to Clyde B. Wright and assigned the lease to him. In the document embodying the assignment was an agreement executed by Wright wherein he undertook "to assume and be bound by all of the terms and conditions of the said Lease which the Lessee therein agrees to be made and performed." The consent of the defendant lessor was expressed in the following language: "The undersigned Lessor hereby consents to the above Assignment of Lease to Clyde B. Wright waiving none of his and/or her rights thereunder as to the Lessee or the Assignee."

The nature of the controversy is indicated by the following findings of fact of the trial court: 1. The rent due on September 1, 1959, was not paid. 2. On September 16, 1959, the defendant lessor discovered that the premises had been vacated by Wright and the defendant entered the premises after having a door opened by a locksmith.[1] 3. Since September 16, 1959, the defendant has refused to deliver possession of the premises to the plaintiffs. 4. After September 16, 1959, the defendant removed the fixtures and equipment from the prem⊥ises ⊥308 and stored them for "the account of Soskin and/or Plaintiffs who then and there were the holders of chattel mortgages against said personal property."

The pertinent evidence before the trial court will be stated. Mr. Flynn, one of the plaintiffs, testified that he and his wife entered into possession of the premises about August, 1958. The premises consisted of a "beer bar cafe" and living quarters. As part of their transaction of purchase, the Flynns executed a chattel mortgage in favor of Soskin on property used in the business. Thereafter Wright took possession (he having purchased the business from the Flynns and the lease having been assigned to him by them.) On subsequent occasions the plaintiffs went to the premises to try to collect money which Wright owed to them on an obligation secured by a second chattel mortgage on the equipment of the business. On September 16, 1959, Mr. Flynn went there; the premises were closed and Wright was absent therefrom. The defendant was present and he talked to her. They watched the locksmith open the door and then they entered. Mr. Flynn did not notice the presence of any personal effects of Mr. Wright. When asked if he saw "any beer or any stock at all," Mr. Flynn's reply was that he saw a lot of empty bottles. He further testified that he asked the defendant how much money Wright owed her and she said that it was the amount of the rent for one month. After she stated that the only matter in which she was interested was the rent, he said that he would take care of it in a few days and he left. On cross-examination, Mr. Flynn testified that she did not say he could go back into the premises "in those words" and she did not say she would accept the rent from him. Thereafter the plaintiffs sent a check dated September 19, 1959, to the defendant for the sum of $220, the amount of the monthly rent. The defendant returned the check, enclosing it with a letter dated September 21 in which she stated that there had been some misunderstanding, that the rent had not been paid since August 1, 1959, and that "inasmuch as I have been required to repossess the property for nonpayment of rent, the lease has been forfeited."

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[1] In their opening brief the plaintiffs state: "At some period of time between August 31, 1959 and September 19, 1959 appellants [plaintiffs] learned that the fourth lessee, Wright, had *abandoned* the premises." (Emphasis added.)

In a letter dated October 7, 1959, and addressed to Mr. Soskin and the plaintiffs by an attorney acting on behalf of the defendant, it was stated that the communication was to notify the addressees "that because of failure to pay rentals for the above referred to property and the abandonment thereof by |305 the Lessee, the owner of the property was required to reenter the property and terminate the lease thereon." It was further stated that a new lease had been made and that if the furniture, fixtures and equipment were not removed within five days, the defendant would cause that property to be removed and stored "at the Lessee's expense and account." In a prior letter of September 29, 1959, addressed to the same persons, the attorney had stated that the personal property was being held as security for the payment of rent due since July 1, 1959, and "also for the payment of damages to the said real property by the tenants." Later, after such property had been stored in a garage, Mr. Soskin, the plaintiffs' mortgagee, took possession of it.

Mr. Flynn testified that his attorney obtained Wright's signature to a document dated September 19, 1959, part of which was as follows: "That the assignment of lease executed March 24, 1959, * * * on the above mentioned premises from [plaintiffs] * * * to CLYDE B. WRIGHT, is hereby cancelled and rescinded and is of no force and effect." Thereafter the plaintiffs demanded, in writing, that possession of the premises be given to them by the defendant.

The defendant was called as a witness by the plaintiffs pursuant to the provisions of section 2055 of the Code of Civil Procedure. She testified that on September 16, 1959, Mr. Flynn walked up to her and said that he knew that Mr. Wright had abandoned the place; Mr. Soskin had so informed him. He asked her if he could come back and operate the business and she told him that he could not. She testified in part as follows: "A. This is what I was saying. Mr. Flynn wasn't saying anything. I said, 'This is the kind of people you recommend for me, to tell me they are good people; that they will do good business; they are going to be good tenant.' And I said, 'This is what they give me in short time.' I said, I said, 'This is really bad.' I said, 'This is unfair.' I just started crying. * * * A. It was way after we went upstairs. We look[ed] all around the apartment where I really was deeply hurt more than ever. And he asked me if he—'Has he been paying the rent?' I said, 'No kind of money mean[s] anything on this kind of condition.' I said, 'Even if he'd pay rent,' I said, 'that don't mean nothing.' I said—he says if I let him to come back to run the place, everything will be all right. Right then, I tell Mr. Flynn, I said, 'Well, Mr. Flynn,' I said, 'Well, Mr. Flynn,' I said, 'I don't want you or your kind of people to deal with. Look at all the experience, all ⊥310 what I got here,' I said." She further testified that after she removed and stored the fixtures and furnishings, Mr. Soskin and Mr. Flynn took the fixtures away. She said that the fixtures were not damaged in the course of being removed from her property.

[1–5] A lease of the nature of that in the present case has two aspects. While it is primarily a conveyance to the lessee of an interest in the real property, it also is contractual in nature. Two distinct sets of rights and obligations are created, one being those arising out of the relation of landlord and tenant and based on privity of estate and the other being those arising out of the express provisions of the lease and based on privity of contract. (Medico-Dental etc. Co. v. Horton & Converse, 21 Cal.2d 411, 418, 132 P.2d 457; Goodman v. Jonas, 142 Cal.App.2d 775, 790, 299 P.2d 424; Strecker v. Barnard, 109 Cal.App.2d 149, 152, 240 P.2d 345.) By an assignment the lessee transfers all of his title and interest in the leasehold estate and retains no reversionary interest or right of reentry. (Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 242, 73 P.2d 1163; Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 351–352, 45 P. 680; Blumenberg v. Myres, 32 Cal. 93, 95; Williams v. Hinckley, 109 Cal.App. 574, 575, 293 P. 644; Weintraub v. Weingart, 98 Cal.App. 690, 698–699, 277 P. 752; see 30 Cal.Jur.2d, Landlord and Tenant, § 219, p. 366.) The assignor's privity of estate is thereby divested (see Barkhaus v. Producers Fruit Co., 192 Cal. 200, 205, 219 P. 435; Mayer v. Dwiggins, 114 Neb. 184, 206 N.W. 744, 746, 42 A.L.R. 1102, 1105), although ordinarily his contractual obligations to the lessor are not released even though the lessor consents to the assignment and the assignee expressly assumes the obligations of the lease. (De Hart v. Allen, 26 Cal.2d 829, 832, 161 P.2d 453; Jordan v. Scott, 38 Cal.App. 739, 741, 177 P. 504.) After the assignment there is privity of estate between the lessor and the assignee who enters the premises pursuant thereto. (Fanta v. Maddex, 80 Cal.App. 513, 516, 252 P. 630.)

[6,7] Acts of a lessee may give rise to a surrender or abandonment of the leased premises. An abandonment occurs when the lessee vacates the premises with the intent to relinquish all rights therein. (See Martin v. Cassidy, 149 Cal.App.2d 106, 110–111, 307 P.2d 981; Swigert v. Stafford, 85 Cal.App.2d 469, 472, 193 P.2d 106; 1 Cal.Jur.2d, Abandonment, §§ 2, 3, pp. 2–3; Joffe, Remedies of California Landlord upon Abandonment by Lessee, 35 So.Cal.L.Rev. 34, 35.) As said ⊥311 in Rognier v. Harnett, 45 Cal.App.2d 570, at page 574, 114 P.2d 654 at page 657; "* * * if the landlord accepts a surrender or abandonment of leased premises that has already taken place with the intent to terminate the lease, the lease is terminated as effectually as if there had been a valid agreement of surrender in advance." (See also Bernard v. Renard, 175 Cal. 230, 233–234, 165 P. 694, 3 A.L.R. 1076; Joffe, Remedies of California Landlord upon Abandonment by Lessee, supra, 35 So.Cal.L.Rev. 34, 37.)

[8–10] Whether the evidence in the present case established the existence of the elements of an abandonment presented a question of fact. (See Martin v. Cassidy, supra, 149 Cal.App.2d 106, 111–112, 307 P.2d 981.) Since the assignment passed all of the Flynns' title and interest in the leasehold estate to their assignee, Wright, there was no reason why subsequent conduct on his part could not result in a surrender or an abandonment of the premises. (See Mayer v. Dwiggins, supra, 114 Neb. 184, 206 N.W. 744, 748, 42 A.L.R. 1102, 1108.) The defendant lessor's testimony as to what occurred on the premises on September 16, 1959, as set forth hereinabove, was sufficient to sustain the inference that on that occasion she made known to Mr. Flynn her intention not to have any further dealings with him or with Mr. Wright. There was substantial evidence to support a determination not only that the assignee Wright had abandoned the premises[2] but that the defendant lessor had treated such abandonment as a surrender which she accepted with the intent thereby to terminate the lease. (See 30 Cal.Jur.2d, Landlord and Tenant, § 270.) The fact that in her letter of September 21, 1959, the defendant referred to repossession of the property "for nonpayment of rent" did not bar such a determination since her reentry was justified because of such abandonment and since she retook possession with the intent to bring the lease to an end. The question remains as to whether there were any other facts in the present case which precluded a termination of the lease which would otherwise occur under such circumstances.

[11–13] The plaintiffs, as assignors of the lease, retained no interest in the premises in the nature of a right of reentry which they could exercise in the event of an abandonment of the premises by Wright. (See Kandis v. Pusch, 86 Ind.App. 246, 155 N.E. 618, 619.) Consequently, there was no ob⌊312ligation on the part of the defendant lessor to accept the check tendered by the plaintiffs instead of terminating the lease. Such determination is not altered by reason of the document executed by the Flynns and Wright which bears the date of September 19, 1959, a copy of the body of which is set forth in the footnote.[3] That instrument appears to have been intended to evidence the terms of a settlement between the Flynns and Wright of their respective rights and obligations. It was a reasonable inference that prior to the acquisition by the Flynns of any claim of rights pursuant to that document, the defendant lessor, for the purpose of bringing the lease to an end, had treated the acts of Wright as a surrender of the premises. Consequently, Wright had no interest in the premises to transfer. The use of the language of rescission could not revive the Flynns' former interest; the real nature of the instrument appears to be that of an attempted reassignment. "The law always respects form less than substance." (Weintraub v. Weingart, supra, 98 Cal.App. 690, 698, 277 P. 752, 756.) The defendant was not required to recognize or to consent to any such attempted reassignment.

The judgment is affirmed.

SHINN, P. J., concurred.

FILES, J., did not participate.

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[2] As noted in footnote 1 to this opinion, the plaintiffs have conceded that there was such an abandonment.

[3] "FOR VALUABLE CONSIDERATION and as part of the settlement between the parties hereto as to their respective rights in and to that certain business known as 'GREEN OASIS' at 6007 East Olympic Boulevard, Los Angeles 22, California, the parties hereto mutually agree as follows:

"(1) That the assignment of lease executed March 24, 1959, assigning that certain lease dated November 6th, 1957, on the above mentioned premises from ERNEST FLYNN and FABIENNE FLYNN to CLYDE B. WRIGHT, is hereby cancelled and rescinded and is of no force and effect;

"(2) That escrow number BS 142–A opened on March 24, 1959, at the Security Escrow Company, 6554 Long Beach Boulevard, Long Beach, California, the bill of sale deposited by sellers therein, the $660.00 unsecured note and the chattel mortgage and note executed by Clyde B. Wright, buyer therein, in favor of sellers are hereby cancelled as of the date hereof, and in consideration of sellers retaining all monies heretofore paid by buyer, Clyde B. Wright, as stipulated damages, sellers will file for record a release of said chattel mortgage above mentioned.

"(3) Each of the parties hereto in consideration hereof do hereby waive any claim against each other arising out of said escrow and sale above mentioned."

208 Cal.App.2d 213

213 **Dorothy A. ROBINSON, Plaintiff and Appellant,**

v.

Harold M. ROBINSON, Defendant and Respondent.

Civ. 25596.

District Court of Appeal, Second District, Division 2, California.

Oct. 4, 1962.

Divorce action in which the wife appealed from an interlocutory judgment of divorce and order denying a motion to vacate and set aside such judgment, Elmer D. Doyle and Macklin Fleming, JJ. The District Court of Appeal, Herndon, J., held that by entry into a stipulation the parties withdrew the issues raised in the pleadings and there was no error in failing to make findings of fact and conclusions of law, and there was no abuse of discretion in refusing to vacate the judgment on ground that wife did not understand her legal rights.

Affirmed.

1. Divorce 🔑150(2), 184(12)

Failure to find on all material issues raised by pleadings and evidence in contested divorce action is ground for reversal unless findings have been waived.

2. Trial 🔑397(4)

Findings of fact are required only on trial of questions of fact which assume that evidence will be introduced on issues raised by pleadings, and if any issue is withdrawn or if evidence is not introduced in support thereof no finding is necessary thereon.

3. Divorce 🔑184(12)

Where parties to divorce action stipulated to waive findings of fact and have matter heard by default their stipulation amounted to withdrawal of issues raised by pleadings and failure of court to make findings of fact and conclusions of law was not reversible error.

4. Divorce 🔑169

Insofar as divorce judgment, or part thereof, has been rendered pursuant to express consent of parties it will be regarded as contract between parties, to be construed as any other contract, and when it admits of two constructions whole record will be examined and that construction will be adopted which is most consonant with judgment that should have been rendered under facts and law of case.

5. Divorce 🔑254

Where it was apparent that court intended to incorporate stipulation into judgment and stipulation had provided that any after-discovered property, meaning property acquired during period of marriage until date of separation, should be awarded to wife, ambiguous language of judgment would be interpreted in accordance with stipulation.

6. Divorce 🔑160

Where interlocutory divorce judgment was practically a literal adoption of stipulation entered into by plaintiff wife whose original or substituted attorneys failed to prepare judgment as directed by court, and records failed to disclose any objection by wife to form of judgment wife could not complain of any lack of certainty of form thereof.

7. Divorce 🔑249(2)

Where status of property as joint tenancy or community property was put in issue by divorce pleadings of parties who thereafter stipulated as to its disposition, court had jurisdiction to dispose of properties in accordance with stipulation.

8. Judgment 🔑382

When justice requires it, party in whose favor judgment has been rendered is entitled to relief from judgment as well as party against whom it is rendered.

9. Appeal and Error 🔑957(1)
Judgment 🔑139

Motions for relief from default are addressed to sound discretion of trial court and exercise of that discretion, in absence of clear showing of abuse, will not be interfered with by appellate tribunal.

10. Appeal and Error 🔑1024(5)
Judgment 🔑392

Burden is on party moving to vacate judgment to establish position by clear preponderance of evidence, and since it is presumed that trial court resolved all conflicts in favor of prevailing party order will not be set aside in face of such conflict and ruling thereon. West's Ann.Code Civ.Proc. § 473.

11. Divorce 🔑165(5½)

Evidence on wife's motion to set aside interlocutory decree of divorce in her favor on ground that she had not known her legal rights fully justified trial court's denial of motion. West's Ann.Code Civ.Proc. § 473.

◆

A. Maurice Rogers, Jr., Los Angeles, for appellant.

Marvin M. Mitchelson, Douglas L. Glaser, Beverly Hills, for respondent.

⌊215 HERNDON, Justice.

This is an appeal by plaintiff from (1) an interlocutory judgment of divorce and (2) from an order denying a motion to vacate and set aside said judgment.

Appellant wife filed the action, praying for divorce on the ground of extreme cruelty, custody and support of the minor child of the parties, alimony, division of community property and attorney's fees. Respondent husband cross complained, praying for divorce on the same ground, an award of the community property to him, and an adjudication that the property held in the names of the parties as joint tenants was his separate property.

It was admitted by the pleadings that the parties were married on April 18, 1956, that they have one minor child born on January 22, 1957, and that the community property included furniture, furnishings and effects at the family residence, and approximately $3,000 cash in the possession of the wife.

The complaint alleged, and it was denied by the answer, that the community property also included the family residence in Los Angeles, other real property in San Bernardino County, an undivided one-half interest in other real property in Los Angeles County, two trust deeds, and certain corporate securities. The answer and cross-complaint alleged that these items were the separate property of the husband and were held in joint tenancy solely for convenience in the event of his ⌊216 death. The answer to the cross-complaint denied that they were the separate property of respondent but admitted that title to them was held in joint tenancy. In addition, it was alleged by each of the parties that a 1956 Buick automobile was his or her separate property.

The case was called for trial on July 12, 1960. A conference was held in chambers, and the cause continued to the following day. On July 13, on the court's motion, it was continued to a third day. On July 14, following conferences in the judge's chambers, the parties and their counsel entered into a stipulation read in open court by respondent's counsel.

The stipulation provided: that appellant might put on evidence for a default divorce; that she have custody of the minor child with reasonable visitation rights to respondent subject to modification by the court after a court-appointed psychiatrist's examination of the parties; that she be awarded alimony of one dollar per year for the next five years, terminable upon her death or remarriage; and that child support be determined by the court.

It was further provided that the property of the parties should be divided as follows: that the family residence be awarded to respondent; that appellant vacate the premises no later than September 1, 1960; that respondent keep up the payments on the residence until September 1, 1960; that appellant be awarded the Kanimoto Second Trust Deed, valued at $11,774, all of the stocks and securities in the joint possession of the parties, $1000 in a bank account in her possession, $611 in the possession of a court-appointed referee, the household furniture in the family residence with the exception of several specified items, and any after-discovered property acquired during the period of the marriage and separation; and that all other property be awarded to respondent. *Counsel for both parties expressly waived findings of fact.*

After the parties individually had expressed their agreement to the stipulation, appellant and a witness testified to the jurisdictional facts alleged in the complaint and to acts of cruelty by respondent. No evidence was offered on behalf of respondent. The divorce was granted to appellant and the matters stipulated were expressly incorporated in the court's minute order. Thereafter, on August 19, 1960, the court determined the remaining issues that had not been settled at the previous hearing and ordered respondent to pay child support of $25 per week, certain medical and hospital
217 bills, and $300 additional fees to appellant's attorney, and directed appellant's attorney to prepare the judgment.

In the interim, however, the appellant had filed a substitution of attorneys and the judgment finally entered on November 2, 1960, was actually prepared by the attorney for respondent. The language contained therein was taken almost literally from the minute order made on July 14, 1960. It contained a seeming ambiguity which will be more fully discussed hereafter. Following the entry of this judgment, respondent filed a motion seeking a clarification of this ambiguous language, and appellant filed motions for a new trial and to vacate and set aside the judgment pursuant to Code of Civil Procedure, section 473. All of said motions were denied and this appeal followed.

[1, 2] Appellant's first point is that the failure of the court to make findings of fact and conclusions of law is reversible error. It is well settled that failure to find on all material issues raised by the pleadings and evidence in a contested divorce action is ground for reversal unless findings have been waived. (Hamburger v. Hamburger, 60 Cal.App.2d 530, 538, 141 P.2d 453; Gilmore v. Gilmore, 99 Cal.App.2d 186, 187, 221 P.2d 123.) However, as stated in Alhadeff v. Alhadeff, 130 Cal.App. 578 at page 580, 20 P.2d 112 at page 113: "Findings of fact are only required 'Upon the trial of a question of fact.' Section 632, Code Civ.Proc. That assumes that evidence will be introduced on the issues raised by the pleadings. If any issue is withdrawn or evidence is not introduced in support thereof, no finding is necessary thereon."

It has been held that in an action for divorce the hearing required to be had before the court after entry of a default, pursuant to Civil Code, section 130, is not a trial of issues of fact (Foley v. Foley, 120 Cal. 33, 37, 52 P. 122), and that findings are not required in default divorce proceedings. (Waldecker v. Waldecker, 178 Cal. 566, 568, 174 P. 36.)

[3] Not only did the parties expressly waive findings, but their stipulation amounted to a withdrawal of the issues raised by the pleadings and the matter was heard as a default. Manifestly, appellant's contention is entirely without merit.

As her second assignment of error, appellant urges that the judgment with respect to the division of property is so ambiguous and uncertain that it requires reversal. As heretofore indicated, the judgment, prepared by respondent's attorney, closely follows the language of the minute order of the court. A review of the minute order of 218
July 14, 1960, and the transcript of the oral proceedings, which contains the stipulation of the parties, clearly indicates that the order is based on the stipulation. Furthermore, the order states that it is made "pursuant to stipulation." There is, however, some small difference in the language used in the minute order and judgment from that of the stipulation. The reporter's tran-

script of the stipulation reads, in pertinent part, as follows:

"MR. MITCHELSON: Mr. Robinson further stipulates that any after-discovered property—and by after-discovered property is meant that during the period of the marriage, April 18, 1956, until the date of separation, November 12, 1959, if there is any property newly discovered during this period of time that was purchased during the marriage, Mrs. Robinson shall be awarded that entire property. THE COURT: That is newly discovered property not here set forth? MR. MITCHELSON: Yes. All other property is hereby awarded and it is agreed that it shall be awarded to Mr. Robinson."

The minute order and judgment, however, merely direct "that any property not herein listed, and acquired during the period of the marriage and separation, shall be the sole and separate property of the plaintiff; that all property not herein mentioned is awarded to defendant."

[4] It is appellant's contention that it is impossible to determine the rights of the parties from the judgment. However, the rule is well settled that insofar as a judgment, or a part thereof, has been rendered pursuant to the expressed consent of the parties, it will be regarded as a contract between the parties, to be construed as any other contract; and when it admits of two constructions, the whole record will be examined, and that construction will be adopted which is most consonant with the judgment that should have been rendered under the facts and the law of the case. (In re Ferrigno, 22 Cal.App.2d 472, 474, 71 P.2d 329.)

" 'If the entry of a judgment is so obscure as not to express the final determination with sufficient accuracy, reference may be had to the pleadings and to the entire record. If, with the light thrown upon it by them, its obscurity is dispelled, and its intended significance made apparent, it will be upheld and carried into effect. * * *' " (Brown v. Superior Court, 110 Cal.App. 464, 466, 294 P. 428, 429.)

[5] It is readily apparent from the instant record that the court intended to incorporate the stipulation into the judgment and that any additional property awarded to the wife beyond that expressly given to her ⊥219 by the terms of the judgment was any property which might have been acquired by the parties during their marriage, but which had not been listed in the pleadings because of her lack of knowledge thereof. This provision in the stipulation obviously was intended to insure the fairness of the agreement reached by the parties by providing that if the husband had failed to disclose any of the assets of the community in his pleadings, they were to be awarded to the wife upon discovery. The general expression relating to property awarded to the husband clearly was intended to cover all other property listed in the pleadings but not expressly mentioned in the judgment.

[6] In view of the facts (a) that the judgment was practically a literal adoption of the stipulation entered into by appellant, (b) that her original or substituted attorneys failed to prepare the judgment as directed by the court, (c) that the record fails to disclose any objection by appellant to the "form" of the judgment and, further (d) that she apparently contested respondent's motion seeking a clarification, she now can hardly complain with grace of any lack of certainty in the form thereof. (Morrow v. Learned, 76 Cal.App. 538, 540, 245 P. 442; Browand v. Scott Lumber Co., 125 Cal.App.2d 68, 72, 269 P.2d 891.)

[7] Appellant advances a further argument urging that the judgment is void. She contends that in the absence of evidence that the properties admittedly held in joint tenancy were in fact community property, the court was without jurisdiction to award certain of said parcels to the husband and others to her. As we have seen, the record discloses that the status of the properties was put in issue by the pleadings and that

thereafter by stipulation the parties expressly consented to the dispositions reflected in the judgment.

Appellant's argument is fully answered in Spahn v. Spahn, 70 Cal.App.2d 791, 162 P.2d 53, and the cases cited therein. The appellant in the Spahn case contended, unsuccessfully, that the court had no jurisdiction to dispose of anything but community property, and that the order could not be construed as showing a stipulation that separate property might be disposed of in a divorce action. The court stated at pages 797–798, 162 P.2d at pages 53–56.

"This argument appears to be based upon the language of the minute order which said, 'community property is awarded as follows'; thereafter, however, disposing of all of the property owned by the parties. 220 * * * It entirely loses sight of the fact that, whatever the character of the property, whether community or separate, the parties had by their pleadings and stipulation, made its disposition an issue for the court to decide. Under the California cases to which attention has been directed, the trial court then had full jurisdiction to decide such issue."

In addition to the arguments which have been considered, appellant complains that her case was mismanaged by her attorney, that no one informed her of her rights, that due to her ignorance of legal procedure her failure to assert them is excusable, and that the court abused its discretion in denying her motion to vacate the judgment.

Appellant's affidavit in support of the motion states: that her attorney ignored her requests to set the trial at a later date and to obtain a continuance at the time of trial; that he prematurely released witnesses in her behalf; that he never intended that the case go to trial; that he led her to believe a continuance was to be granted; and that he arranged for the property settlement without her knowledge. It further states that the judge, at a conference with the attorneys and parties, misinformed her as to the law in respect to the property held in joint tenancy and that his statement implied a threat to rule against her if she did not agree to a settlement arranged by the attorneys and the judge in her absence and without her authorization. In respect to her consent in open court to the stipulation, it states that she had no understanding of what transpired in the courtroom, or how it would affect her, and that she mistakenly believed that the case was being decided by the judge upon evidence which the attorneys had presented to him in chambers. The declaration of her mother, who was present with her during the proceedings, is corroborative of some of her statements.

Affidavits of counsel for both parties and of the respondent were filed in opposition to the motion. The affidavit of appellant's attorney states: that he had some twenty-five conferences with appellant prior to the day of the trial; that a second attorney was retained by appellant on July 13 and 14, 1960, as a further protection to her and was present in the courtroom; that a lengthy conference had been held in his office with the second attorney, appellant and her mother in order fully to acquaint the former with the facts; that he did not lead appellant to believe a continuance would be arranged and did not release any witnesses prior to the afternoon of July 14; that he had several conferences with appellant on July 12, 13 and 14 in 221 which they discussed the relative values of the properties and the provisions to be made for the custody of the child; that appellant indicated to him upon what basis she would settle the case; that he acquainted her fully with all the proceedings which took place in the judge's chambers; and that he advised her to accept the settlement because he believed it to be fair and equitable in view of all the evidence of which he had knowledge at that time.

The minutes of the trial court for July 13 and 14, 1960, reflect the fact that appellant was represented by two attorneys on those dates. The declarations of respondent and his counsel were also submitted in opposition to the motion, corroborating the statements of appellant's counsel and denying most of the detailed statements of appellant in respect to the negotiations for settlement.

[8–10] Where justice requires it, a party in whose favor a judgment has been rendered is entitled to relief from the judgment as well as the party against whom it is rendered. (Olson v. Olson, 148 Cal.App.2d 479, 482, 306 P.2d 1036.) However, "[i]t is a settled principle of law that motions for relief from default under the remedial provisions of section 473 of the Code of Civil Procedure are addressed to the sound discretion of the trial court, and the exercise of that discretion, in the absence of a clear showing of abuse, will not be interfered with by an appellate tribunal. [Citations.]" (Rackov v. Rackov, 164 Cal.App.2d 566, 569, 330 P.2d 926, 928.) The burden is on the moving party who must establish his position by a preponderance of the evidence; it is presumed that the trial court resolved all conflicts in favor of the prevailing party, and the order will not be set aside in the face of such conflict and the ruling thereon. (Warren v. Warren, 120 Cal.App.2d 396, 400, 261 P.2d 309.)

[11] In this case it clearly appears from the evidence before the trial court that it was fully justified in denying appellant any relief on the grounds provided by Code of Civil Procedure, section 473. The affidavits were in conflict and from them the court readily could draw the reasonable inference that there was no mistake, inadvertence, surprise or excusable neglect on the part of appellant, but that she participated in the settlement negotiations, received the advice of counsel, and entered into the stipulation in open court with full knowledge of its finality and effect.

The judgment and order presented for review are affirmed.

FOX, P. J., and ASHBURN, J., concur.

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208 Cal.App.2d 109

⊥**Mary Jo MARTINDALE, Victor Lynn Martindale, Warren Martindale and Myra L. Martindale, by their Guardian ad litem, Mary Jo Martindale, Plaintiffs and Appellants,** ⊥109

v.

The CITY OF MOUNTAIN VIEW, the Southern Pacific Co., a corporation, Wilder & Jones, a corporation, Harry E. Jones, Defendants and Respondents.

Civ. 19593.

District Court of Appeal, First District, Division 2, California.

Oct. 2, 1962.

Rehearing Denied Oct. 18, 1962.

Hearing Denied Nov. 28, 1962.

Action for wrongful death of plaintiff's decedent who was killed when truck he was driving was struck by railroad's train. The Superior Court, Santa Clara County, Raymond G. Callaghan, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Agee, J., held that error, if any, in admission or exclusion of evidence, or in giving certain instructions was not prejudicial, in view of overwhelming evidence that contributory negligence of decedent in attempting to cross tracks, although signal lights were operating, proximately caused or proximately contributed to cause of the accident.

Judgment affirmed.

1. Railroads 🔑347(4)

Evidence of prior accidents occurring under substantially same general circumstances as railroad grade crossing accident in question is admissible to prove existence of a dangerous condition as well as that railroad had knowledge or notice thereof, and it is not necessary to prove the prior accidents occurred in precisely the same manner, but it is sufficient if they occurred under substantially similar circumstances.

2. Negligence 🔑125

Before evidence of previous injuries may be admitted on issue of whether or not a condition as it existed was in fact a dangerous one, it must first be shown that conditions under which the alleged previous accidents occurred were the same or substantially similar to the one in question, and admissibility of such evidence is discretionary.

3. Railroads 🔑347(4)

Evidence that two female motorists, prior to fatal collision between railroad's train and truck driven by decedent, in crossing grade crossing had the wheels of their vehicles become locked in the rails, was inadmissible to show dangerous condition, in view of fact female motorists approached crossing from opposite direction of decedent, and in view of fact there was no showing that truck decedent was driving at any time went off the pavement as it proceeded across the tracks.

4. Railroads 🔑347(1)

Evidence that city and railroad had notice that a crossing at which decedent was killed when struck by railroad's train should be widened was inadmissible where there was no showing that width of pavement at the crossing had any relevancy to the accident.

5. Railroads 🔑347(4)

Evidence as to conditions existing at similar railroad grade crossings in the same general area may be admissible in an action arising out of an accident at another railroad grade crossing if a showing is made as to similarity and relevancy.

6. Railroads 🔑347(4)

Evidence as to conditions existing at railroad grade crossings in the same general area as grade crossing in which accident in question occurred was not admissible where there was no showing as to similarity of other crossings and no showing of relevancy.

7. Evidence 🔑195

Admission in evidence of a model of an electrically operated railroad grade crossing signal warning and grant of permission to activate it for a period of 32 seconds during which signal operated before train, at speed it was traveling, struck vehicle of plaintiff's decedent, was discretionary. West's Ann.Code Civ.Proc. § 1954.

8. Appeal and Error 🔑1052(5)

Admission of evidence of wealth of decedent's widow, who sought recovery of damages for decedent's wrongful death when truck he was driving was struck at a grade crossing by railroad's train, if error, was not prejudicial, in view of finding of nonliability.

9. Railroads 🔑328(2)

If obstruction to a motorist's view is such that he cannot obtain, without stopping, a reasonably assuring view of railroad tracks in both directions before entering dangerous track area, ordinarily it is his duty to stop and listen for approach of the train and to stop if necessary and not proceed across the dangerous track area without taking such precautions as a reasonably prudent motorist would take under existing circumstances.

10. Railroads 🔑351(2)

Giving of instruction that a motorist is required to keep his vehicle under such control that he can stop it as quickly as might be required was not error, even though decedent's vehicle was moving slowly at time it was struck by railroad's train, where there was testimony that decedent's vehicle failed to stop before reaching railroad's tracks at a time when crossing signals were operating.

11. Evidence 🔑506

Exclusion of expert testimony as to whether condition at railroad grade crossing at which railroad's train collided with decedent's truck constituted a hazard to motorist was not, in view of other testimony, as to conditions at the crossing, an abuse of discretion.

12. Appeal and Error 🔑1170(7, 9)

Error, if any, in admission or exclusion of evidence, or in giving certain instructions, in action for wrongful death of decedent who was killed when truck he was operating was struck at grade crossing by railroad's train, was not prejudicial, in view of overwhelming evidence that contributory negligence of decedent in attempting to cross tracks, although signal lights were operating, proximately caused or proximately contributed to cause of the accident. West's Ann.Const. art. 6, § 4½.

◆

J. A. London, Mountain View, William G. Filice, San Jose, of counsel, for appellants.

Hoge, Fenton, Jones & Appel, San Jose, for respondents City of Mountain View and Wilder & Jones.

Rodney R. Atchison, City Atty., Mountain View, Alexander, Bacon & Mundhenk, San Francisco, Herbert Chamberlin, San Francisco, for respondent City of Mountain View.

Rankin, Oneal, Luckhardt & Center, by William A. Ingram, San Jose, for respondents Southern Pac. Co. and Harry E. Jones.

⊥112 ⊥ AGEE, Justice.

This is a wrongful death action brought by the widow and minor children of the decedent, who was killed when he drove a pickup truck over a railroad crossing and was struck by a train. Decedent's brother is a co-plaintiff, seeking damages for the truck.

The defendants are the City of Mountain View, within whose confines the crossing is located, the Southern Pacific Company and the engineer who was operating its train, and Wilder & Jones, a corporation, the general contractor on sewer construction work for the city.

The appeal is from a judgment entered upon a unanimous jury verdict in favor of all defendants, returned in less than one hour after a twelve day trial.

The accident happened on Saturday, January 12, 1957, about 10:20 o'clock a. m. Rengstorff Avenue runs north and south and is intersected by two sets of railroad tracks, running east and west. Decedent was alone and proceeding north on Rengstorff. As he reached the northerly track, a westbound train collided with the right side of the pickup.

The railroad right of way is 90 feet wide. Vehicles northbound on Rengstorff would have to traverse a distance of 40½ feet from the southerly boundary line of the right of way before reaching the southerly rail of the westbound track. The tracks run straight for a mile and a half to the east of the crossing. The width of the crossing is 24 feet and the paved portion thereof is 22 feet wide.

The crossing was protected by two automatic signals, one on each side of the tracks. Each consisted of a standard to which was attached a pair of alternately flashing red lights, a twelve-inch circular gong, and the familiar "crossbuck" railroad crossing signs. Each light faced front and back and enabled an approaching vehicle operator to see the pair of red lights to his right, plus another pair to the left on the opposite side of the tracks. An actuating mechanism operated the lights and gongs whenever a train reached a point 3,300 feet from the crossing. All of the testimony was to the effect that these ⊥ signal lights and ⊥113 gongs were in proper operation at the time in question.

The train's locomotive was equipped with a "Mars gyro" rotating headlight and two fixed beam headlights, a sixty pound bell and an air horn. All three headlights on the front of the locomotive were burning as the train approached, and the bell attached to the locomotive was in continuous operation.

The city had let a contract to defendant Wilder & Jones which included the installation of a sewer pipe line along the center of Rengstorff. This required the boring of a hole under the railroad tracks in order to insert steel casing pipes into which the sewer pipe itself was to be inserted. It was necessary to dig a hole or a pit in the center of Rengstorff to the south of the tracks in order to get the boring machinery down into a position to do the boring. The pit was dug on January 3 and part of January 4. It extended in a north-south direction for a distance of approximately 32 feet, was from 5 to 7 feet in width, and 10 to 12 feet in depth. The end nearer the tracks was approximately even with the southerly property line of the right of way. The various witnesses gave various estimates of the distance from this end of the pit to the nearest rail, ranging from 18 to 41 feet, but photographs introduced into evidence by both sides show that the pit ended at or very near the southerly line of the right of way.

The boring subcontractor commenced work on Friday, January 4, and started pushing pipe under the tracks on the following day. This work was completed on Tuesday, January 8, and the boring equipment was removed the following morning. Defendant Wilder & Jones then constructed a temporary bulkhead at the northerly end of the pit to prevent a cave-in and to protect traffic southbound on Rengstorff. This consisted of five 2″ by 12″ planks placed side by side in a vertical position. These planks covered the entire width of the pit at that point. They extended up from the bottom of the pit to various heights above the ground level. The most westerly plank extended 7 feet, 4 inches above the pavement, the next three 4 feet, 5 inches, and the most easterly 3 feet, 6 inches.

There were also barriers placed at both sides and the southerly end of the excavation. These were 3 feet, 7 inches in height. Because the work was being done from the easterly side of the excavation, there was a "detour" sign at the southerly side, directing northbound traffic to proceed to the left of the excavation. There was no work being done on the day ⊥114 of the accident, which was a Saturday, and the right or easterly side was clear and of sufficient width to permit its use by northbound traffic intending to cross over the tracks. The only witness who claimed to have seen which side decedent used testified that it was the right side.

Decedent was familiar with the crossing and the construction work in progress. A business owned by himself and his brother was located nearby. The crossing was on the route between such business and the church of which he was the minister. In fact, at the time of the accident, decedent was en route from the business to the church. The general contractor's foreman had seen him pass by several times before the accident. On one occasion, he stopped and asked the foreman if he could get some of the excess dirt to use as fill on the church premises. The decedent also had rented a lot on Rengstorff to the general contractor to use for parking equipment.

Decedent's speed as he crossed over the eastbound track and headed toward the track on which the train was coming was testified to be approximately 10 miles per hour. He never stopped. The truck was struck broadside by the front of the train and carried down the track for a considerable distance.

Theory of Plaintiffs' Case. Plaintiffs state, in their closing brief: "Plaintiffs' theory in the case was that the defendants [city, railroad and contractor] were negligent in permitting a dangerous and defective condition to exist, in that the crossing was too narrow [22 feet] and when coupled with the construction work became more dangerous. Further, that the defendants had knowledge of these facts and permitted the dangerous condition to exist without taking greater safety precautions."

In their opening brief, plaintiffs also state: "One of plaintiffs' theories was that Reverend Martindale's pickup went off the roadway due to the narrow crossing, and that *he became locked on the tracks.*" (Emphasis ours.)

There is absolutely no evidence which would support such a theory. The testimony of the eye witnesses was that the truck was in motion at all times up to the actual impact and this testimony is uncontradicted. The investigating police officer testified that the point of impact was approximately in the center of the intersection. He stated that he determined this from lateral skid marks, paint scrapings and debris from the truck and by indentures in the right of way crossing. He marked the location of these on the engineer's diagram used at the trial. Plaintiffs' counsel then called the officer's ⊥115 attention to the following notation in his report: "Point of impact was determined by large indentures found on the railroad ties * * *." It was pointed out by plaintiffs' counsel that the ties at the crossing were covered over by the pavement and could not have been indented by the impact. The officer explained that he was referring to the planks which run lengthwise beside the rails over the crossing and not to the cross-ties beneath. These planks are approximately level with the top of the rails and the adjacent pavement. The one on the outside of the rail is, in railroad terminology, called the "runner plank" and the one on the inside, the "gauge plank."

It is apparent that plaintiffs' counsel hoped to develop an argument that the indentures on the "ties" could only refer to cross-ties and, since the cross-ties at the crossing were covered with 6 or 7 inches of asphalt, the point of impact would therefore be "off the roadway." This being so, it would then be argued that the "pickup went off the roadway due to the narrow crossing" and "became locked on the tracks."

While it is true that plaintiffs called the officer as an adverse witness, he being an employee of the city, his testimony stands uncontradicted and is corroborated by the only eye witness who fixed the point of impact. The theory of "going off the roadway" is completely without support in the record, and a verdict in accord therewith would be based upon nothing more than pure speculation.

Points Raised on Appeal.

Prior accidents. A Mrs. Barry testified that on January 3, 1957, about 5:30 o'clock p. m., she was driving her automobile south on Rengstorff and, as she approached the tracks, she observed the construction work that had been done on the other side; that "it wasn't real dark" at the time. Plaintiffs' counsel then offered to prove by her testimony that "she couldn't determine whether to proceed to her left or to her right, that she became engaged in the rails, that as a result of that she injured her back"; that she notified the Mountain View Police Department of the incident that same evening. Objections to this offer of proof were sustained.

An offer of proof was then made as to what a Mrs. McKinnon would testify, and objections thereto were also sustained. The offer is by no means clear but the following statement is made in plaintiffs' opening brief: "Counsel for plaintiffs further offered that on January 8, 1957, just four days before the fatal accident, Mrs. McKinnon, in driving across the intersection went off the roadway, got her wheels locked 116 in the rails and got stuck"; that she called the city and wrote to the railroad, advising them of her experience.

[1] Evidence of prior accidents occurring under substantially the same general circumstances as the accident in question is admissible to prove the existence of a dangerous condition as well as that defendant had notice or knowledge thereof. It is not necessary that the prior accidents be shown to have occurred in precisely the same manner. It is sufficient if they occurred under substantially similar circumstances. (Dragash v. Western Pac. R. R. Co., 161 Cal.App.2d 233, 242, 326 P.2d 649; Gilbert v. Pessin Grocery Co., 132 Cal.App.2d 212, 217, 282 P.2d 148; Witkin, California Evidence (1958) § 144, p. 165.)

[2, 3] The basic rule is stated in Laird v. T. W. Mather, Inc., 51 Cal.2d 210, 220, 331 P.2d 617, 623: "Before evidence of previous injuries may be admitted on the issue of whether or not the condition as it existed was in fact a dangerous one, it must first be shown that the conditions under which the alleged previous accidents occurred were the same or substantially similar to the one in question." [Citations.] The question of admissibility is primarily one for the trial court and is confined to its sound discretion. (Dragash, supra, p. 242, 326 P.2d 649.) In the opinion of the trial court, the accidents of Mrs. Barry and Mrs. McKinnon were not similar to that of the decedent. We agree.

Decedent's accident was on a quiet Saturday forenoon. All construction work had been suspended for the weekend. The easterly or right side of Rengstorff was clear. All equipment and spoil dirt had been removed therefrom. There was no moving traffic in the vicinity. The sky was overcast but the weather was dry. Decedent's speed as he traversed the crossing was about 10 miles per hour. Gongs on the light standards were ringing and the red lights were flashing. The train's bell was in continuous operation and its three headlights were on. No confusion was caused by the construction work. There was no activity of any kind around it. Decedent had become very familiar with its existence and location. The truck did not at any time go off the pavement. There was no causal connection between the width of the pavement and decedent's accident.

Mrs. Barry and Mrs. McKinnon both approached the tracks from the north and were proceeding south. Each entered Rengstorff from Alma Street which runs parallel with the tracks and is 20 feet north of the right of way. Thus each was on 117 Rengstorff for a distance of only 20 feet before reaching the right of way. Each saw the construction work and the barriers on the opposite side of the right of way and became confused. Each was faced with the problem of crossing over the two sets of tracks and then passing by the barriers in order to continue south on Rengstorff. There were men working around the pit when Mrs. McKinnon came along. There were also rock and dirt at the easterly side of the pit. She was going twenty-five miles per hour and there was other traffic crossing at the time. Mrs. Barry came along when it was dark or almost dark. One or more wheels of each automobile ran off the edge of the pavement on the westerly side.

The gist of this offered testimony is that each woman, under the circumstances confronting her, became so confused that her automobile was caused to run "off the roadway." We do not find any error in the trial court's ruling that these accidents were not sufficiently similar to comply with the "basic rule," as quoted above from the Laird case, supra.

However, Laird goes on to state, 51 Cal.2d at page 220, 331 P.2d at page 623: "The strictness of this requirement of similarity of conditions is 'much relaxed,' however, when the purpose of the offered evidence is to show notice, 'since all that is required here is that the previous injury should be such as to attract the defendant's attention to the dangerous situation which resulted in the litigated accident.'" (Quoting from McCormick, Evidence § 352.)

In the instant case, the city and the railroad stipulated to knowledge of the physical conditions existing at the time of the accident. The court repeated this stipulation in its instructions to the jury. There was no disagreement about what these conditions were. Numerous photographs were introduced by both sides. Some of these were taken within minutes after the accident. The question as to what the physical conditions were and as to whether the city and the railroad had knowledge thereof was never in dispute. The same is true as to the general contractor, who created the conditions caused by the construction work and who must necessarily have had knowledge of the physical condition of the crossing under which he was installing the sewer pipe.

It is true that the defendants did not stipulate that these conditions made the crossing dangerous or hazardous for motorists exercising reasonable care for their own safety. The court instructed the jury, after stating the stipulation, as follows: 118 "Whether or not these conditions constituted a dangerous, defective and hazardous condition in the respects charged, and was a proximate cause of the accident is a question of fact for the jury to decide."

Plaintiffs complain that the city's stipulation did not include an admission that it had such knowledge for a sufficient time to remedy the condition (Gov.Code § 53051) but the city inspector testified to daily inspection and express knowledge of the construction from the beginning. The width of the crossing, the location of the tracks, the signals and warning signs had been the same for many years. While it is true that section 53051 applies to defendant city only, the fact that the jury did not impose liability upon either of the other two defendants indicates that the "time to remedy" provision was not the basis of the jury's verdict in favor of the city.

Notice to the city and railroad that crossing should be widened. Plaintiffs made an offer to prove by certain communications, in addition to those made by Mrs. Barry and Mrs. McKinnon, that defendants were put "on notice of the existence of a dangerous and defective condition at the crossing." They state: "Plaintiffs have contended throughout that the stipulation made by the defendants City and Southern Pacific were [sic] not broad enough to exclude the offered evidence. Had they stipulated they had knowledge of the dangerous or defective condition rather than knowledge of the conditions that existed, perhaps the evidence could be properly excluded."

The plaintiffs' offer of proof is stated in their brief, as follows: "In addition to the prior accidents [of Mrs. Barry and Mrs. McKinnon], plaintiffs offered to prove that the Public Utilities Commission (PUC) recommended that the crossing be widened; that the Southern Pacific advised the PUC that it would widen the crossing; that the Society of Locomotive Engineers recommended to both the Southern Pacific and PUC that the crossing be widened; that the city recommended the crossing be widened; that the PUC conducted surveys in 1948 and 1951 with respect to the Rengstorff crossing and that it recommended the crossing be widened and that other improvements be made; that the Chief of Police of Mountain View forwarded documents to the City Manager pointing out that traffic inventories had been taken of the crossing and that cars had become locked in the rails because it was too narrow; that there was an inter-office communication betwen the City Manager and the City Engineer ⊥119 on December 13, 1956, requesting more width for the Rengstorff crossing."

The foregoing recommendations were that the pavement be increased from the existing width of 22 feet to a width of 24 feet, except that the city recommended an increase to 28 feet.

[4] As before stated, there is absolutely no evidence that the width of the pavement at the crossing had any relevancy to the accident involved herein and therefore the trial court did not commit error in excluding the offered evidence.

[5, 6] *Other crossings.* There is no doubt that evidence as to the conditions existing at similar crossings in the same general area may be admissible if a showing is made as to similarity and relevancy. But here there was no such showing as to either. Counsel for plaintiffs says that he tried to lay a foundation for such evidence by asking certain questions of the city's Chief of Police, to which questions objections were sustained. The record is as follows: "Q. [of the Chief] Now, in comparison with the other crossings in the City of Mountain View, would you say that the traffic over this crossing is greater, lesser, about the same, as other crossings in this area? * * * [Objection sustained.] Q. Now, you are familiar with all the other crossings in the City of Mountain View? A. Yes. Q. And you are familiar with the amount of traffic that goes over all of the crossings? A. Not precisely. Q. Rough idea? A. It would be an estimate. Q. I see. Now, would you say that the Rengstorff crossing is the same or similar to these other crossings? * * * [Objection sustained.] Q. Are you familiar with the Castro Street crossing? A. I am. Q. Would you state that the amount of traffic that traverses the Rengstorff crossing is substantially the same as the amount of traffic that crosses the Castro Street crossing? * * * [Objection sustained.]"

Immediately before resting his case, plaintiffs' counsel made an extended offer of proof, covering five pages of the reporter's transcript, and no reference whatsoever was made therein as to any other crossings.

Plaintiffs' counsel says that he desisted from making a record on this point because the trial court had admonished him that the subject should not be inquired into. Assuming this to be so, although the record fails to disclose it, counsel did not so restrain himself as to any other points in his offer of proof referred to above. As stated in Jensen v. Southern Pacific Co., 129 Cal.App. 2d 67, 74, 276 P.2d 703, 708: "Determination of relevancy, including similarity of 120 conditions in such a case [other crossings], is primarily the function of the trial judge." There is no basis for disturbing his decision in the instant case.

Demonstration of signal by use of model. Defendant railroad maintained an electrically operated signal at the crossing which was automatically activated when a westbound train was 3,200 feet east of the crossing. The speed of the train was 68 miles per hour. This would mean that the warning bell started ringing 32 seconds before the train reached the crossing. A model of the signal was brought into the courtroom and activated for a period of 32 seconds. Plaintiffs complain that a distorted impression was created because the model was cleaner than the one at the crossing and the sound of the bell was louder when emitted within the confines of the courtroom. This was admitted to be so on the voir dire examination of the witness who explained the working of the signal and qualified the model as an exact replica thereof, except for the height of the standard, which had to be lowered in order to get it into the courtroom.

[7] The admission of such evidence rests within the sound discretion of the trial court. (Code Civ.Proc. § 1954.) In a recent case, involving the same type of accident, it was held that such discretion was not abused by the allowance of an identical demonstration. (Greeneich v. Southern Pac. Co., 189 Cal.App.2d 100, 108–109, 11 Cal.Rptr. 235.) The cited case is so directly in point that we do not feel that further citations involving the use of models in the courtroom are necessary.

Evidence of "Widow's Wealth." On direct examination, the widow testified that decedent's annual salary as a full-time minister was $3,900 and that in the year prior to the accident he had received $12,954 from the trailer sales business owned by him and his brother, which the latter managed and to which decedent devoted very little time or attention. She also testified as to the current expenses of herself and children. This was over three years after her husband's death and the expenses, which included new car payments, special schools, and music lessons, totaled a substantial amount. The question was thus presented, under the issue as to the extent of damages sustained by plaintiffs, whether decedent would have had the financial capacity to meet these expenses if he had lived. This led to an inquiry on cross-examination concerning the trailer business. It developed that the widow had continued to receive the same share of profits therefrom that her husband had been receiving prior to his death. The 121 business was later incorporated and the widow became one of its officers. When asked if she received a salary as such, her counsel for the first time objected to this line of questioning. The objection was overruled and the answer was in the affirmative. The amount of the salary was not asked. It was also developed, without objection, that the widow was herself an ordained minister and that she had taken her husband's place as minister for a period of sixteen months after his death at the same salary. She also stated that she had an interest in an implement business in Idaho and a venture referred to as "Max Craft," both being handled by decedent's brother. There is nothing in the record to indicate that either had any value. She testified: "I think it [implement business] went in the hole. If you will look on my records that you have I am sure you will find that it went kind of sad last year, and also the Max Craft too."

[8] The prejudice claimed to have been suffered by the foregoing testimony is that the jury "could very well conclude that she [the widow] was not entitled to [any] compensation." The verdict, however, was against *all* plaintiffs, including the minor children and the decedent's brother, who was seeking a recovery for damages to the truck. Also, no recovery was allowed for the funeral expenses, as to the amount of which there was no dispute. It is evident that the jury's verdict was based upon a finding of nonliability of the defendants and not on the basis that the widow's "wealth" precluded any recovery whatsoever.

It seems clear that, in the instant case, such a claim of prejudice would only become relevant if the verdict had been in favor of plaintiffs and they then contended that the *amount* of the award was improperly affected by the testimony discussed above.

We see no need to discuss the further answers of the defendants that the cross-examination was within the scope of the direct examination, that timely objection was not made, that no motion was made to strike any of the testimony, and that the jury was fully and correctly instructed as to measure and elements of damages.

The instructions criticized. The court instructed the jury in the language of BAJI 203, as follows: "The tracks of a railroad, such as that involved in this case, are in themselves a warning of danger. Before a person drives a vehicle into the space which would be occupied by a train if it were to pass over such tracks, it is his duty to use every reasonable opportunity to look and listen for the approach of train, engine or car on the tracks, and to yield the right-of-way to any approaching train, engine or car so near as to constitute an immediate hazard. What is included in the term 'every reasonable opportunity' depends on all the surrounding circumstances, as they would be met and viewed by a person of ordinary prudence, if he occupied the same position as the one whose conduct is in question. No failure of duty or of the customary practice on the part of those in charge of a train or of anyone handling or supervising any phase of its operation, such as a failure to sound the bell, siren or whistle when required absolves a person going upon a track area, such as that involved in this case, from the duty to use ordinary care for his own protection." There is no criticism of this instruction.

The instruction which followed is the one criticized. The trial court followed substantially the wording of the first part of BAJI 203–B. In order to more clearly state the point, we quote BAJI 203–B in its entirety: "If the obstruction is such that one cannot obtain, without stopping, a reasonably assuring view of the tracks in both directions before entering the dangerous track area, then ordinarily it is his duty to stop, look and listen for the approach of train, engine or car, *and if necessary, to alight from his vehicle, go forward a few steps and take advantage of the view thus afforded.*" (Emphasis added.)

[9] The above italicized portion was eliminated from the instruction given, which is as follows: "If the obstruction is such that one cannot obtain, without stopping, a reasonably assuring view of the tracks in both directions before entering the dangerous track area, then ordinarily it is his duty to look and listen for the approach of train, engine or car and stop if necessary and not proceed on to the dangerous track area without taking such precautions as a reasonably prudent motorist would take under the then existing circumstances."

This instruction, as given, eliminates the vice denounced by Mr. Justice Dooling in Pennington v. Southern P. Co., 146 Cal.App.2d 605, at page 620, 304 P.2d 22, at page 31, 65 A.L.R.2d 690, in which he states, in concurring with the result reached by the majority of the court on other grounds. "I cannot concur in the approval, even tacit, of that portion of the stop, look and listen instruction which requires the plaintiff 'if necessary, to alight from his vehicle, go forward a few steps and take advantage of the view thus afforded.'"

123 In Anello v. Southern Pacific Co., 174 Cal.App.2d 317, 344 P.2d 843, BAJI 203–B was given in full and this was held to constitute reversible error. In a later case, Essick v. Union Pacific R. R. Co., 182 Cal. App.2d 456, 6 Cal.Rptr. 208, the giving of the same instruction was held to be error but not to require a reversal.

It is not necessary to prolong the discussion of this point because, in the words of Mr. Justice Dooling in Pennington, supra, page 621, 304 P.2d at page 32 "this ridiculous refinement [i. e., alighting] of the so-called stop, look and listen rule" was eliminated from the instruction given. Such instruction, as given, did not inform the jury that the decedent had an absolute duty to stop, but that such duty existed only if the obstruction to his view was such that he could not obtain a reasonably assuring view of the tracks without doing so. The instruction did not impose a duty to alight from his vehicle and go forward on foot if such a view could not be obtained.

The court also instructed the jury in the terms of BAJI 151 regarding the duty of care imposed on the driver of any vehicle. Plaintiff contends that the court erred in giving the last portion of that instruction because the record reveals no evidence to support the instruction. This portion of the instruction required that the decedent "keep the vehicle under such control that, to avoid a collision with any person or with any other object, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver in a like position."

[10] Plaintiffs' contention appears to rest on the fact that the only witnesses who saw decedent's vehicle testified that it was moving slowly. In the instant case, much of the jury's decision necessarily rested on inference rather than upon direct evidence of the facts in issue. The single most significant fact was that the decedent's vehicle failed to stop before reaching the tracks at a time when the crossing signals were operating. From this fact, considered in the context of the surrounding circumstances, it is reasonably inferable that the decedent did not have such control of his vehicle as would behoove a reasonably prudent man in like circumstances. In Lutz v. Schendel (1959), 175 Cal.App.2d 140, 345 P.2d 488, the court specifically recognized the duty of the driver of a vehicle as set out in the quoted instruction and applied the rule in a case involving vehicles which were admittedly proceeding at a slow rate of speed. No other evidence of lack of control was apparent. Plaintiffs' contention is without merit.

[11] *Was expert opinion admissible on whether the condition at the crossing constituted a hazard to motorists?* Plaintiffs called a safety engineer as a witness and propounded a hypothetical question to him which called for an opinion as to whether or not the condition at the crossing was hazardous to motorists attempting to cross the tracks. Defendants' objection was sustained. Plaintiffs incorrectly state that the "point has never been before a California Court." 124

In Wilkerson v. City of El Monte, 17 Cal. App.2d 615, 62 P.2d 790, the almost identical question was propounded to two expert witnesses, both of whom answered that the intersection involved therein was, in their opinion, dangerous and unsafe. The court held: "The opinions went to the ultimate question of fact to be determined by the jury." (Page 621, 62 P.2d page 794.) The judgment for plaintiff was reversed. To the same effect are: Hogan v. Miller, 153 Cal.App.2d 107, 116, 314 P.2d 230; Baccus v. Kroger, 120 Cal.App.2d 802, 803–804, 262 P.2d 349.

We recognize that expert opinion is not inadmissible merely because it coincides with an ultimate issue of fact. The question is one which must be determined under the particular circumstances of each case and the answer rests largely in the discretion of the trial court. We find no abuse of such discretion in the instant case.

[12] In conclusion, we wish to state that we are mindful of the difference between the functions of a trial court and an appellate court in considering the facts. In this case, however, the evidence as to negligence on the part of the decedent proximately causing or proximately contributing to cause the accident in question is so overwhelming that the alleged errors complained of by appellants, if we are incorrect in holding that none occurred, could not in our opinion have resulted in a miscarriage of justice. (Cal.Const. Art. VI, § 4½.)

Judgment affirmed.

KAUFMAN, P. J., and SHOEMAKER, J., concur.

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208 Cal.App.2d 134

⌊134 ⌊ **Martin J. KNEGO et al., Plaintiffs, Cross-Defendants and Respondents,**

v.

Horace James GROVER, aka James H. Grover, Defendant, Cross-Complainant and Appellant,

Petra J. Jorgensen, Cross-Defendant.

Martin J. KNEGO as administrator with will annexed in the Estate of Christine Oline Grover, deceased, Plaintiff and Respondent,

v.

Horace James GROVER, aka James H. Grover, Defendant and Appellant.

Civ. 6760.

District Court of Appeal, Fourth District, California.

Oct. 2, 1962.

Suit by beneficiaries under wife's will against the surviving husband respecting extent of wife's interest in property in the possession of the husband. The Superior Court of San Diego County, William P. Mahedy, J., entered a decree from which the surviving husband appealed. The District Court of Appeal, Coughlin, J., held that finding that the husband and the wife, who had executed joint will, intended that promissory notes and deeds of trust in both of their names, acquired in sales of properties after execution of will, were community property was supported by evidence.

Affirmed in part and reversed in part.

1. Husband and Wife 🔑14(3), 266

Agreement, understanding or intention of husband and wife respecting status of their property, as to whether it is separate, community, or joint tenancy, is determinative of that status.

2. Husband and Wife 🔑14(3), 266

Understanding of husband and wife as to whether their property is separate, community, or joint tenancy may be expressed or implied, written or oral.

3. Husband and Wife 🔑14(1)

In absence of showing to contrary, status of property declared by instrument through which husband and wife acquired title is controlling, since there is a rebuttable presumption that parties intended to hold property in manner indicated in instrument which evidences their ownership.

4. Evidence 🔑89

Whether presumption that parties intended to hold property in manner indicated by instrument which evidences their ownership has been rebutted is question of fact.

5. Evidence 🔑89

Presumption that parties intended to hold property in manner indicated in instrument by which they acquired title may not be overcome solely by evidence as to source of funds used to acquire property, or by evidence of secret intention of one of the parties.

6. Appeal and Error ⚿1010(1)

If there is any substantial evidence in case, including any inferences reasonably deducible from facts established thereby, which supports a questioned finding, that finding will be sustained on appeal.

7. Husband and Wife ⚿264

Finding that husband and wife, who had executed joint will, intended that promissory notes and deeds of trust in both of their names, acquired in sales of properties after execution of will, were community property was supported by evidence in action by beneficiaries of wife's will.

8. Husband and Wife ⚿249

Declaration in joint will of husband and wife that all property was community property manifested intention that after-acquired property should be considered community property.

9. Appeal and Error ⚿996

Whether inference is to be drawn from established facts is exclusively within discretion of trial court whose determination is conclusive on appeal.

10. Appeal and Error ⚿996

When two or more inferences may reasonably be deduced from facts reviewing court cannot substitute its judgment for that of trial court.

11. Evidence ⚿222(2)

Testimony of surviving husband, being sued by beneficiaries under will of deceased wife, that at all times he considered bank account and home place to be community property was admissible as an admission against interest supporting inference that his belief was founded on mutual understanding between parties.

12. Husband and Wife ⚿247

Statutes respecting husband's power to deal with community property passing from his control either by reason of his death or testamentary disposition by wife must be interpreted as part of total law governing wife's right to make testamentary disposition of her share in community property; defining extent of share for testamentary purposes; and prescribing procedure by which it may be subjected to administration for such purposes. West's Ann.Prob. Code, §§ 202, 203.

13. Husband and Wife ⚿268(4)

Medical, funeral and burial expenses incurred on behalf of deceased wife are debts of husband for which community property is liable.

14. Husband and Wife ⚿273(4)

Community property after death of wife should be liable for other debts of husband for which community property would have been liable during wife's lifetime.

15. Husband and Wife ⚿273(5)

"Debts" of husband, referred to in statute subjecting community property passing from his control to his debts and to administration, do not include those incurred by him after his wife's death which have no relationship to their community property. West's Ann.Prob.Code, § 202.

16. Husband and Wife ⚿273(2)

Statute giving husband, pending probate of wife's will and the incident administration of her estate, same power to deal with community personal property as he had in her lifetime does not give husband right to consume wife's share of community property which was subject to her testamentary disposition, by giving it away or by using it in payment of debts incurred by him after her death which have no relationship to maintenance or preservation of that property; and obvious purpose of statute is to permit husband to retain possession of community property except insofar as it is necessary to carry wife's will into effect. West's Ann.Prob.Code, § 202.

17. Husband and Wife ⚿273(2)
Wills ⚿6

Wife's share of community property which is subject to her testamentary disposition is one-half interest in that part thereof in existence at time of her death which remains after payment of her husband's debts, and possession and control of this share remains with husband pending administration except to extent necessary to carry wife's will into effect. West's Ann. Prob.Code, § 202.

18. Husband and Wife ⇨257

Community property does not change its character by reason of change in its form, and rents, issues, and profits therefrom partake of its community character.

19. Husband and Wife ⇨273(2)

While community property is in possession of husband, after death of wife, he has right and duty to preserve and maintain same and should be credited with any expenditures incurred in so doing and his status is analogous to that of trustee authorized to manage and deal with trust property.

20. Husband and Wife ⇨276(7)

Any accounting ordered for purpose of suit by beneficiaries of deceased wife's will to determine extent of wife's share in community property which was subject to administration should have been directed only to determination respecting extent of wife's interest in property in possession or under control of husband, which was subject to her testamentary disposition. West's Ann. Prob.Code, § 202.

21. Husband and Wife ⇨276(4)

Court had authority to direct surviving husband to pay over to administrator of his wife's estate that part of note payments and bank account funds which were community property and which were subject to administration if administrator should have possession thereof to carry wife's will into effect.

22. Husband and Wife ⇨274(4)

Refusal to give husband credit for payment for taxes or repairs to property, in suit by beneficiaries of wife's will, was proper when there was no showing that payments concerned home place which was only community real property in his possession.

23. Husband and Wife ⇨273(5)

Where wife's will disposed of her share in community property court properly refused to give credit for debts incurred by husband after wife's death and paid from community property.

24. Husband and Wife ⇨273(12)

That part of judgment which required husband, who obtained loan and placed mortgage on home place which was community property, to pay into estate of wife, who had disposed of her community interest in home by will, an amount equal to unpaid balance on note was unsound and matter would be remanded to trial court for application of proper formula.

25. Husband and Wife ⇨249

Proceeds of loan secured by community property are community funds.

26. Husband and Wife ⇨273(2)

Where husband, after wife's death, obtained loan secured by community property he could not make a gift of proceeds of loan under statute which gave husband same power to deal with community property as he had in his wife's lifetime. West's Ann. Civ.Code, § 172; West's Ann.Prob.Code, § 202.

Leedy & Kimball and John W. Kimball, Encinitas, for defendant, cross-complainant and appellant.

Kolts & Kolts and Donald Kolts, Los Angeles, for plaintiffs, cross-defendants and respondents.

⊥138 COUGHLIN, Justice.

The beneficiaries named in the will of a deceased wife, and the administrator with the will annexed of her estate, who are the plaintiffs and respondents above named, brought separate actions against her surviving husband, who is the defendant and appellant herein, claiming certain property in his possession to be community property subject to the provisions of her will. These actions were consolidated for trial; resulted in judgments in favor of the plaintiffs; and gave rise to the appeals now before this court.

Christine Grover, the deceased wife, and Horace Grover, the surviving husband, were married April 8, 1944. The wife, at the time of marriage, owned a hotel, located on nine lots in Block 17 of Solano Beach and, thereafter, with her husband, acquired other property which they appeared to hold as joint tenants. On March 18, 1958, they executed mutual wills, together with a written agreement that neither would revoke or change the same without the written consent of the other. Each of these wills contained the following:

> "I declare that all of the property, both real and personal, in which I have any right, title, interest or estate, is community property of myself and my said" spouse, naming the latter.

The wife, from her "community one-half interest" bequeathed $3000 to a sister, and all of the remainder of her ⌊139 "estate" to her three adult children in equal shares; declared that her husband should retain his one-half interest in their community property as his separate property; provided that in the event he should predecease her the foregoing dispositive provisions of her will should apply to the whole of her estate including that which she may have received from him; and nominated her husband as executor. The husband devised and bequeathed all of the property in which he had any right, title, interest or estate to his wife; provided that in the event she should predecease him that his entire estate should be devised and bequeathed to her sister and children, incorporating the dispositive provisions with respect thereto contained in his wife's will; and nominated her as executrix.

At the time of the execution of the foregoing wills, record title to the hotel appeared in the name of the wife as her separate property; two unimproved lots were owned by the husband and wife, who held title under deeds conveying the same to them as joint tenants; and a bank account, as well as an automobile, also stood in their names as joint tenants.

A little less than three months after executing these wills a sale of one of the unimproved lots to people named Kelley resulted in a net cash payment of $8,871.42, which was deposited in the joint bank account, and the execution of a note by the purchasers, in the sum of $22,500.00, payable to the husband and wife as joint tenants, together with a deed of trust on the purchased property securing payment of that note, in which they, as joint tenants, were named as beneficiaries. Shortly thereafter a sale of the hotel to people named Grybas and Childs resulted in a net cash payment of $15,969.76, which was deposited in the joint bank account, and the execution of a note by the purchasers, in the sum of $75,000.00, payable to the husband and wife as joint tenants, together with a deed of trust on the purchased property securing the payment of that note, in which they, as joint tenants, were named beneficiaries.

Subsequently a home was built on the remaining unimproved lot. Proceeds from the bank account were used for this purpose.

The wife died on March 31, 1959. The husband did not probate her will. Instead he retained possession of all of the remaining foregoing property, which included a $746.00 balance in the joint bank account, the Kelley note upon which there was unpaid $11,500.00, the Grybas-Childs note upon which there was unpaid the sum of $73,037.52, the home place, and the ⌊140 automobile. Thereafter he instituted joint tenancy termination proceedings with respect to these items.

Following the wife's death a series of conversations took place between the husband and individual beneficiaries under her will, the gist of which amounted to statements by him that he knew his wife wanted her children to receive something from her estate; that all of the property was joint tenancy property and now belonged to him; that the will in question was invalid; that, nevertheless, he intended to carry out his wife's wishes to the best of his ability; that he had been under considerable expense and did not know when they would get anything; but that anything they received would be a gift on his part. Subsequently he paid them varying sums of money as "gifts."

Three months following his wife's death, i. e., on July 6, 1959, the husband married; five months later, i. e., on December 2, 1959, he borrowed $19,000.00, securing repayment of this loan by a deed of trust on the home place; and gave the amount thus acquired to his second wife. On one occasion after his second marriage, the husband told one of the children that this marriage would "make no difference to the family, that he would still carry out Christine's [his wife's] wishes, as far as the estate was concerned."

Shortly after completion of the $19,000.00 loan, the foregoing actions were commenced. The trial court found, in substance, that the bank account, the promissory notes, the home place, and the automobile were community property; entered judgments which determined, among other things, that the interest of the deceased wife in that property was subject to probate under her will; and decreed recovery by the administrator with the will annexed from the husband of the sum of $30,922.96, as reimbursement for the alleged conversion by the latter of funds and property belonging to his wife's estate.

The husband appeals and contends: (1) That there is no evidence to support the finding that the property in question was community property of the parties at the time of the wife's death; (2) that the court erred in the admission of evidence respecting this issue; and (3) that the evidence is insufficient to support the award of damages.

SUFFICIENCY OF EVIDENCE RE FINDING OF COMMUNITY PROPERTY.

The husband concedes that the property owned by him and his wife on March 18, 1958, being the date of the execution of ⊥141 ⊥ their mutual wills, became community property, but claims that the property which they thereafter acquired was held by them as joint tenants.

[1–5] The agreement, understanding or intention of a husband and wife respecting the status of their property, as to whether it is separate, community, or joint tenancy, is determinative of that status (Gudelj v. Gudelj, 41 Cal.2d 202, 212, 259 P.2d 656; Socol v. King, 36 Cal.2d 342, 345, 223 P.2d 627; LaMar v. LaMar, 30 Cal.2d 898, 903, 186 P.2d 678); their agreement may be expressed or implied (Alocco v. Fouche, 190 Cal.App.2d 244, 251, 11 Cal.Rptr. 818; Van Houten v. Whitaker, 169 Cal.App.2d 510, 517, 337 P.2d 900), written or oral (Socol v. King, supra, 36 Cal.2d 342, 346, 223 P.2d 627; Huber v. Huber, 27 Cal.2d 784, 788, 167 P.2d 708; McDonald v. Morley, 15 Cal.2d 409, 412, 101 P.2d 690, 129 A.L.R. 810); their understanding or intention may be inferred from their conduct or declarations (Socol v. King, supra, 36 Cal.2d 342, 346, 223 P.2d 627; Cash v. Cash, 110 Cal.App.2d 534, 538, 243 P.2d 115); and, in the absence of any showing to the contrary, the status declared by the instrument through which they acquired title is controlling. The latter result follows from a rebuttable presumption that the parties intend to hold their property in the manner indicated in the instrument which evidences their ownership. (Gudelj v. Gudelj, supra, 41 Cal.2d 202, 212, 259 P.2d 656; Guerin v. Guerin, 152 Cal.App.2d 696, 709, 313 P.2d 902; Cash v. Cash, supra, 110 Cal.App.2d 534, 538, 243 P.2d 115.) Ordinarily, whether this presumption has been rebutted is a question of fact. (Gudelj v. Gudelj, supra, 41 Cal.2d 202, 212, 259 P.2d 656.) However, it may not be overcome solely by evidence as to the source of the funds used to acquire the property (Gudelj v. Gudelj, supra, 41 Cal.2d 202, 212, 259 P.2d 656; Socol v. King, supra, 36 Cal.2d 342, 346, 223 P.2d 627; Guerin v. Guerin, supra, 152 Cal.App.2d 696, 710, 313 P.2d 902; Cash v. Cash, supra, 110 Cal.App.2d 534, 538, 243 P.2d 115); or by evidence of a secret intention of one of the parties. (Gudelj v. Gudelj, supra, 41

Cal.2d 202, 212, 259 P.2d 656; Socol v. King, supra, 41 Cal.2d 342, 346, 223 P.2d 627; Guerin v. Guerin, supra, 152 Cal.App.2d 696, 710, 313 P.2d 902.)

[6–8] The husband contends that there is no evidence to support a finding that he or his wife agreed, understood or intended that the Grybas-Childs or Kelley promissory notes and deeds of trust were community property. On appeal, if there is any substantial evidence in the case, including any inferences reasonably deducible from the facts established thereby, ⊥142 which supports a questioned finding, it will be sustained. (Grainger v. Antoyan, 48 Cal.2d 805, 807, 313 P.2d 848; Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.) The facts and circumstances in the instant case fully support the finding of the trial court in the premises. When Mr. and Mrs. Grover executed the joint wills they intended that all of their property should be community property. Their declarations in these wills clearly manifested this intention. (Brewer v. Simpson, 53 Cal.2d 567, 585, 2 Cal.Rptr. 609, 349 P.2d 289; Alocco v. Fouche, supra, 190 Cal.App.2d 244, 251, 11 Cal.Rptr. 818.) From the total evidence the court was entitled to conclude that this intention extended to the proceeds of this property as evidenced by the promissory notes and deeds of trust executed in connection with the subsequent sales thereof. The very nature of the transaction was such as to indicate an intention that one-half of the property owned by the parties at the time of the wife's death, should she predecease her husband, would be devised to her children. Such an understanding supports an inference that they did not intend that the property thereafter acquired by a joint tenancy instrument should have joint tenancy status. (See McDonald v. Morley, supra, 15 Cal.2d 409, 412, 101 P.2d 690, 129 A.L.R. 810; Lich v. Carlin, 184 Cal.App.2d 128, 137, 7 Cal.Rptr. 555; Van Houten v. Whitaker, supra, 169 Cal.App.2d 510, 517–518, 337 P.2d 900.) In addition, the cash receipts from the subject sales, as well as subsequent payments upon these notes, were deposited in the bank account which the parties had declared was their community property bank account. Funds from this account were used to build a home upon a lot which they had declared was community property. Such conduct supports a conclusion that they considered that the status of the proceeds from the sale of their property, whether evidenced by cash or promissory notes, was the same as the status of their bank account and the property upon which they built their home. Furthermore, as the wife's will would be effective only if she died possessed of a community interest in the property which is the subject of these actions, the statement by the husband, after her death, that he knew her wishes in the matter were that her children "should get something," and that he intended to carry them out, support an inference that such knowledge was based upon an understanding between him and his wife that the property which they owned at the time of her death would be community.

[9, 10] At the time the husband and wife sought legal advice concerning their wills, the attorney who prepared the same ⊥143 explained the differences in status between separate, community and joint tenancy property. At this time they stated "that it was their desire to consider everything that they owned community property." Thereafter no discussion was had with respect to the status of any of the property owned by them. The respondent contends that in view of this advice the trial court was required to infer that the wife did not intend that the Grybas-Childs and Kelley promissory notes, which were made payable to herself and to her husband as joint tenants, should be community property. The testimony concerning the attorney's advice in the premises is subject to conflicting inferences; does not require the inferences for which the husband contends; and the rejection of the latter inference by the trial court may not be interfered with on appeal. Whether an inference shall be drawn from established facts is a matter exclusively within the discretion of the trial court, and its de-

termination is conclusive on appeal. (Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868.) Furthermore, the testimony respecting the attorney's advice and conduct in the premises supports the conclusion that the parties considered all of their property to be community property regardless of the type of deed or agreement by which it came to them or was created; that the attorney considered it to be thus; that they must have been advised accordingly; and that they were entitled to conclude that the designation of its status in instruments of transfer or of creation was not controlling. Where two or more inferences reasonably may be deduced from the facts, a reviewing court is without authority to substitute its deductions for those of the trial court. (Estate of Schultz, 54 Cal.2d 513, 518, 6 Cal. Rptr. 281, 353 P.2d 921, 81 A.L.R.2d 1106; Primm v. Primm, 46 Cal.2d 690, 694, 299 P.2d 231.)

ALLEGED ERROR IN ADMISSION OF EVIDENCE

[11] Over objection, the husband testified in substance that at all times he considered the bank account and the home place to be community property. He contends that this testimony was inadmissible insofar as it declared his intention with respect to the property subsequent to the making of the joint wills because such intention was not communicated to his wife. This contention is without merit. The subject testimony constituted an admission against interest supporting an inference that his belief in the premises must have been founded upon the existence of a mutual understanding between the parties.

⊥144 ⊥

SUFFICIENCY OF THE EVIDENCE TO SUSTAIN JUDGMENT RE DAMAGES

The court found that the husband converted the interest of his wife's estate in the payments made upon the promissory notes after her death, in the joint bank account, and in the automobile; that the value of this interest was $12,376.47; that, by deed of trust, he placed an encumbrance upon the home place in the total sum of $19,000.00 of which there was unpaid the sum of $18,546.49; and that the administrator with the will annexed should recover from the husband the total of these sums, i. e., $30,922.96; judgment was entered accordingly.

[12] The husband contends that pending administration of his wife's estate he had the right to consume the community personal property in payment of his debts; to impose an encumbrance upon the community real property securing payment of the loan to him; and to give away the proceeds of this loan. He cites the provisions of Sections 202 and 203 of the Probate Code in support of this contention. The former thereof provides that:

> "Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration * * * but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect."

The latter section provides:

> "After 40 days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property is claimed by another under the wife's will."

The code sections in question must be interpreted as a part of the total law governing the wife's right to make a testamentary disposition of her share in the community property; defining the extent of that share for testamentary purposes; prescribing a procedure governing the time and method by which it may be subjected to administration for such purposes; retaining in the husband a form of management of the 145 community personal property essential to the use of his interest therein; also retaining in him the control and possession of all of the community property, restricted only to the extent necessary to carry into effect the provisions of his wife's will, for the evident purpose of enabling him to preserve in the fullest measure commensurate with testamentary disposition both his and his wife's interests therein; providing a method whereby the beneficiaries under a wife's will may give notice of their claim to an interest in community real property under control of the husband; and protecting those who deal with him concerning the same where such notice has not been given.

The evidence shows that the husband spent the note receipts and the bank account funds in payment of medical expenses incurred for services rendered his wife during her lifetime, of expenses incurred for her funeral and burial, and of debts contracted after her death, including his living expenses, inheritance taxes, legal fees for services rendered in connection with the joint tenancy termination proceedings, taxes on real property, and repairs thereto. The evidence does not show that the taxes and repairs in question were levied or made upon the community property.

[13–15] Heretofore it has been determined that the medical, funeral and burial expenses incurred on behalf of a deceased wife are debts of the husband for which the community property is liable. (Odone v. Marzocchi, 34 Cal.2d 431, 439, 211 P.2d 297, 212 P.2d 233, 17 A.L.R. 1109.) It is reasonable to conclude that such property should be liable for other debts of the husband for which the community property would have been liable during the wife's lifetime. (See 10 Cal.Jur.2d 778–779 regarding such debts.) On the other hand, the debts of the husband referred to in Section 202 do not include those incurred by him after his wife's death which have no relationship to their community property. (See Johnston v. San Francisco Savings Union, 75 Cal. 134, 144–145, 16 P. 753.) If the statute were interpreted otherwise, the husband could render for naught any testamentary disposition by his wife of her share in the community property, which is contrary to the evident purpose of the law.

[16] As noted, Section 202 further provides that, pending probate of a wife's will and the incident administration of her estate, a husband shall have "the same *power* to sell, manage and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative 146 of the wife except to the extent necessary to carry her will into effect." (Italics ours.) However, the subject section does not purport to give the husband the right to consume his wife's share of the community property, which was subject to her testamentary disposition, by giving it away or by using it in the payment of debts incurred by him after her death which have no relationship to the maintenance or preservation of that property. The obvious purpose of the statute is to permit the husband to retain possession of the community property except insofar as it is necessary to carry his wife's will into effect. Consistent with this purpose he may be required to account to her personal representative for her share.

[17–19] The wife's share of the community property which is subject to her testamentary disposition is a one-half interest in that part thereof in existence at the time of her death which remains after payment of her husband's debts. (Odone v. Marzocchi, supra, 34 Cal.2d 431, 440, 211 P.2d 297, 212 P.2d 233, 17 A.L.R. 1109; Estate of Coffee, 19 Cal.2d 248, 252, 120 P.2d 661.) Possession and control of this share remains with the husband pending administration except to the extent necessary to carry the wife's will into effect. (Prob.Code, sec. 202.) During this time he has certain powers with respect thereto which enable him to change the form but not the status thereof. Community property does not change its character by reason of a change in its form. (Boyd v. Oser, 23 Cal.2d 613, 623, 145 P.2d 312; Estate of Jolly, 196 Cal. 547, 556, 238 P. 353.) Furthermore, the rents, issues and profits therefrom partake of its community character. (Boyd v. Oser, supra, 23 Cal.2d 613, 621, 145 P.2d 312.) Under applicable equitable principles, while the community property is in possession of the husband he has the right and duty to preserve and maintain the same, and should be credited with any expenditures incurred in so doing. His status in the premises is analogous to that of a trustee authorized to manage and deal with trust property. (Generally see Civ.Code, sec. 2273; Neet v. Holmes, 25 Cal.2d 447, 466, 154 P.2d 854; Ochoa v. McCush, 213 Cal. 426, 431, 2 P.2d 357; In re Beisel, 110 Cal. 267, 275, 277, 40 P. 961, 42 P. 819; Glide v. Dwyer, 83 Cal. 477, 487–488, 23 P. 706; Bixby v. Hotchkis, 58 Cal.App.2d 445, 452, 136 P.2d 597; 49 Cal.Jur.2d 134–138.)

[20–23] In the case at bar, among other things, the plaintiffs sought a determination of the extent of the wife's share in community property which was subject to administration. Any accounting ordered for that purpose ⌊147 should have been directed only to a determination respecting the extent of the wife's interest in the property in possession or under control of her husband, which was subject to her testamentary disposition to the extent heretofore outlined. On the other hand, the court had authority to direct the defendant-husband to pay over to the administrator of his wife's estate that part of the note payments and the bank account funds in question which were subject to administration, as aforesaid, if it was necessary that the administrator should have possession thereof to carry the wife's will into effect. (Prob.Code, sec. 202.) To the extent that the judgment herein failed to credit the husband for the payments made by him upon the medical and funeral expenses incurred on behalf of his wife, it was in error. As there is no showing that the payments for taxes or repairs concerned the home place, which was the only community real property in his possession, the refusal to give credit for these items was proper, although a further hearing in the matter may establish the propriety thereof. Likewise, the refusal to give credit for the other debts incurred by the husband after his wife's death was in accord with the rules heretofore noted, and was not error.

[24] That part of the judgment which decreed recovery of an amount equal to the balance unpaid on the note and deed of trust against the home place, i. e., the sum of $18,546.49, is unsound. The court declared that a one-half interest in that property was subject to the wife's testamentary disposition. To further require the husband to pay into his wife's estate the amount of the outstanding encumbrance against the property might result in a double recovery. Should he pay the obligation in question, for which he is personally liable, and for which his one-half interest in the property as well as his wife's one-half interest therein is security, the wife's estate would receive her one-half interest clear of any encumbrances plus $18,546.49, which obviously would be unfair. A proper disposition of the issue at hand requires a consideration of many facets, as to some of which the evidence has not been developed, and this court must leave to the trial court the burden of adopting and applying a proper formula and procedure which will do justice in accord with the facts established by the evidence and the law in the premises.

[25, 26] The defendant-husband contends that he is entitled to retain the $19,-

000.00 which he received from the loan in question; was authorized to place an 148 encumbrance upon his wife's community interest in the home securing repayment of that loan; and is not required to account for any part thereof. This contention is based upon the provisions of Section 203 of the Probate Code which provide that, after 40 days following the death of the wife, the husband shall have "full power" to mortgage or otherwise deal with and dispose of the community real property unless a notice is recorded to the effect that another person claims an interest in such property under the wife's will. No such notice was recorded in this case. The power of the defendant-husband to execute the subject deed of trust is not questioned. However, the code provisions relied upon neither confer upon him the right to give away the proceeds of a loan thus obtained; authorize him to change the status thereof from community to separate; declare that he shall not be accountable for the same; nor enable him thus to divest his wife's estate of her community share. The proceeds of a loan secured by community property are community funds. These funds, being personal property, may be subject to the provisions of Section 202 of the Probate Code conferring upon the husband the "same power" to deal therewith as he had in his wife's lifetime. However, this power is conferred by Section 172 of the Civil Code which provides that "he cannot make a gift of such community personal property." The contention of the defendant to the contrary is wholly without merit. (See Harris v. Harris, 57 A.C. 403, 407, 19 Cal.Rptr. 793, 369 P.2d 481.)

No claim of error is asserted with respect to the award for a one-half interest in the value of the automobile, and no consideration is given this phase of the case.

That part of the judgment in favor of the administrator with the will annexed awarding damages is reversed with instructions to take such further proceedings respecting the issues raised by the defendant's collection and use of all of the payments made on the promissory notes since his wife's death, by his use of the whole of the bank account, and by his use of the proceeds of the loan against the home place, as may be proper, and thereupon to enter a judgment on these issues in accord with the facts as found and the law in the premises. All other parts of both judgments are affirmed. Neither party shall recover costs on appeal.

GRIFFIN, P. J., and SHEPARD, J., concur.

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87 **BALDWIN PARK COUNTY WATER DISTRICT, Downey County Water District, La Puente Valley County Water District, Newhall County Water District, Orchard Dale County Water District, Paramount County Water District, Pico County Water District, Rowland Area County Water District, and San Gabriel County Water District, County Water Districts; La Canada Irrigation District, Littlerock Creek Irrigation District, Palmdale Irrigation District and Palm Ranch Irrigation District, Irrigation Districts; and Walnut Valley Water District, a California Water District, Plaintiffs and Respondents,**

v.

COUNTY OF LOS ANGELES, a Public Corporation, and John A. Lambie, County Engineer, Defendants and Appellants.

Civ. 26137.

District Court of Appeal, Second District, Division 1, California.

Oct. 1, 1962.

Rehearing Denied Oct. 25, 1962.

Hearing Denied Nov. 28, 1962.

Suit by irrigation and water districts within Los Angeles County for declaratory relief as to validity of a county ordinance regulating them. The Superior Court of Los Angeles County, Leon T. David, J., rendered judgment holding the ordinance invalid and the defendants appealed. The District Court of Appeal, Wood, P. J., held that Los Angeles county ordinance requiring that all persons or agencies supplying water for domestic purposes comply with certain specifications relative to supplying water, water supply equipment, and fire protection, conflicting with Water Code provisions with respect to construction and management and control of systems and imposing minimum requirements for fire protection while Water Code permitted districts to determine such, was invalid as in conflict with general law and not applicable to irrigation districts, county water district and California water district in county.

Affirmed.

1. Counties 🔑21½

Los Angeles county ordinance requiring all persons or agencies supplying water for domestic purposes to comply with certain specifications relative to supplying water, equipment, and fire protection, conflicting with Water Code provisions with respect to construction and management and control of systems and imposing minimum requirements for fire protection while Water Code permitted districts to determine such, was invalid as in conflict with general law and not applicable to irrigation districts, county water district and California water district in county. West's Ann.Water Code, §§ 100, 102, 104, 20500 et seq., 21385, 22075, 22077, 22078, 22280, 22309, 22961, 24250–26553, 30000 et seq., 30200–32000, 30576, 30580, 31000, 31001, 31020–31024, 31026, 31120, 31048, 31060, 34000 et seq., 34150–37156, 34153, 34807, 35400, 35401, 35425, 35600; West's Ann.Const. art. 11, § 11.

2. Waters and Water Courses 🔑183½

Water Code shows intention by Legislature to adopt general and complete scheme and plan for conserving water and regulating production, control, distribution, and use of water by water districts by which state occupied legislative field with respect to water conservation and regulation by irrigation districts and by county and California water districts. West's Ann.Water Code, §§ 20500 et seq., 30000 et seq., 34000 et seq.

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, for appellants.

Burris & Lagerlof, Frank E. Jenney and H. Jess Senecal, Los Angeles, for respondents.

⊥WOOD, Presiding Justice. ⊥88

The plaintiffs are fourteen state governmental agencies which produce and distribute water, in Los Angeles County, for domestic and commercial purposes. Four of the plaintiffs are irrigation districts; nine are county water districts; and one is a California water district. Those respective districts were organized, and are existing, under Divisions 11, 12, and 13 of the Water Code of California.

This is a declaratory relief action in which the principal question is whether Ordinance 7834, adopted by Los Angeles County in August 1960, is applicable constitutionally to the⊥plaintiffs. It may be stated generally ⊥89 that the ordinance provides that all persons or public agencies which supply water for domestic purposes shall comply with certain specified requirements of the county relative to supplying water, and water supply equipment, for fire protection.

The defendants, who are the County of Los Angeles and the county engineer, will be referred to herein as the "county."

The plaintiffs, who will be referred to herein as the "districts," contended at the trial, and now contend on appeal, that the state has occupied the legislative field of regulating water and irrigation districts, that the ordinance is in conflict with general state law, and therefore that the county ordinance is not applicable to them.

The defendant contended at the trial, and now contends on appeal, that the state has not occupied that field, that the ordinance is not in conflict with general state law, and that the ordinance is a reasonable provision within the police power granted to the county by section 11 of article XI of the state Constitution.

The trial judge concluded, among other things, that the state has occupied such legislative field; that the county ordinance is in conflict with general state law; and that the ordinance was not applicable to plaintiffs.

The judgment (1) declared that the ordinance was not applicable to plaintiffs, and (2) enjoined defendants from enforcing the ordinance as against plaintiffs.

Section 100 of the Water Code provides, in part: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." Section 102 of that code provides: "All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law." Section 104 provides: "It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection."

Section 100 of the Water Code provides, in part: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." Section 102 of that code provides: "All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law." Section 104 provides: "It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection."

⊥90 The Water Code provides for the formation and regulation of state agencies for the purposes of controlling and distributing water. Among those agencies are irrigation districts, county water districts, and California water districts.

Division 11 of the Water Code, which is entitled "Irrigation Districts," includes provisions regarding: the method of forming such a district, and the area thereof (pt. 2); the qualifications, tenure, compensation, powers, and duties of the directors, and the management of a district (pt. 3); the elections therein (pt. 4); the powers and purposes of such a district, and the construction of the waterworks system (pt. 5); regulation of the financial affairs of a district (pt. 8); issuance of bonds (pt. 9); and levying assessments (pt. 10). The area which may be included in an irrigation district is "land susceptible of irrigation from a common source and by the same system of works * * *." (Water Code, § 20700.) It thus appears that the land which may be included in an irrigation district is not limited to land in one county, but it may be land in two or more counties. The powers of an irrigation district include the right to: perform "any act necessary to furnish sufficient water in the district for any beneficial use" (§ 22075); "deliver water for fire protection purposes" (§ 22077); control, distribute, store, purify, and salvage any water for the beneficial use of the district or its inhabitants (§ 22078); fix and collect charges for use of water (§ 22280); hold, acquire, manage, sell, or lease the property of the district. Section 21385 provides: "The board [of directors] except as otherwise specifically provided has the power and it shall be its duty to manage and conduct the business and affairs of the district." Section 22309 provides: "The works [of an irrigation district] shall be constructed under the direction and to the satisfaction of the engineer of the district and be subject to the approval of the board [of directors]." It thus appears that the Legislature has given broad powers to irrigation districts with respect to the control and distribution of water in the districts; has provided that the management of the affairs of the district shall be in the board of directors; and has provided that the construction of the system of waterworks of the district shall be under the direction of the district engineer, subject, however, to the approval of the board of directors.

Division 12 of the Water Code, which is entitled "County Water Districts," includes provisions regarding: the method 91 of forming such a district, and the area thereof (pt. 2); the qualifications, tenure, compensation, powers, and duties of the directors (pt. 3); the elections therein (pt. 4); the powers and purposes of a district, the management of the district, and the construction of the waterworks system (pt. 5); regulation of the financial affairs (pt. 6); and levying taxes (pt. 7). Section 30200 provides: "The people of a county or two or more contiguous counties or of a portion of such county or counties, whether the portion includes unincorporated territory or not, may form a county water district pursuant to this part." It thus appears that the land which may be included in a county water district is not limited to land in one county, but it may be land in two or more counties. Section 31000 provides: "County water districts shall be managed under the provisions of this division [12] and may exercise the powers therein expressly granted or necessarily implied therefrom." Powers expressly granted to a county water district include the right to: perform "all acts necessary to carry out fully the provisions of this division [12]" (§ 31001); perform "any act necessary to furnish sufficient water in the district for any present or future beneficial use" (§ 31020); "store water for the benefit of the district" (§ 31021); operate waterworks and property necessary to convey, supply, store, or make use of water (§ 31022); sell water for any useful purpose and "whenever there is a surplus, dispose of the surplus to municipalities, public agencies, or consumers located without the district" (§ 31023); "establish rules and regulations for the sale, distribution, and use of water" (§ 31024); "to restrict the use of district water during any emergency caused by drought, or other threatened or existing water shortage, and to prohibit the wastage of district water or the use of district water during such periods, for any purpose other than household uses or such other restricted uses as may be determined to be necessary by the district and may prohibit use of such water during such periods for specific uses which the district may from time to time find to be nonessential" (§ 31026); "acquire, construct, and operate facilities for providing fire protection to the district and its inhabitants, including buildings, engines, hose," and other appliances for the full equipment of a fire company (§ 31120); cooperate with the state or any agency thereof, municipalities, public and private corporations, and persons with respect to salvage, control, storage, distribution, purification, and recapture of any 92 waters, and the construction of any works, the acquisition of any property, or for the protection of property, watersheds, water courses, and the underground water supplies, and for the use, operation, management, or control of any public works or property (§ 31048); "construct any works along, under, or across any street, water course, railway, or conduit in a manner that will afford security for life and property" (§ 31060). Section 30576 provides: "The powers of [county water] districts enumerated in this division [12] shall, except as therein otherwise provided, be exercised by the board [of directors]." Section 30580 provides that the general manager of a county water district shall have "full charge and control of the maintenance, operation, and construction of the water works or water-works system of the district." It thus appears that the Legislature has given broad powers to county water districts with respect to the control and distribution of water in the districts; and has provided that the management of the affairs of the district and the construction of the system of waterworks shall be under the direction of the board of directors.

Division 13 of the Water Code, which is entitled "California Water Districts," includes provisions regarding: the method of forming such a district, and the area thereof (pt. 2); the qualifications, tenure, powers and duties of the directors, and the management of a district (pt. 3); the elections therein (pt. 4); the powers and purposes of a district, and the construction of the waterworks system (pt. 5); regulation of the financial affairs (pt. 6); and levying assessments (pt. 7). The area which may be included in a California Water District, is "land which is susceptible of irrigation from a common source and by the same system of works." (Water Code, § 34153.) It thus appears that the land which may be included in a California Water District is not limited to land in one county, but it may be land in two or more counties. The powers of a California Water District include the right to: "perform all acts necessary or proper to carry out fully the provisions of this division [13]" (§ 35400); acquire, construct, maintain, and operate the necessary works for the production, storage, transmission, and distribution of water for irrigation, domestic, industrial, and municipal purposes, and any drainage or reclamation works connected therewith (§ 35401); "enter into a contract for the lease, sale, or use of any surplus water not than necessary for use within the ⌊93 district" (§ 35425); "within or without the district in the State, acquire by purchase, condemnation, or other legal means all property or rights in property necessary or proper for the district works and to supply the land with sufficient water for irrigation purposes" (§ 35600). Section 34807 provides: "The board [of directors of a California Water District], except as otherwise specifically provided, shall manage and conduct the business and affairs of the district." It thus appears that the Legislature has given broad powers to California Water Districts with respect to the control and distribution of water in the district and has provided that the management of the affairs of the district be in the board of directors.

On August 2, 1960, the Board of Supervisors of Los Angeles County adopted Ordinance No. 7834, entitled "Water Ordinance." Section 1 of that ordinance provides: "The purpose of this ordinance is to promote and obtain a reasonable minimum level of fire protection performance for water supply facilities constructed, replaced, extended or rehabilitated to serve new subdivisions and residential, commercial and industrial improvements in the unincorporated area of the County of Los Angeles." Section 81 provides: "The term 'Water System' shall mean the source facilities transmission pipelines and the distribution system and shall include all those facilities of the water system under the complete control of the utility, up to the customer's connection." Section 82 provides, in part: "The term 'Water Utility' shall mean any person, firm, private, quasi-public or public agency supplying or purporting to supply water to more than one retail customer * * *." Section 151 provides, in part: "A person to whom constitutionally this ordinance can apply shall not construct any portion of a water system which is subject to the provisions of this ordinance without first having obtained a Water Utility Certificate of Registration. Such registration may be accomplished by filing with the [county] Engineer" a form (therein set forth) which shall include the statement: "I am familiar with the terms of the Water Ordinance and I agree to abide by the terms therein." Section 152 provides: "Plans and Specifications for water service to new subdivisions shall be submitted to the [county] Engineer * * *. For new subdivisions the water system plans and specifications * * * shall include a certificate from a water utility that the proposed system can be operated by the water utility, and that the system will in every particular, meet the requirements of this ⊥94 ordinance." Section 154 provides: "A person legally required to comply with this Ordinance and not having a water utility certificate of registration shall not construct any portion of a water system subject to the provisions of this Ordinance without first having obtained a Water Utility Authorization." Section 155 contains provisions with respect to the form of, the place of filing, and the processing of an application for a Water Utility Authorization. It is therein provided (§ 155) that the county engineer shall process the application, and that the applicant shall revise his plans and specifications as required by the engineer.

Chapter II of the ordinance, which is entitled "Requirements of Service Design and Construction," sets forth requirements as to total water flow, average daily water flow, water flow for fire protection, water pressure, size of mains and service pipes, and location of valves. Section 232 provides that the size and type of the fire hydrants shall be designed by the county forester and the location shall be approved by the forester and fire warden, and the road commissioner. Section 252 provides: "If the [county] Engineer finds that, in order to comply with the provisions of this Ordinance it is necessary to conform to certain standards of materials and construction or both, he shall promulgate such standards and publish the same in a Utility Manual. The Engineer shall file this Utility Manual and all amendments thereto with the Board [of Supervisors]. All construction and materials shall conform to the Utility Manual described in this Section."

The ordinance also provided that an appeal may be taken to an appeals board from any decision made pursuant to the ordinance; that an appeal may be taken from the decision of that board to the Board of Supervisors of the county; that an appeal may be taken from a decision of the Board of Supervisors to a court; and that all persons shall comply with a final decree made pursuant to the ordinance.

Section 11 of article XI of the state Constitution provides: "Any county, city * * * may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

In Agnew v. City of Los Angeles, 51 Cal. 2d 1, 5, 330 P.2d 385, 387, it was said: "A local municipal ordinance that is in conflict with a general law adopted by the Legislature is invalid if it attempts to impose additional requirements in a field that is preempted by the general law."

⊥95 In Abbott v. City of Los Angeles, 53 Cal. 2d 674, 681, 3 Cal.Rptr. 158, 163, 349 P.2d 974, 979, 82 A.L.R.2d 385, it was said: "The power granted by section 11 of article XI is not only a delegation of power by the people to the local body, but it is also a limitation upon the local body * * *. When there is doubt as to whether an attempted regulation relates to a municipal or to a state matter, or if it be the mixed concern of both, the doubt must be resolved in favor of the legislative authority of the state [citations]. These rules are not limited in their application to situations where a local body attempts to enact legislation the actual language of which conflicts with previously enacted state law. These rules also prevent any legislation by a local body (other than in furtherance of the state law) when the entire field, that is the subject matter of the ordinance, has already been fully occupied by the state. Thus the Constitution prohibits a city from imposing additional requirements in a state occupied field * * *."

In Hall v. City of Taft, 47 Cal.2d 177, 302 P.2d 574, defendant city contended that its building ordinance was applicable to a school district by reason of the city's police power under section 11 of article XI of the state Constitution. In affirming a judgment which enjoined the city from enforcing the ordinance against the plaintiff (building contractor), it was said, at page 181, 302 P.2d at page 577: "The public school system is of statewide supervision and concern and legislative enactments thereon control over attempted regulation by local government units. * * * School districts are agencies of the state for the local operation of the state school system." It was also said therein (p. 183, 302 P.2d p. 578): "When it [state] engages in such sovereign activities as the construction and maintenance of its buildings * * * it is not subject to local regulations unless the Constitution says it is or the Legislature has consented to such regulation. Section 11 of article XI of the state Constitution, supra, should not be considered as conferring such powers on local government agencies."

After the decision in Hall v. City of Taft, supra, sections 53090 and 53091 of the Government Code were enacted. Those sections defined "Local agency" and provided such an agency should comply with applicable building and zoning ordinances of a county or city where the agency was located; but it was expressly provided therein that such ordinances should not apply to the "location or construction of facilities ⌊96 for the production, generation, storage, or transmission of water or electrical energy by a local agency."

In the present case, provisions of the Water Code indicate that the Legislature did not intend that irrigation or water districts should be subject to legislation by counties. One of such provisions is that the area of such districts may be in more than one county. It is apparent that the Legislature did not intend that a county enact legislation controlling activities of a district which extended into another county. If each county, in which there is a portion of a district, should enact legislation purporting to control the activities of the district, it is obvious there would be confusion as to rules and regulations. Likewise, if a city or cities within a district in a county were to enact legislation purporting to control the affairs of the district there would be confusion.

[1] In the present case, the county ordinance is in conflict with the state legislation. One respect in which there is such a conflict is that the Water Code provides that the matter of constructing the waterworks system (for an irrigation district or a county water district) is within the duties of the district engineer or manager, subject to the approval of the board of directors of the district; whereas, the ordinance requires that the district obtain from the county a certificate of registration or a water utility authorization prior to constructing any part of the water system. With reference to a California water district, the Water Code does not refer expressly to the district engineer or manager in connection with the duty of construction, but it provides that such duty rests with the directors of the district. Another respect in which there is a conflict is that the Water Code provides that the management and control of the district is within the powers conferred on the directors of the district; whereas, the ordinance requires as a condition to obtaining such a county permit for construction the applicant must state on the application form that he agrees to abide by the provisions of the ordinance. Another conflict is that the Water Code provides that the district shall determine the amount of water to be made available for fire protection and other uses; whereas, the ordinance designates the minimum amount of water flow for fire protection and other uses. Another conflict is the provision of the ordinance setting up an appeals board (and specifying other appellate procedure) for reviewing determinations made by the district directors, who derive their powers under provisions of state ⌊97 law. It is obvious that the ordinance purports to impose upon the districts requirements in addition to those imposed by the Legislature. The trial court properly concluded that the county ordinance was in conflict with general state law.

[2] Many provisions of the Water Code, and of the county ordinance, have been referred to hereinabove in some detail. "In

determining whether the Legislature intended to occupy a particular field to the exclusion of all local regulation we may look to the 'whole purpose and scope of the legislative scheme' * * *." (In re Lane, 58 A.C. 97, 100–101, 22 Cal.Rptr. 857, 859, 372 P.2d 897, 899.) The Water Code shows an intention by the Legislature to adopt a general and complete scheme and plan for conserving water, and regulating the production, control, distribution, and use of water by such water districts as those involved herein. The trial court properly concluded that the state has occupied the legislative field with respect to the subject of water conservation and regulation by irrigation districts, and by county and California water districts; and properly concluded that Ordinance 7834 is not applicable to plaintiffs.

In view of the above conclusions, it is not necessary to determine other contentions on appeal.

The judgment is affirmed.

LILLIE, J., concurs.

208 Cal.App.2d 331

⌊331 ⊥ **Virginia HAYNES and Vital E. Haynes, Plaintiffs and Respondents,**

v.

Robert Speer HUNT, Defendant and Appellant.

Civ. 26275.

District Court of Appeal, Second District, Division 1, California.

Oct. 10, 1962.

Pedestrians' action against motorist for injuries suffered when pedestrians were struck while crossing highway on a marked crosswalk in city. The jury returned verdicts favorable to the pedestrians who, however, claimed inadequacy, and from an order of the Superior Court, Los Angeles County, George A. Dockweiler, J., granting a new trial on the issues of damages only, the motorist appealed. The District Court of Appeal, Lillie, J., held that evidence of motorist's negligence was "overwhelming" justifying claim that inadequate award of damages had not resulted from a compromise on the liability issue.

Affirmed.

1. New Trial 🔑9

In determining whether evidence of motorist's negligence in striking pedestrians crossing highway in crosswalk was "overwhelming" for purposes of establishing whether inadequate award of damages indicated a compromise on the liability issue, so as to preclude award of new trial on issue of damages alone, quantum of liability was not necessarily measured either by quantum of conflict in testimony or amount of argument of counsel concerning issues of negligence and contributory negligence.

2. Attorney and Client 🔑86
Evidence 🔑246

Statements of counsel in argument or otherwise are not evidence and, unless in the form of a stipulation or admission, are not binding upon client.

3. New Trial 🔑9

Evidence of a defendant's negligence is said to be "overwhelming" for purposes of determining whether an inadequate award of damages indicated a compromise on the liability issue so as to preclude award of new trial on issue of damages alone when there is no showing that any difficulty should have been experienced in establishing defendant's liability.

See publication Words and Phrases for other judicial constructions and definitions.

4. New Trial 🔑9

In pedestrians' action against motorist for injuries suffered when pedestrians were struck while crossing highway in crosswalk in city, evidence of motorist's negligence, including evidence that motorist had not been watching the road just prior to having his attention called by his passenger to presence of pedestrians, was "overwhelming," justifying award of new trial on issue of damages alone, on ground that inadequate award of damages had not resulted from a compromise on the liability issue.

5. Courts 🔑95(2)

Where Nevada statute was applicable in California action against motorist for injuries in Nevada crosswalk accident, and where California court was not advised that statute had been judicially construed in Nevada, California court would construe statute as a similar California statute had been construed. N.R.S. 484.176; West's Ann.Vehicle Code, § 21950.

6. Automobiles 🔑206

Pedestrians in crossing highway in crosswalk in city were entitled to act upon assumption that motorist would not violate pedestrians' right of way when pedestrians stepped off curb.

7. New Trial 🔑9

Where jurors in pedestrians' action against motorist for injuries suffered when pedestrians were struck while crossing highway in marked crosswalk in city rendered a unanimous verdict and reached their verdict within two hours without any confusion in minds of jurors, the required "other circumstances" which would have indicated that inadequate award of damages resulted from a probable compromise on liability issue were not shown.

See publication Words and Phrases for other judicial constructions and definitions.

8. New Trial 🔑9

Where jury awarded $652.73 to husband and $2,500 to wife for injuries suffered when they were struck by motorist's vehicle while crossing highway on marked crosswalk in city, and where there was evidence which would permit finding that husband had paid special damages of $1,052.73 and that wife had incurred special damages of $3,370.88, with $600 estimated future medical bills, it was not an abuse of discretion to award new trial on issue of damages.

◆

Morgan, Holzhauer, Burrows & Wenzel, and William Marshall Morgan, Los Angeles, for appellant.

Casey, McClenahan & Christensen, San Diego, for respondent.

⊥LILLIE, Justice. ⊥333

Verdicts in favor of plaintiffs were returned by the jury in the within personal injury action. Claiming that the awards were inadequate, plaintiffs thereafter successfully moved for a new trial on the issue of damages only. Defendant appeals from the order granting such limited new trial. He contends that the trial court's ruling constituted an abuse of discretion since the issue of liability was close, the damages were substantially less than the claimed special damages, and other circumstances indicate that the verdicts probably resulted from a compromise of the liability issue. (Rose v. Melody Lane, 39 Cal.2d 481, 488, 247 P.2d 335.)

In view of the above claim, we summarize the facts disclosed by the record. The accident occurred in Las Vegas, Nevada, on October 17, 1958, at approximately 2:45 a. m. The weather was clear and dry. Plaintiffs were attempting to walk across Highway 91—south, in a marked crosswalk, when they were struck by defendant's car. Highway 91, at that point, contains six lanes marked for traffic—three northbound and three southbound, separated by a center island divider.

Plaintiffs, husband and wife, are residents of San Diego, California. They arrived in Las Vegas on October 15, and stayed at the Desert Inn. In the early evening of October 16, after resting most of the afternoon, they left their room and attended the dinner show at the Stardust Hotel. When the show ended, they visited with friends in the cocktail lounge for about an hour. Although Mr. Haynes stated that he had one drink during the dinner show, neither he nor his wife had anything additional to drink until they arrived at another cocktail lounge, the Silver Slipper, situated on the same side of the highway. At the Silver Slipper they met more friends; Mr. Haynes had two highballs and his wife had one.

When plaintiffs left the Silver Slipper for the return trip to the Desert Inn (located on the other side of the highway), they proceeded to the crosswalk in question approximately 100 feet to the north. There was testimony that the lights on the Desert Inn building cast a glow on the area of the crosswalk. According to Mr. Haynes, he and his wife crossed 334 the first half of the highway—pausing on the center island divider. One car, then about 200 feet away in the center lane, they permitted to pass; they then crossed the second portion of the highway. Defendant's car, when first observed by Mr. Haynes, was about 200 feet behind the car they allowed to pass—approximately 400 to 450 feet from the crosswalk. He testified that this distance was reduced by about 100 feet when he and his wife stepped off the divider. Plaintiffs never again saw defendant's car until the accident occurred. The bumper portion of defendant's automobile struck Mr. Haynes' left leg and then struck Mrs. Haynes; according to Mr. Haynes, she was "knocked the rest of the way across the road."

Defendant was likewise visiting in Las Vegas—the complaint alleges that he is a resident of Redondo Beach, California. With his mother-in-law and sister-in-law as passengers, he was driving toward the center of Las Vegas to get a sandwich. As he approached the scene of the accident, his car was in the center of the three lanes—the traffic was light but, according to defendant's testimony, the illumination in the center of the highway was very poor. He estimated his speed at about 25 miles per hour. Immediately before the accident, he had looked away from the roadway; his mother-in-law screamed at him, and he focused his vision ahead. Plaintiffs were then 50 to 60 feet away. After the brakes were applied, his car decelerated to about 5 miles per hour. Shortly after the accident, he said to Mr. Haynes: "It is the first time I have ever been in Las Vegas, and I was so enthralled by the lights on the Desert Inn and the place across the street, so I just didn't see you." He also admitted telling the police: "Being unfamiliar with the area and being interested in the entertainment, I was looking at the billboards at the various motels and hotels, and I looked to my left at the sign over the New Frontier and whatever the entertainment space is that is next to that to see who was starring in their shows, and as I did so, one of the passengers in my automobile screamed, 'Look out.'"

The only other witness, whose testimony related to the circumstances of the accident, was a deputy sheriff who observed a skid mark, 39 feet in length, leading up to the left rear wheel of the defendant's car; from this he was able to determine that the vehicle had been traveling less than 35 miles per hour, which was the posted speed limit.

The jury awarded damages to Mr. Haynes in the sum of 335 $652.73; his wife was awarded $2,500. Although it appears to be disputed whether Mr. Haynes was injured at all, there was evidence that he had incurred and paid special damages in the total amount of $1,052.73. There is no dispute, however, that Mrs. Haynes sustained injuries. The evidence also indicates her special damages at the time of the trial aggregated $3,370.88; in addition, her doctor estimated that future medical expenses would amount to $600.00.

[1, 2] In Rose v. Melody Lane, supra, 39 Cal.2d 481, at page 489, 247 P.2d 335, at page 340, the court said: "When the jury fails to compensate plaintiff for the special damages indicated by the evidence, and despite the fact that his injuries have been painful, makes no award or allows only a trifling sum for his general damages, the only reasonable conclusion is that the jurors compromised the issue of liability,

and a new trial limited to the damages issue is improper. (Citations.) A contrary conclusion is justified only when the evidence of defendant's negligence is 'overwhelming.' (Citations.)" Of crucial importance, therefore, is the question whether the liability here was "overwhelming." Although this issue, says defendant, "was in sharp and substantial conflict throughout the pleading and trial stages of the case," the quantum of liability in a given case is not necessarily measured by the quantum of conflict in testimony. Furthermore, we do not follow defendant's argument that "a substantial portion of counsel's argument was consumed by the issues of negligence and contributory negligence * * *" Statements of counsel in argument (or otherwise) are not evidence and, unless in the form of a stipulation or admission, are not binding on the client (Davis v. Franson, 141 Cal.App. 2d 263, 271, 296 P.2d 600); it follows, therefore, that the importance attached by counsel to any particular issue in the case is not binding on a jury absent evidence warranting such appraisal of the claim.

[3–5] Evidence of a defendant's negligence is said to be "overwhelming" when "(T)here is no showing that any difficulty should have been experienced in establishing [such liability] * * *." (Crandall v. McGrath, 51 Cal.App.2d 438, 440, 124 P.2d 858, 859, cited in Rose v. Melody Lane, supra, 39 Cal.2d 489, 247 P.2d 335.) We have concluded that the evidence of defendant's negligence is of that character, thus justifying plaintiffs' claim that the liability issue was not compromised; we do so in view of the approach to the problem in Novak v. Dewar, 55 Cal.2d 749, 13 Cal. Rptr. 101, 361 P.2d 709, which follows the reasoning in Gray v. Brinkerhoff, 41 Cal. 2d 180, 258 P.2d ⊥834. Both were crosswalk ⊥336 cases and neither is inapposite. Both hold that failure to yield the right of way " 'constitutes a violation of the statute [1] and negligence as a matter of law in the absence of reasonable explanation for defendant's conduct.' " (Novak v. Dewar, supra, 752, 13 Cal.Rptr. 103, 361 P.2d 711, quoting from Gray v. Brinkerhoff, supra, 184, 258 P.2d 836, 837.) While it is true, unlike the situation in the cited cases that plaintiffs did not keep the defendant's vehicle "under observation while crossing," they " 'had the right to assume that defendant driver would obey the law, drive in a reasonable manner, observe [their] right of way, and yield it.' " (Novak v. Dewar, supra, 752, 13 Cal.Rptr. 103, 361 P.2d 711, quoting from Gray v. Brinkerhoff, supra, 186, 258 P.2d 837, 838.)

[6] Defendant points out that plaintiffs upon arrival at the center island allowed the first (and unidentified) car to pass; since they judged this first car too close to permit of their safe crossing, simple calculation should assertedly have indicated to plaintiffs that when they stepped off the curb of the island, defendant's vehicle would then be in the same approximate position as the first car which, in deference to their safety, they allowed to pass; in other words, defendant's car "was an immediate and perceivable hazard." (Shoemake v. Wilsey, 43 Cal.2d 686, 688, 277 P.2d 17.) The following from the Novak case, supra, not only disposes of the above argument, but of defendant's claim that plaintiffs were guilty of contributory negligence: "The position of Johnson's car has no relevancy to plaintiff's conduct in crossing the street.

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[1] The governing Nevada statute provides: "When traffic-control signals are not in place or not in operation, the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger." (Nev.Rev. Stats. 484.176). Not having been advised that the statute has been judicially construed in Nevada in respect to the matters material here, we construe it as a like statute. (Cal.Veh.Code, § 21950) has been construed in Novak and Gray (See 45 Cal.Jur.2d, Statutes, § 166; Vaughan v. Gideon, 56 Cal.App.2d 158, 161, 132 P.2d 529.)

Whatever the speed of defendant's car plaintiff was entitled to act on the assumption that it would not violate her right of way until she actually observed that it was doing so by making a left turn; and whether it was stopped at the intersection or approaching from 250 feet away plaintiff was equally entitled to assume that it would not violate her right of way. Whether plaintiff waited 15 seconds or stepped into the crosswalk immediately is also immaterial ⌊337 on the question of her contributory negligence. In either event she admittedly had the green light in her favor from the time she left the curb until she was struck by defendant's car." (Novak v. Dewar, supra, 753, 13 Cal.Rptr. 103, 361 P.2d 711.) The fact that the accident in both Novak and Gray occurred at an intersection controlled by signals does not substantially distinguish those cases from the one at bar.

Under the holding in these two cases, defendant also presented no reasonable explanation for his violation of the statute. In Gray v. Brinkerhoff, supra, the defendant's attention was diverted by a fast-moving car; here, however, the defendant was simply enthralled with the lights of the night clubs and looking at marquees rather than the roadway. As in the Gray case, "the evidence does not reasonably admit of any conclusion other than that defendant could have fulfilled his duty to look for pedestrians and could have seen plaintiff[s] if he had exercised ordinary care." (Gray v. Brinkerhoff, supra, 184, 258 P.2d 837.)

[7] As pointed out in Rose v. Melody Lane, supra, 39 Cal.2d 488, 247 P.2d 335, there should also be "other circumstances" indicating a compromise before it can be said that the court abused its discretion in granting a limited new trial. An example of such "other circumstances" is found in Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324, 29 A.L.R.2d 1185, where there were inquiries by the jurors, long deliberation and difficulty in arriving at a 9–3 verdict although the evidence on the issue of damages was practically without dispute. Another example is found in Murphy v. Wilson, 141 Cal.App.2d 538, 297 P.2d 22; in addition to the money discrepancy in that case there was evidence, from the judge's colloquy with members of the jury, of their confusion. Here, however, the verdict was unanimous, it was reached within two hours and so far as the record indicates, without any confusion in the minds of the jurors.

[8] We must presume that the trial judge, in passing upon the motion, has weighed the evidence and the possibility of prejudice to the defendant by limiting the new trial (Leipert v. Honold, supra, 467, 247 P.2d 324, 29 A.L.R.2d 1185.) Under all of the circumstances, we cannot say that an abuse of discretion has been shown.

The order is affirmed.

WOOD, P. J., and FOURT, J., concur.

In the Matter of Arbitration Between THRIFTIMART, INC., and RETAIL CLERKS UNION, LOCAL 770, AFL–CIO.

THRIFTIMART, INC., a corporation and Customers Finance Co., doing business as More (Intervenor), Plaintiffs and Appellants,

v.

RETAIL CLERKS UNION, LOCAL 770, AFL–CIO, Defendant and Respondent.

Civ. 26125.

District Court of Appeal, Second District, Division 1, California.

Oct. 1, 1962.

Rehearing Denied Oct. 25, 1962.

For Opinion on Hearing, see 30 Cal.Rptr. 12, 380 P.2d 652.

Proceeding wherein the Superior Court of Los Angeles County, Macklin Fleming, J., made an order and entered judgment confirming an arbitration award against an employer, and appeals were taken. The District Court of Appeal, Wood, P. J., held that whether employer's acquisition, through involved transaction, of another corporation constituted a new location within meaning of bargaining agreement applicable to "all locations" of employer was an arbitrable issue under bargaining agreement provision stating that question of arbitrability should be determined in first instance by arbitrator, and award in favor of arbitrability and determining that agreement covered employees of acquired corporation was to be affirmed.

Affirmed.

Labor Relations ⚷434

Whether employer's acquisition, through involved transaction, of another corporation constituted a new location within meaning of bargaining agreement applicable to "all locations" of employer was an arbitrable issue under bargaining agreement provision stating that question of arbitrability should be determined in first instance by arbitrator, and award in favor of arbitrability and determining that agreement covered employees of acquired corporation was to be affirmed.

◆

McLaughlin & McLaughlin and Joseph M. McLaughlin, Los Angeles, for appellant Thriftimart, Inc.

Hill, Farrer & Burrill, Carl M. Gould, Stanley E. Tobin, and Barry R. Weiss, Los Angeles, for appellant Customers Finance Co.

Arnold, Smith & Schwartz, George L. Arnold, Kenneth M. Schwartz, and Laurence D. Steinsapir, Los Angeles, for respondent.

WOOD, Presiding Justice.

Appeals from an order and a judgment confirming an arbitration award.

Thriftimart, Inc., a corporation, operates 60 retail food stores in and about Los Angeles County. Retail Clerks Union, Local 770, is an unincorporated association whose members are retail clerks in and about Los Angeles County, and the purpose of the union, among other things, is to negotiate, execute, and maintain collective bargaining agreements on behalf of its members and employees who are engaged in retail businesses.

In January 1959, and at all times herein mentioned, Thriftimart and the union were parties to a collective bargaining agreement. The agreement provided that all matters of controversy between the parties and arising out of or involving the interpretation or application of the terms of the agreement should be settled by arbitration. The agreement also stated that it was made between Thriftimart, Inc., a corporation, "all locations," the first party, and Retail Clerks Union, Local 770, the second party.

In May 1961 Thriftimart acquired all of the outstanding shares of stock, and the physical assets, of Customers Finance Co., doing business as More, which acquisition was an involved transaction that will be referred to in some detail later herein.

Thereafter, the union asserted that the collective bargaining agreement (between it and Thriftimart) was applicable to the employees of More. Thriftimart disputed that assertion of the union. Thriftimart and the union agreed to arbitrate the dispute. They appointed an arbitrator pursuant to the terms of the bargaining agreement. Thriftimart reserved the right to move to dismiss the proceeding on the ground that the substantive issue was not arbitrable.

One issue presented to the arbitrator was the issue of arbitrability. The other issue was whether the collective bargaining agreement applies to and covers the employees of the Customers Finance Co., doing business as More. After testimony was received, Thriftimart moved to dismiss the proceeding. On August 7, 1961, the arbitrator decided that the issue was arbitrable, and that the agreement applies to and covers the employees of More.

On August 22, 1961, the union filed a notice of motion to confirm the award of the arbitrator.

On August 25, 1961, More made a motion, in superior court, for permission to intervene in the confirmation proceeding for the purpose of opposing the confirmation. The motion was granted.

On September 7, 1961, the superior court made an order confirming the award. On October 2, 1961, judgment confirming the award was entered. Thriftimart, and Customers Finance Co., doing business as More, appeal from said order and judgment.

Customers Finance Co., doing business as More, was not a party to the arbitration proceeding, and did not consent to or participate in that proceeding. The employees of that company did not consent to or participate in that proceeding. It was established that Thriftimart and More were engaged in interstate commerce.

Appellant Thriftimart contends that the arbitrator's award is void (1) because it purports to bind More which did not consent to or participate in the arbitration proceeding; and (2) because the National Labor Relations Board has sole power and jurisdiction to decide questions of representation of employees, whose employers are engaged in businesses which affect interstate commerce.

Appellant More contends (1) that the award, as confirmed, is a judgment which denies More due process of law in that it adjudicates the rights and duties of More and its employees despite the fact that they were not parties to, and did not participate in or consent to the arbitration proceeding; (2) that the arbitrator lacked jurisdiction to decide the question of jurisdiction in that the matter of designating an appropriate unit for representation is exclusively within the jurisdiction of the National Labor Relations Board. The arbitrator's opinion is set forth in a footnote.[1]

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[1] "ARBITRATOR'S OPINION AND AWARD

"Pursuant to stipulation, the above entitled matter came duly on for hearing before the undersigned, ROBERT KINGSLEY, as Arbitrator on July 12, 1961. The firm of McLaughlin & McLaughlin, by Messrs. Joseph M. McLaughlin and Edward C. Barretta, appeared for the Employer and the firm of Arnold, Smith & Schwartz, by Kenneth M. Schwartz, Esq., appeared for the Union.

"The parties evidenced substantial difficulty in reaching a submission agreement. After some debate, it was stipulated that the Union should proceed with its evidence on the merits of the ultimate issue as hereinafter set forth, that the Employer should follow with such evidence on such issue as it might desire to offer, reserving to Employer the right, at the close of testimony, to move to dismiss the proceeding on the ground that the substantive issue was nonarbitrable. On this basis, evidence, both oral and documentary, was received, the Employer has moved to dismiss, briefs were filed and the matter submitted for decision.

"I

"The Issue of Arbitrability

"(1) The contract provides (Art. XIV, Sec. D(1):

"'* * * If a question of the arbitrability of an issue is raised by either party, such question shall be determined in the first instance by the arbitrator or board. Neither party to this Agreement shall refuse to proceed to arbitration upon the grounds that the matter in question is not arbitrable.'

I am, thus, not only authorized but, by the express terms of the contract, required, to decide the preliminary issue of arbitrability.

"(2) The arbitration clause of the contract reads as follows:

"'Any and all matters of controversy, dispute or disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of this Agreement, except as may be otherwise provided in Paragraph D of this Article, shall be settled and resolved by the procedures and in the manner hereinafter set forth.'

"The issue, as set forth below, does not fall within the exceptions set out in Article D; it clearly is within the broad general language just quoted. The issue is arbitrable.

"II

"The Issue on the Merits

"The issue on the merits was stated, by stipulation, to be as follows:

"'Does the Collective Bargaining Agreement between the Employer and the Union, by its terms, apply to and cover employees of Customers Finance

Appellants cite Retail Clerks Union v. L. Bloom Sons Co., 173 Cal.App.2d 701, 344 P.2d 51. At the time of making the bargaining agreement therein L. Bloom Sons

Co., dba MORE, employed in the appropriate classifications covered by the said contract and within the territorial area of the Union, because of its acquisition by Thriftimart?'

"III

"Background

"For some time prior to May 18, 1961, a corporation named Customers Finance Co., doing business under the trade name of 'MORE', operated a group of so-called 'discount houses'—two of which were located within the geographical jurisdiction of the Union herein involved. Sometime prior to December, 1960 (the record does not disclose exactly when), the management of Thriftimart began to consider the acquisition of the MORE operation. During December, 1960, and January, 1961, certain employees of Thriftimart were loaned to MORE—remaining, however, on the Thriftimart payroll. One of these employees was ultimately to resign from Thriftimart and become an employee of MORE. For some months (again exact dates are not disclosed on the record) supervisory employees of Thriftimart were present at the MORE stores, in the capacity of observers, with the objective of reports on the MORE operation. Ultimately (and the record suggests prior to April 5, 1961) a decision to acquire the MORE operation was made by the management of Thriftimart. It is not clear when the exact method of acquisition was decided on, nor, except for the general statement that it was for 'tax and other business reasons' and on advice of counsel, do we know why the acquisition was carried out as it was. The method used was as follows:

"Thriftimart, Inc., procured the incorporation of a new California corporation, named 'The W.I.T. Co.,' with an authorized capital stock of 20,000 shares, of which 18,660 were issued. The W.I.T. Co., then exchanged all of its issued stock (i. e., 18,660 shares) for 67,854 shares of the Class A stock of Thriftimart, Inc. As a result, Thriftimart, Inc., became the sole owner of the W.I.T. Co., and the W.I.T. had, as its sole asset, the 67,854 shares of Thriftimart, Inc. stock, W.I.T. then exchanged the Thriftimart stock for the physical assets of Consumers Finance Co. At this point, Consumers Finance Co. was no longer a store operator, but was a stockholder of Thriftimart, and W.I.T. owned the MORE store operation. Thereafter, Consumers Finance Co., transferred its corporate name, and its trade name, to W.I.T., assuming a new corporate name for the purpose of ultimate dissolution.

"Subsequent to May 18, 1961, then, there have been three corporations: Thriftimart, Inc., which is the sole stockholder of the new Consumers Finance Co.; Consumers Finance Co., dba MORE (formerly the W.I.T. Co.) a wholly owned subsidiary of Thriftimart, Inc., operating the MORE stores; and a newly named corporation (formerly Consumers Finance Co.), owning 67,854 shares of Thriftimart, Inc., which corporation is now in the process of dissolution.

"Except for Mr. Lampman, Controller and Assistant Secretary of Thriftimart, Inc., who is a Director of Consumers Finance Co., there are no officers or directors in common. The two companies maintain separate offices, keep separate books, and engage in somewhat divergent lines of retail business. There is no evidence of direct operational control of MORE by Thriftimart.

"V

"Discussion

"Based on these facts, the Union contends, and Thriftimart denies, that the contract requires the MORE operations to be regarded as locations of Thriftimart. The Union relies on two parts of the contract. I agree with the Company that Article XIX is not directly in point; it deals merely with the seniority rights of employees transferred by an employer to a newly opened branch. This is not the issue here. However, it is clear from the preamble to the contract, and from Article I, that the parties intended the contract to apply to any new location; and this doctrine is implicit in Article XIX. Clearly, had Thriftimart purchased the assets of MORE, and operated those stores for its own account, with its own employees, contractual coverage would have extended to the newly acquired stores. I do not think that the result is affected by Thriftimart's decision to consummate the operation in a more involved form. Whether exercised or not, it is clear that Thriftimart has the power of complete domination of Consumers Finance—Thriftimart selects Consumer's directorate; through them it selects management.

"I cannot regard it as significant that Thriftimart and MORE are different kinds of retail stores. Thriftimart's ob-

Co., Inc., owned three shoe stores in Santa Clara County. Thereafter another store, known as "Bloom's Salinas, Inc.," was opened in that county, and the union claimed that the new store was operated by L. Bloom Sons Co., Inc., and that the bargaining agreement applied to the employees at the new store. L. Bloom Sons Co., Inc., which asserted that it was not the owner or operator of the new store and that the agreement did not apply to those employees, refused to arbitrate the controversy. The union sought a court order requiring arbitration. The court dismissed the petition for arbitration on the ground that Bloom's Salinas, Inc. (the new store), was an indispensable party, and that arbitration was not the proper procedure for determining whether the new store was the alter ego of L. Bloom Sons Co., Inc. That case is distinguishable in that the question therein was whether the court should order arbitration, whereas in the present case the bargaining agreement provided that the question as to arbitrability "shall be determined in the first instance by the arbitrator or board." The arbitrator herein decided that under the circumstances in this case, particularly with reference to the manner in which More was acquired, the controversy was arbitrable.

Appellant More cites several cases which were decided by the National Labor Relations Board, among which is (as stated in its brief) "Illinois Malleable Iron Co., 120 N.L.R.B. 451 (1958)." In that case there was a bargaining agreement between Appleton Electric Company and a union (International Brotherhood of Electrical Workers), which agreement provided that it would be applicable to "any future plants or divisions" of Appleton. Soon after making the agreement, Appleton purchased substantially all of the stock of Illinois Malleable Iron Company; and Malleable retained its corporate entity. A question before the National Labor Relations Board was whether the employees of the newly acquired Malleable plant were covered by the bargaining agreement with the Union, IBEW, under the provision therein that the agreement would be applicable to any future plants of Appleton. The Board found to the effect that those employees were not covered by the agreement. Appellant More, in the present case, states that: "Clearly, the contract provision between Appleton and the IBEW was, if anything, more inclusive than that in the instant case."; that the decision of the Board in the Malleable case was "In language and facts that are virtually definitive of the instant case"; and that, "Surely, the Malleable case is virtually a replica of the instant fact situation, and yet the Board ruled completely contrary to the summary judgment of the arbitrator [in the present case]. Surely, such conflicts cannot be allowed to exist and the rule, as enunciated by the Board, must reign supreme since Congress has so directed." Appellant More quotes at length from the Board's opinion in the Malleable case. It is to be noted, however, that the United States Court of Appeals reviewed the order of the Board in that case (upon a petition for enforcement of the order) and that said court reversed the order (i. e., denied the petition to enforce the order). (National Labor Relations Board v. Apple-

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ligations would continue if it were to begin to sell shoes, or furniture, or automobiles; whether it sells one product in one store and other products in another, or all products in all stores, is immaterial.

"I must emphasize that I deal only with the situation before me. I do not speculate as to the consequences of a stock purchase of a non-retail business, nor of purchase of a minority interest—nor even as to how much less than 100% stock ownership would have the same effect. What I rule is that the acquisition of Consumers Finance Co., in the manner disclosed on this record, constituted the opening by Thriftimart, Inc., of a new location, to which location, the Collective Bargaining Agreement, in terms, applied. The formally stated issue is answered in the affirmative. Los Angeles, August 7, 1961."

ton Electric Company (7 Cir., 1961), 296 F.2d 202, 206–207.) In other words, in a case which appellant More states "is virtually a replica of the instant fact situation," the United States Court of Appeals decided (as the arbitrator herein decided) that the employees of the newly acquired plant were covered by the bargaining agreement.

With reference to the question of arbitrability in the present case, the bargaining agreement provides, as above stated, that the question shall be determined in the first instance by the arbitrator. In United Steelworkers v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403, it was said at page 566, 80 S.Ct. at page 1345: "Section 203(d) of the Labor Management Relations Act * * * states, 'Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *' That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." It was said therein (pp. 567–568, 80 S.Ct. p. 1346): "The collective agreement calls for the submission of grievances in the categories which it describes, irrespective of whether a court may deem them to be meritorious. * * * In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." It was also said therein (p. 569, 80 S.Ct. p. 1347): "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal."

In United Steelworkers v. Enterprise Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed. 2d 1424, the collective bargaining agreement provided that any differences "as to the meaning and application" of the agreement should be submitted to arbitration and that the arbitrator's decision "shall be final and binding on the parties." It was said therein (p. 596, 80 S.Ct. p. 1360): "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." It was also said therein (p. 599, 80 S.Ct. p. 1362): "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

As above indicated, the acquisition by Thriftimart of all the outstanding shares of stock of Customers Finance Co., doing business as More, was an involved transaction. The W. I. T. Co., a corporation, was organized and 18,660 shares of stock were issued. That corporation transferred all of its issued stock (18,660 shares) to Thriftimart for 67,854 shares of Thriftimart stock. Then the W. I. T. Co. transferred all of its Thriftimart stock to Customers Finance Co., doing business as More, for all stock and physical assets of Customers Finance Co., which company (Customers) transferred its corporate name and its trade name (More) to W. I. T. Co. At that stage of the transaction, Thriftimart owned all the stock of W. I. T. Co., which owned all the stock and assets of Customers Finance Co., doing business as More, which last mentioned company owned 67,854 shares of Thriftimart. The name of W. I. T. Co. was changed and it was then known as Customers Finance Co., doing business as More. The former or old Customers Finance Co. was then in the process of dissolution and was not a store operator.

It is upon this intricate factual background, relating to Thriftimart's acquisition of More, that the arbitrator was required to find whether or not such acquisition constituted a new location. The arbitrator emphasized that in making his determination herein he was dealing only with the particular situation before him and was not contemplating the consequences of stock purchases of businesses generally.

The trial court properly confirmed the award.

The order and judgment are affirmed.

LILLIE, J., concurs.

208 Cal.App.2d 222

222 **Clarence E. WHALEY, Plaintiff and Appellant,**

v.

A. Elmer JANSEN, Chief of Police; Merlyn A. Ludvigson, Frank Drake and Clarence Meyers, Police Officers; and George Bean, San Diego City Manager, Defendants and Respondents,

San Diego City; San Diego County; Dr. W. G. Wiend and Dr. C. E. Lengyel, County Psychiatrists; and T. W. Fletcher, Assistant City Manager, Defendants.

Civ. 6780.

District Court of Appeal, Fourth District, California.

Oct. 4, 1962.

Hearing Denied Dec. 12, 1962.

Action against certain city officials, police officers and others for false arrest and false imprisonment. The Superior Court of San Diego County, William A. Glen, J., sustained a demurrer to an amended complaint without leave to amend and an order dismissing the action and the defendant appealed. The District Court of Appeal, Griffin, P. J., held that since the allegations showed that the defendant police officers had reasonable and probable cause for ordering detention and psychiatric examination of plaintiff the complaint was insufficient to state a cause of action.

Affirmed.

1. Arrest 🔑63(3)

Officer is justified in making arrest in case of misdemeanor without warrant only when person arrested has committed an offense in presence of officer.

2. Arrest 🔑63(3)

In case of misdemeanor, it is sufficient that arresting officer have reasonable cause to believe, from observable acts, that crime is being committed in his presence to justify an arrest without a warrant.

3. False Imprisonment 🔑39

In action for false arrest and imprisonment the question of reasonable or probable cause is ordinarily for court and not jury, and if facts are admitted or beyond controversy question is to be determined by court alone, but if facts are controverted determination of their legal effect by court is necessarily hypothetical and jury is to be instructed that if it finds facts in a designated way such facts do or do not amount to probable cause.

4. Appeal and Error 🔑863

Complaint as a whole is subject to review on question of its sufficiency.

5. False Imprisonment 🔑20(1)

Because allegations in complaint for false imprisonment showed that defendant police officers had reasonable and probable cause for ordering detention and psychiatric examination of plaintiff complaint was insufficient to state a cause of action. West's Ann.Welfare & Inst. Code, § 5050.3; U.S.C.A.Const. Amends. 4, 14; West's Ann. Const. art. 1, §§ 9, 19.

6. Mental Health 🔑31

Peace officer has right to take person into custody if he has reasonable cause to believe that person is so mentally ill as to be dangerous to himself or others. West's Ann.Welfare & Inst.Code, § 5050.3.

7. Municipal Corporations 🔑180(1)

Police officers of city are police officers of state.

8. Arrest 🔑63(4)

In determining whether there is reasonable cause for arrest without warrant police officers are justified in taking into account past conduct, character and reputation of person suspected.

9. Pleading 🔑8(1)

Conclusions or deductions from facts alleged do not constitute cause of action.

10. Evidence 🔑83(2)

It will be presumed that police officer performed his duty. West's Ann.Civ.Code, § 3529.

11. False Imprisonment 🔑20(1)

Allegation that city manager and police chief had policies and practices which made them partly responsible for plaintiff's allegedly false arrest and imprisonment did not state a cause of action against them.

12. Municipal Corporations 🔑741(1)

Claim by plaintiff, suing for false imprisonment, that city manager and police chief were negligent in not suspending or discharging certain police officers did not allege intentional tort and statute requiring filing of claim would be applicable. West's Ann.Gov.Code, §§ 801, 802.

◆

Clarence E. Whaley, in pro. per.

Alan M. Firestone, City Atty., and G. Don Lindberg, Deputy City Atty., for respondents.

224 GRIFFIN, Presiding Justice.

Plaintiff-appellant Clarence E. Whaley brought this action in pro pria persona for false arrest and false imprisonment against defendants "San Diego City, San Diego County," Dr. W. G. Wiend and Dr. C. E. Lengyel, Chief of Police A. Elmer Jansen, and San Diego City Police Officers Merlyn A. Ludvigson, Frank Drake and Lieutenant Clarence Meyers, San Diego City Manager George Bean and his Assistant City Manager T. W. Fletcher.

Plaintiff alleges generally that on May 29, 1959, while he was going from house to house in San Diego "exposing wrong-doers in government," he carried with him a letter entitled, "A MOST APPALLING CONDITION," which letter outlined his grievances and requested the use of the home to call in the neighbors and friends so he could deliver a lecture and obtain voluntary contributions from them to carry on his work; that about noon he was walking on the sidewalk in a residential district when defendant Officer Ludvigson stopped him and questioned him; that plaintiff told Officer Ludvigson what he had been doing and the officer asked him to get into the patrol car and talk and that plaintiff walked away; that the officer told him that if he walked away he would place him 225 under arrest; that plaintiff continued walking away from the officer and the officer stated, "You're under arrest for vagrancy"; that plaintiff was forced into the car and literature was removed from his pocket with such titles as "A MOST APPALLING CONDITION, KIDNAPPED AND RAILROADED TO THE BUG HOUSE," and "Earl Warren a Travesty of Equal Justice Under the Law"; that after reading the articles and talking to plaintiff, Officer Ludvigson transported plaintiff to the police station and plaintiff remained in the car while the officer went to the office; that Officer Ludvigson returned and asked plaintiff if he had a permit to solicit and plaintiff answered that he had none because he was not soliciting money; that the officer then went back and in a few minutes returned with another officer and they took plaintiff to the county psychiatric unit; that plaintiff told them that they had no right to do this and attempted to walk away from them and Officer Drake took him into the psychiatric unit; that he was there interviewed by Dr. Reed and plaintiff demanded of the doctor that he be released; that the doctor replied that he had no authority to do so and that plaintiff's release would have to be effected through defendants Dr. Wiend or Dr. Lengyel; that on June 1, 1959, these two doctors interviewed plaintiff and on June 3, 1959, without being formally charged with a crime or mental illness, he was released.

It is then alleged that on June 21, 1959, plaintiff wrote a letter to defendant Assistant City Manager Fletcher, requesting information as to which superior officer ordered these officers to place plaintiff in the psychiatric unit, and he was informed that defendant Lieutenant Meyers was the officer on duty at the time and that he had authority to have plaintiff so committed; that plaintiff inquired of defendant City Manager Bean, on July 13, 1958, as to which officers placed him in the psychiatric ward on May 25, 1957, and he was told to contact defendant Police Chief Jansen about the matter. Plaintiff averred that these policies and practices of the City Manager and his Assistant City Manager Fletcher and Chief of Police Jansen "makes them partly responsible for plaintiff being unlawfully put in the county psychiatric unit on May 29, 1959."

Plaintiff alleges that he was not mentally ill and that defendants had no probable cause to believe he was so mentally ill as to render him dangerous to himself or to the person or property of others at the time. He seeks damages in the sum of $100,000 against each defendant.

⊥226 ⊥ A demurrer to the complaint as to the City of San Diego and the remaining defendants was interposed and sustained with leave to amend, except as to the City of San Diego. Plaintiff filed amendments to the original complaint alleging that defendant Dr. Wiend and Dr. Lengyel knew that the police officers did not have reasonable cause for taking plaintiff into custody and incarcerating him in the psychiatric unit on May 29, 1959; further, that defendant officers, Ludvigson and Drake, arrested plaintiff without a warrant and without legal process; that he assumes defendant Lieutenant Meyers did authorize defendants Ludvigson and Drake to imprison plaintiff in the said psychiatric unit in violation of plaintiff's constitutional rights.

It is then alleged that defendant City Manager Bean, having the power to appoint and remove the chief of police, did not use due care and was negligent in his failure to take action to suspend or remove Lieutenant Meyers and Officers John D. Kirby and D. E. Thomas for being unfit and incompetent police officers, after receiving notice of such fact from him, and that defendant Assistant City Manager Fletcher and defendant Chief of Police Jansen also failed to act in this respect. Accordingly, damages were sought against each defendant.

The trial court sustained the demurrer to the complaint as amended without further leave to amend and dismissed the complaint as to all defendants. Plaintiff appeals from the judgment of dismissal as to defendants City Manager Bean, Chief of Police Jansen, Officers Meyers, Ludvigson and Drake, and argues: (1) that plaintiff is deemed to have established a prima facie case for false imprisonment where it appears that he was arrested without a warrant; that the complaint shows the imprisonment of plaintiff by alleging that Officers Ludvigson and Drake unlawfully, and against the will of plaintiff, transported him to the county psychiatric unit and incarcerated him therein, and that he was confined to the said unit until June 3, 1959, on which day he was released without having to appear in court and without having been formally charged with a crime or mental illness; (2) that defendant policemen did not have reasonable cause to place plaintiff in the county psychiatric ward (citing Collins v. Jones, 131 Cal.App. 747, 22 P.2d 39; Welf. & Inst. Code, sec. 5050.3); (3) that defendant policemen violated section 237 of the Penal Code and the State and Federal Constitutions pertaining to freedom of speech and the press and security against unreasonable search⊥and seizure of the person (citing ⊥227

U.S.Constitution, Fourth and Fourteenth Amendments; Cal.Const. art. I, secs. 9 and 19); that the defendants City Manager Bean and Chief of Police Jansen are liable for failure to remove or suspend the officers as unfit (citing Fernelius v. Pierce, 22 Cal.2d 226, 138 P.2d 12; San Diego City Charter, secs. 27, 28, 57 and 129) and that the filing of a claim with a public officer or employee is not a prerequisite to an action against them for an intentional tort, but only in negligence actions (citing Whitson v. LaPay, 153 Cal.App.2d 584, 315 P.2d 45). Accordingly, it is argued that all that was necessary to state a cause of action for false imprisonment was to allege that the arrest was made without process, the subsequent imprisonment and the damage. (Citing Kaufman v. Brown, 93 Cal.App.2d 508, 209 P.2d 156; 22 Cal.Jur.2d sec. 43, p. 78.)

The defendant-respondent police officers contend that as to them the complaint itself is replete with allegations that show probable and reasonable cause for the arrest and detention of the plaintiff and that no cause of action is stated against defendants City Manager Bean and Chief of Police Jansen.

[1, 2] The courts have repeatedly held that an officer is justified in making an arrest in the case of a misdemeanor without a warrant only when the person arrested in fact committed the offense in the presence of the officer. (Collins v. Owens, 77 Cal.App.2d 713, 714, 176 P.2d 372.) The law further states that in the case of a misdemeanor, it is sufficient that the arresting officers have reasonable cause to believe, from the observable acts, that a crime is being committed in their presence. (Garske v. United States, 8 Cir., 1 F.2d 620, 622; Coverstone v. Davies, 38 Cal.2d 315, 320, 239 P.2d 876.)

[3] In an action for false arrest and imprisonment, the question of reasonable or probable cause is ordinarily one for the court, and not for the jury. When the facts are admitted or are beyond controversy, the question is to be determined by the court alone. When the facts are controverted or the evidence conflicting, the determination of their legal effect by the court is necessarily hypothetical and the jury is to be told that if it finds the facts in a designated way such facts do or do not amount to probable cause. (Aitken v. White, 93 Cal.App.2d 134, 208 P.2d 788.) See also Hill v. Nelson, 71 Cal.App.2d 528, 534, 162 P.2d 927.

[4–8] The critical question normally presented is whether the acts done in the presence of the officers justified the arrest being made without a warrant. The only facts before ⌊228 this court or the lower court are those alleged in the complaint and the amended complaint. The complaint as a whole is subject to review on the question. (Muller v. Coastside County Water District, 191 Cal.App.2d 511, 12 Cal.Rptr. 712.) The complex, detailed, and somewhat erratic account of plaintiff's detention clearly indicates that the officers had reasonable cause to believe that a misdemeanor was being committed. However, the detention of plaintiff by the officers was not made for any public offense, but apparently it was made pursuant to Welfare and Institutions Code, section 5050.3, which provides the following authorization:

> "Emergency detention; application of peace or health officer. When any person becomes so mentally ill as to be likely to cause injury to himself or others and to require immediate care, treatment, or restraint, a peace officer or health officer, who has reasonable cause to believe that such is the case, may take the person into custody for his best interest and protection and place him as provided in this section. The person believed to be mentally ill may be admitted and detained in the quarters provided in any county hospital or state hospital upon application of the peace officer or health officer. The application shall be in writing and shall state the circumstances under which the

> person's condition was called to the officer's attention and shall also state that the officer believes, as a result of his personal observation, that the person is mentally ill and because of his illness is likely to injure himself or others if not immediately hospitalized.
>
> "The superintendent or physician in charge of the quarters provided in such county hospital or state hospital may care for and treat the person for a period not to exceed seventy-two (72) hours, excluding Sundays and nonjudicial days. Within said seventy-two (72) hours the person shall be discharged from the institution unless a petition of mental illness is presented to a judge of the superior court and the court issues an order for detention of such person, or unless the person is admitted as a patient under any other provision of law."

While Collins v. Jones, supra, 131 Cal.App. 747, 22 P.2d 39, relied upon by plaintiff, might indicate that want of probable cause is not an essential element in an action for false imprisonment, it appears from Coverstone v. Davies, supra, 38 Cal.2d 315, 321, 239 P.2d 876, that an authorized peace officer may make an arrest without a warrant for a crime which he has probable cause to believe is being committed in his presence, although it be a misdemeanor. The holding ⌊229 in Collins v. Owens, supra, 77⌊Cal.App.2d 713, 714, 176 P.2d 372, was disapproved insofar as such language denies application of the doctrine of probable cause to such a situation. The Legislature has clearly stated the right of a peace officer to take a person into custody if he has reasonable cause to believe that person to be so mentally ill as to be dangerous to himself or others. (Welf. & Inst.Code, sec. 5050.3.) The defendant officers are police officers of the City of San Diego and as such are peace officers of the State of California. (Pen. Code, sec. 7, subdiv. 8; sec. 817.) If we accept as true the account alleged in the complaint, it is clear that there was reasonable and probable cause for the detention and psychiatric examination of plaintiff. The authority contained in Welfare and Institutions Code, section 5050.3, does not confine the test of reasonable cause to acts committed in the presence of the officers. In determining whether there was reasonable cause for an arrest without a warrant, police officers are justified in taking into account the past conduct, character and reputation of the person suspected. (Farnsworth v. Cote, 199 A.C.A. 795, 800, 19 Cal. Rptr. 45.) The totality of circumstances as set forth in plaintiff's statement of the case must be considered in determining whether reasonable cause existed. We conclude that justification for the detention was clearly shown on the face of the complaint, and we must conclude that the complaint and its amendments fail to state a cause of action because reasonable cause for the detention was shown on its face.

[9] The plaintiff alleges that from certain alleged facts he assumed that Lieutenant Meyers authorized or instructed the police officers to put plaintiff in the county psychiatric unit. The allegation was merely a conclusion or opinion. Conclusions or deductions from the facts alleged do not constitute a cause of action. (39 Cal.Jur.2d sec. 130, p. 191.) It is clear that the detention was instituted by Officers Kirby and Thomas acting under the authority of Welfare and Institutions Code, section 5050.3.

If the officers and defendant doctors lawfully and with reasonable cause acted under that section, then plaintiff has not stated a cause of action for false arrest and false imprisonment. Under Penal Code, section 847:

> "There shall be no civil liability on the part of and no cause of action shall arise against any peace officer, acting within the scope of his authority, for false arrest or false imprisonment arising out of any arrest when: (a) Such arrest was lawful or when such⌊peace officer, at the time of such arrest had ⌊230

reasonable cause to believe such arrest was lawful * * *."

[10] Upon application of the peace officer, plaintiff was admitted to the hospital. Sufficient facts are recited in the complaint to justify the officer's belief that plaintiff was so mentally ill as to be likely to cause injury to himself or others and to require medical care or restraint. It is not indicated by the complaint whether the application for entry of the plaintiff was in writing and did state the circumstances under which the person's condition was called to the officer's attention and the officer's belief in respect to his personal observation. It will be presumed that the officer performed his duty. (Civ. Code, sec. 3529.) The complaint does not allege otherwise. Sufficient opportunity was afforded plaintiff to so plead if it was untrue. Plaintiff was subsequently discharged after interviews with the doctors. No violation of plaintiff's rights, under that section, is indicated.

[11] Plaintiff's complaint as to defendant City Manager Bean and defendant Chief of Police Jansen merely alleges that the policies and practices of these defendants make them partly responsible for plaintiff's arrest and imprisonment. This allegation is a bare conclusion, not deduced from facts alleged, and does not constitute a cause of action. (39 Cal.Jur.2d sec. 130, p. 191.)

[12] In the amendment to the complaint, these defendants are alleged to be liable for their negligence in failing to remove officers Kirby and Thomas (not parties to this action) because of some former difficulty between plaintiff and these officers and Officers Ludvigson, Drake and Lieutenant Meyers. Fernelius v. Pierce, supra, 22 Cal. 2d 226, 138 P.2d 12 relied upon by plaintiff, held that liability for the acts of their subordinates is imposed on superior public officers only if, knowing of the unfitness of the subordinates, they *negligently* fail to remove them. The pleading does not allege prior knowledge of these defendants as to any claimed act committed by the officers which constituted incompetency or unfitness. Plaintiff merely recites that he complained about their actions. The allegations are not sufficient to bring the pleading within the holding of the case relied upon. (22 Cal. Jur.2d sec. 33, p. 70; Michel v. Smith, 188 Cal. 199; Downey v. Allen, 36 Cal.App.2d 269; Fernelius v. Pierce, supra, 22 Cal.2d 226, 246, 138 P.2d 12.) It is claimed by defendant officers that plaintiff has failed to allege the filing of a claim with such officers, as required by section 801 ⊥231 of the Government Code. Whether the pleadings state a cause of action for intentional tort is problematical. It was held in Farnsworth v. Cote, supra, 199 A.C.A. 795, 19 Cal.Rptr. 45, in construing section 1981 of the Government Code, that the making of the filing of a claim with a public officer or employee a prerequisite to maintenance of an action against him embraces only negligence actions, not intentional torts. In 41 Cal.Jur.2d, section 243, page 129, it was held that the claims statute did not apply to intentional torts such as false arrest, false imprisonment, or assault and battery. (Citing Jones v. Shears, 143 Cal.App.2d 360, 299 P.2d 986.) As to City Manager Bean and Chief of Police Jansen, the allegations are that they were negligent not to suspend or discharge certain police officers. This does not allege an intentional tort and sections 801 and 802 of the Government Code, requiring the filing of a claim, would be applicable. (Farnsworth v. Cote, supra, 199 A.C.A. 795, 19 Cal.Rptr. 45; Bettencourt v. State of California, 139 Cal.App.2d 255, 293 P.2d 472.) There is no allegation that any claim was filed in this respect. (Payne v. Bennion, 178 Cal.App.2d 595, 3 Cal.Rptr. 14.) The demurrer to the complaint and its amendments was properly sustained without leave to amend.

Judgment affirmed.

COUGHLIN and STONE,* JJ., concur.

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* Assigned by the Judicial Council.

208 Cal.App.2d 259

⊥259 ⊥ **Arthur OLSEN, Plaintiff and Appellant,**

v.

ROOS-ATKINS, a corporation, Defendant and Respondent.

Civ. 20263.

District Court of Appeal, First District, Division 2, California.

Oct. 8, 1962.

Hearing Denied Dec. 5, 1962.

Action for personal injuries sustained by janitor in employ of a building maintenance company when he slipped and fell on defendant's premises in which he had been assigned to work. The Superior Court, San Francisco County, Byron Arnold, J., after a verdict for plaintiff granted defendant's motion for judgment notwithstanding the verdict, and plaintiff appealed. The District Court of Appeal, Shoemaker, J., held that evidence that piece of banana peel on which plaintiff allegedly slipped was dry around the edges and that no inspection of the stairway on which plaintiff slipped had been made from previous morning until evening when accident occurred was sufficient to present question for jury as to defendant's negligence in failing to have discovered and removed the peeling, and evidence that peeling was black and located on a black stairway was sufficient to present question for jury as to whether plaintiff was contributorially negligent in not discovering the peeling, even though it was his job to observe and remove dirt or rubbish from stairway on which he fell.

Order and judgment notwithstanding verdict reversed; cause remanded with instructions.

Kaufman, P. J., dissented.

1. Appeal and Error 🔑934(1), 1024(4)

On appeal from a judgment notwithstanding the verdict, the evidence must be viewed most strongly in favor of the verdict, and, if there is any substantial evidence in support of the verdict, the judgment must be reversed.

2. Negligence 🔑48

Proprietor of a store is liable to his invitees for injuries resulting from a dangerous condition which he ought to have discovered by the exercise of ordinary care.

3. Negligence 🔑136(16, 27)

Evidence that piece of banana peel on which employee of a building maintenance company allegedly slipped was dry around the edges and that no inspection of the stairway on which he slipped had been made from previous morning until evening when accident occurred was sufficient to present question for jury as to defendant store owner's negligence in failing to have discovered and removed the peeling, and evidence that peeling was black and located on a black stairway was sufficient to present question for jury as to whether such employee was contributorially negligent in not discovering the peeling, even though it was his job to observe and remove dirt or rubbish from stairway on which he fell.

* * *

Edises, Treuhaft, Grossman & Grogan, Oakland, Charles W. Decker, San Francisco, for appellant.

Barfield, Barfield & Dryden, San Francisco, for respondent.

⊥ SHOEMAKER, Justice.

⊥260 Plaintiff Arthur Olsen, a janitor in the employ of a building maintenance company, brought this action to recover damages for personal injuries sustained when he slipped and fell on the premises where he was assigned to work, and which were owned by defendant Roos-Atkins. After a trial by jury, the verdict was for the plaintiff in the amount of $27,000. Defendant then moved for judgment notwithstanding the verdict on the grounds that (1) there was no evidence of negligence on its part, and (2) the evidence conclusively established contributory negligence on the part of the plaintiff. From the order granting this motion and awarding judgment for the defendant, plaintiff now appeals.

⊥261 [1] The rule is well established that on appeal from a judgment notwithstanding the verdict, the evidence must be viewed most strongly in favor of the verdict, and, if there is any substantial evidence in support of the verdict, the judgment must be reversed. (Parker v. City & County of San Francisco (1958) 158 Cal.App.2d 597, 602, 323 P.2d 108.) This court must assume the truth of the plaintiff's evidence and every inference of fact which reasonably may be drawn therefrom. (Sparks v. Allen Northridge Market (1959) 176 Cal.App.2d 694, 699, 1 Cal.Rptr. 595.)

Turning now to a review of the evidence testified to by appellant, it appears that on October 10, 1958, appellant was employed as a maintenance man by the Commercial Building and Maintenance Company, and was assigned to perform janitorial services at respondent's Oakland store. Although appellant had only been employed by Commercial for a period of five or six months, he had previously been employed directly by respondent, and thus had performed maintenance work in the Oakland store for a continuous period of seven and one-half years. It was appellant's job to perform all janitorial and building maintenance services other than window washing and floor waxing on all four floors of the store. On Fridays, appellant's hours were from 8 p. m. to 4 a. m. During his initial hour of employment on Fridays, while customers were still in the store, appellant confined his work to emptying the waste containers throughout the building.

October 10, 1958 was a Friday, and appellant reported for work at approximately 7:50 p. m. He took his lunch to the basement and removed his coat. After removing his street shoes and starting to put on his work shoes, appellant remembered that it was a Friday night and that customers would still be in the store. Since appellant considered that his work shoes did not look well in front of customers, he put his street shoes back on. At this time, he looked at the bottoms of his street shoes and observed that they were clean.

Appellant then took an elevator to the second floor and began emptying wastebaskets into a large carton which he had brought for that purpose. After filling the carton, appellant started back toward the elevator, when he happened to glance at the stairway descending to the first floor. He noted a bit of dust on the ledge above the landing between the first and second floors, and concluded that he had better take care of it then before he forgot about it. After taking his carton to the elevator, appellant returned to the stairway and started ⊥262 to descend. Appellant approached the right side of the stairway where there was a railing which he intended to reach for. As appellant took his first downward step and before his hand grasped the railing, appellant's right foot slipped out from under him, and he fell down the stairway with his hands in the air and his feet before him. He landed on his back near the landing between the first and second floors.

Mr. Wehner, a salesman at the boy's counter on the second floor, came to appellant's aid and helped him back up the stairs. As he and appellant passed the top step where appellant had tripped. Mr. Wehner picked up a dried piece of banana peel from the front portion of the step and said, "This is what you slipped on." Appellant then looked down and observed a wet spot further back on the step. Upon examining the heel of his right shoe, appellant found that it was also wet. Mr. Wehner then took appellant to see Mr. Ghertner, the assistant manager of the store. After Mr. Ghertner had been informed of appellant's fall, either he or Mr. Wehner said, "That's the darn kids that have been playing around." The testimony as to Wehner's part in the accident and the presence of the banana skin was directly contradicted by Wehner.

The evidence revealed that respondent had no regular janitorial service in the store during the daytime hours when appellant was not on duty. Respondent did have a rule, however, requiring all of its salespeople and other employees to keep the floors clean and to pick up any refuse which might be lying about.

[2] The sole question presented by this appeal is whether the lower court was correct in finding that the evidence was not sufficient to support the verdict in favor of appellant. In order to resolve this question, it must first be determined whether there was substantial evidence of respondent's negligence. Appellant, in contending that there was, relies upon the rule that the proprietor of a store is liable to his invitees for injuries resulting from a dangerous condition which he ought to have discovered by the exercise of ordinary care. (Bridgman v. Safeway Stores, Inc. (1960) 53 Cal.2d 443, 446–447, 2 Cal.Rptr. 146, 348 P.2d 696.) Appellant asserts that his own testimony in regard to the condition of the banana peel was itself sufficient to support the inference that it had been on the step long enough for a person exercising reasonable care to have discovered it. In our opinion, the record supports this contention.

263 ⊥ According to appellant's testimony, Mr. Wehner removed "a dried piece of banana peeling" from the top step immediately after the accident. Appellant testified that the peeling was located approximately where he had placed his foot just prior to falling, but that it appeared to be slightly closer to the edge of the step. Upon looking down, appellant observed that there was a wet spot on the step just back of where Mr. Wehner had found the peeling. Upon examining his heel, appellant found it was also wet. Appellant described the piece of peeling as being black in color, and about two and one-half to three inches in length, and one inch to one and one-half inches in width. He further stated that the peeling was wet, but "dry around the edges," and that the spot on the floor was dried up and "gluey" in appearance. He stated that "If I had to pick it up I would have to scrape it * * *"

[3] In the light of this testimony, there was sufficient evidentiary support for a finding that the banana peeling had remained on the step long enough for a person exercising reasonable care to have discovered and removed it. (Louie v. Hagstrom's Food Stores (1947) 81 Cal.App.2d 601, 184 P.2d 708; Travis v. Metropolitan Theatres Corp. (1949) 91 Cal.App.2d 664, 205 P.2d 475.) See also Perez v. Ow (1962) 200 A.C.A. 559, 19 Cal.Rptr. 372, for a discussion of the type of evidence necessary to support a finding of constructive notice.

In this connection, the cases of Girvetz v. Boys' Market, Inc. (1949) 91 Cal.App.2d 827, 206 P.2d 6 (banana on floor for one and one-half minutes), and Hale v. Safeway Stores, Inc. (1954) 129 Cal.App.2d 124, 276 P.2d 118 (banana on floor at least ten minutes) discuss the applicable doctrine. We quote from the latter case, commencing at page 128, 276 P.2d at page 121: "'"To impose liability for injuries suffered by an invitee due to the defective condition of the premises, the owner or occupier 'must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he had discovered it.' Hatfield v. Levy Brothers, 18 Cal.2d 798, 806, 117 P.2d 841, 845." * * *

"'Further, the question of whether the condition which caused the injury had existed so long as to be discoverable by the store owner within a reasonable time is for the jury.'

⊥ "In regard to this element, the court, in 264
Louie v. Hagstrom's Food Stores, Inc., supra, at page 608, 184 P.2d at page 712, stated:

"'The exact time the condition must exist before it should, in the exercise of reasonable care, have been discovered and remedied, cannot be fixed, because, obviously, it varies according to the circumstances. A person operating a grocery and vegetable store in the exercise of ordinary care must exercise a more vigilant outlook than the operator of some other types of business where the danger of things falling to the floor is not so obvious.'

"The case of Girvetz v. Boys' Market, Inc., 91 Cal.App.2d 827, 206 P.2d 6, 9, cited by respondent, has facts which are almost identical with the case at bar, except as to the element of time the dangerous condition had existed. The suit involved a plaintiff who had slipped on a banana peel in the defendant's vegetable store. The *only* evidence as to how long the peel had been there was the testimony that someone had seen it there a minute and a half before the plaintiff fell. After a jury verdict for the plaintiff, the court granted a judgment notwithstanding the verdict. In affirming the judgment, the appellate court said:

" 'Viewing the case, as we must, in the light most favorable to plaintiff, it appears that her fall was the result of a dangerous condition existing on the floor of the defendant's market with approximately fifteen employees within a radius of fifteen feet from the scene of the accident, but that the circumstances are such as to afford no basis for an inference that the condition was created by the proprietor or his employees. The question is whether, in the circumstances, it can be inferred that the dangerous condition had existed for such a length of time as to justify charging the defendant with lack of ordinary care in failing to discover and remedy it before the plaintiff was injured. As stated in Louie v. Hagstrom's Food Stores, supra, 81 Cal.App.2d at page 608, 184 P.2d 708, the exact time the condition must exist before it should, in the exercise of reasonable care, have been discovered and remedied, cannot be fixed, but varies according to the circumstances. It may be conceded that ordinary care in the case of a public market involves a more vigilant outlook than in the case of an apartment house lobby. It *might also be conceded that the presence of a condition such as was shown in the circumstances of this case for as long as ten or fifteen minutes would in all probability be held to justify submitting the cause to the jury.* * * * Obviously, the exact time that a dangerous condition must exist in order to charge the proprietor cannot be stated as a matter of law. * * *' (Emphasis added.)" 265

Moreover, such a finding is also supported by the evidence indicating that respondent had made no inspection of the stairway for the period of time prior to the accident, when plaintiff quit his work the morning before at 1:20 a. m.

Our courts have held that evidence that an inspection had not been made within a particular period of time prior to an accident may warrant an inference that the defective condition existed long enough to have been discovered by a person exercising due care. (Bridgman v. Safeway Stores, Inc., supra, at p. 447, 2 Cal.Rptr. 146, 348 P.2d 696; Sapp v. W. T. Grant Co. (1959) 172 Cal.App.2d 89, 341 P.2d 826.)

Respondent contends, however, that a storekeeper, such as itself, cannot be held liable for an injury to a person employed to keep its premises clean and to remove refuse, as a result of slipping or tripping over the exact dirt or rubbish it was his duty to observe and remedy. In order to affirm the judgment notwithstanding the verdict on the theory urged by respondent, this court would be compelled to hold *as a matter of law* that an employee of an independent contractor has no cause of action in negligence if his injuries resulted from a condition which it was his duty to correct. This defense is in reality nothing more nor less than that of contributory negligence.

Since there was ample evidentiary support, as above noted, for the jury's implied finding that respondent was negligent, it remains to be determined whether the judgment in respondent's favor may be upheld on the ground that appellant was contributorily negligent as a matter of law. The facts favorable to appellant reveal that he approached the right side of the stairway and reached out for the railing; that he looked down as he took his first step and did not observe any foreign substance on the marble, but that his right foot slipped out from under him as he took his first downward step before his hand had grasped the railing. There was also evidence that the piece of banana peeling was of a relatively small size; that it was black in color; and that the stairs were similarly of a "darkish" material. This evidence was clearly sufficient to present a question of fact for the jury as to whether or not appellant exercised the proper degree of care for his own safety. The court gave thorough instructions on the issue of contributory negligence. The jury was instructed that appellant was required to use his eyes, 266 intelligence, and other faculties, to protect him from injury, and that if the condition of the premises was open and visible and could have been observed by him through the use of ordinary care, his failure to do so would preclude him from recovery. The jurors were also informed of the inference that one who looks in the direction of an object clearly visible sees it. Although respondent stresses the fact that appellant, as a janitor thoroughly familiar with the premises, was subject to a higher duty of care than the ordinary store patron, it does not appear that respondent requested any instructions to that effect. In any event, the evidence favorable to appellant indicates that he acted in a prudent and careful manner. Under these circumstances, it cannot be said that contributory negligence was established as a matter of law.

Since, as above noted, there was also sufficient evidence of respondent's negligence, the order and judgment notwithstanding the verdict is reversed, and the cause remanded with instructions to the trial court to enter judgment in favor of appellant.

AGEE, J., concurs.

KAUFMAN, Presiding Justice.

I dissent.

It is my view that the judgment for the defendant should be affirmed. I do not feel that a storekeeper has any duty to keep its floor clean toward a person employed by an independent contractor, who in turn, had a contract with the storekeeper to keep the floor clean. If this is not so, then the storekeeper would have to hire a janitor to keep the floor clean before the regular janitor working for the independent contractor, whose duty it was to keep the floor clean under the contract, came on the job, and this could go on ad infinitum. I think basically, there was no legal duty on the part of the storekeeper toward the employee of the independent contractor. Before there can be negligence on the part of the storekeeper, there must be a legal duty on his part to perform in favor of the injured party. The only negligence in this case was the negligence of the plaintiff employed by the independent contractor by failing to see an object in clear view on the floor.

Furthermore, there is no substantial evidence in the record to show that the alleged dangerous condition had existed long enough for the owner, in the exercise of reasonable care, to have discovered it and remedied it. Speculation, conjecture and surmise as to the length of time the banana peel was on the stairs is not enough. The fact alone that a dangerous condition of 267 business premises has resulted in an injury will not warrant an inference that the owner was negligent. (See Girvetz v. Boys' Market, Inc., 91 Cal.App.2d 827, 206 P.2d 6.)

Hearing denied; SCHAUER and McCOMB, JJ., dissenting, WHITE, J., sitting pro tem.

208 Cal.App.2d 177

77 ⊥**James Charles SMITH, Freddie Lee Smith, Thomas J. Smith, Jr., III, Linda Susan Smith, Richard Alfonso Smith, and Darryl Eugene Smith, Minors, by their Guardian Ad Litem, Thomas J. Smith, Jr.; and Thomas J. Smith, Jr., Plaintiffs and Appellants,**

v.

Irwin M. SHANKMAN, also known as I. M. Shankman, M.D., Defendant and Respondent.

Civ. 20156.

District Court of Appeal, First District, Division 2, California.

Oct. 3, 1962.

Hearing Denied Nov. 28, 1962.

Malpractice action. From an adverse judgment of the Superior Court, Solano County, Thomas Kongsgaard, J., the plaintiffs appealed. The District Court of Appeal, Shoemaker, J., held that conduct of bailiff in telling jury foreman during deliberations that jury was not entitled to transcript of testimony of a certain witness constituted error and required reversal in light of other errors.

Judgment reversed.

1. Appeal and Error 🔑1069(1)
Trial 🔑305

Conduct of bailiff in telling jury foreman during deliberations that jury was not entitled to transcript of testimony of a certain witness constituted error and required a reversal in light of other errors.

2. Trial 🔑344

Affidavits of jurors may be used to impeach their verdict only to show that verdict was reached by lot or by chance, and to show that bias or disqualification of a juror was concealed by false answer on voir dire, and affidavits of jurors concerning divided state of jury and their inability to recall significant portions of testimony of a witness could not be considered to establish misconduct of bailiff, whose actions were already attested to by bailiff and by another person.

3. Physicians and Surgeons 🔑18(10)

Instruction concerning method of treatment of a patient by physician was not warranted by the evidence when doctor was charged with failure to diagnose a tubal pregnancy and he admitted that none of the prescribed treatment would aid in treatment of such illness.

4. Appeal and Error 🔑1064(1)
Trial 🔑244(4)

Instructions in malpractice suit tended unduly to overemphasize the defense side of the case to the detriment of the plaintiffs.

◆

Walkup & Downing, Bruce Walkup, Gerald C. Sterns, San Francisco, William B. Boone, Santa Rosa, of counsel, for appellants.

Taft, Hopkins, Newman & Robinson, by Cranson L. Hopkins, Vallejo, for respondent.

⊥SHOEMAKER, Justice. ⊥178

Plaintiffs appeal from a verdict and judgment for the defendant in an action to recover damages for wrongful death allegedly resulting from medical malpractice. The plaintiffs are the surviving husband and six children of the decedent, Elsie Mae Smith, who died on July 1, 1956, as the result of a ruptured tubal pregnancy.

The facts developed on this trial show that at 2 p. m. on the day preceding her death, Elsie Mae Smith, age 28, began to suffer from cramps in her lower abdomen and fainted upon attempting to walk to the bathroom. At about 3 p. m., her husband called his wife's regular doctor and was referred to his "covering doctor," the defendant, Irwin M. Shankman, M. D., and informed him of his wife's condition. The defendant, after suggesting that the wife be brought to the office, inquired if he could afford to pay for a house call. When Mr. Smith replied that he could, the defendant agreed to come and arrived at the house around 5 p. m. Mr. Smith testified that the doctor then pressed on the bottom of his wife's stomach in order to

⊥179 ascertain where her pain was⊥localized; used a stethoscope to listen at places where the pain was worst, but did not make a pelvic examination; further, that although the doctor did not inquire about his wife's menstruation, he volunteered the information that she had already had one period that month and was having a second period at that time. According to Mr. Smith, the doctor told him that this was not unusual. Dr. Shankman then gave Mrs. Smith a shot of penicillin and a shot of demerol to ease the pain. He also gave Mr. Smith his phone number in case he were needed.

By 8 o'clock that evening, Mrs. Smith's symptoms had become increasingly more severe. She was still suffering from cramps in the lower abdomen and again fainted in attempting to go to the bathroom. Although the bathroom was a distance of only six or eight feet from her bed, she required aid to walk that distance. Shortly after 8 p. m., Mr. Smith attempted to reach the doctor by phone but was informed that he was not in. At 11 p. m., Mr. Smith called again and was told that the doctor had gone to a party. At about 12 p. m., Mr. Smith called the Vallejo General Hospital and asked if he could bring his wife in. He was told that he could not bring his wife to the hospital without a doctor's admission. At 2 a. m., Mrs. Smith again fainted while going to the bathroom, and Mr. Smith placed another call to the answering service. He was told that Dr. Shankman had not returned but that he would call Mr. Smith when he came in.

At approximately 5 a. m., Dr. Shankman called, and Mr. Smith informed him that his wife was still fainting and suffering from cramps, chills and fever. The doctor instructed Mr. Smith to go to the Vallejo General Hospital and pick up some pills. The pills prescribed were empirin and codeine to ease the pain, and nembutal to induce sleep. When Mr. Smith gave the pills to his wife, she immediately began vomiting, and Mr. Smith called the doctor and informed him of this symptom. The doctor advised him to give her aspirin.

By 7 o'clock in the morning, Mrs. Smith had fainted again and was having difficulty catching her breath. Mr. Smith called Dr. Shankman, and when he did not come to the house, got in touch with his brother and father. At 7:40 a. m., Mr. Smith again called Dr. Shankman and informed him that his wife had gotten worse—"She keeps a fainting." The doctor then told him not to call any more, that he would be out during the day.

After waiting until 9:30 a. m. for the doctor to arrive, Mr.⊥Smith, with the aid of ⊥180 his relatives, placed his wife in the car and drove her to Vallejo General Hospital. According to the testimony of a hospital nurse, Mrs. Smith appeared to be dead when she was placed on the hospital bed. The death certificate placed the time of death at 10:15 a. m., and listed the cause of death as a ruptured right tubal pregnancy, which was estimated to have set in 24 hours earlier. Dr. DeMay, the doctor who conducted the autopsy, testified that the decedent's peritoneal cavity contained five pints of blood. He stated that she had bled to death as a result of a ruptured Fallopian tube.

According to the testimony of Dr. Shankman, Mr. Smith never informed him, at the time of the initial phone call, that his wife was suffering from any symptoms other than chills and fever. He further testified that when he arrived at the house, Mrs. Smith complained of pain in the area of the tubes and uterus, that he found her to be feverish, but did not detect any sign of chills. He stated that he did not make a pelvic examination of Mrs. Smith because she was a fat woman, and this type of examination would not have revealed the existence of a tubal pregnancy. He also testified that Mrs. Smith did not inform him that she had had an additional menstrual period, but told him that she had commenced her period a few days earlier and was just finishing at that time. He stated that he took her blood pressure and found it to be within normal range. He diagnosed her condition as salpingitis, a pelvic inflammatory disease, and accordingly prescribed drugs which would combat the infection and reduce the pain.

Dr. Shankman further testified that when he talked to Mr. Smith at 5 a. m. the following morning, he was told that Mrs. Smith had not slept and that she was still having pain. He assumed that the salpingitis was getting a little worse and he accordingly prescribed nembutal to make her sleep. He stated that he received no further calls from Mr. Smith until 8 a. m., and, at that time, was told that Mrs. Smith kept fainting when she got up to go to the bathroom. He considered it nothing unusual, since people faint even when approached by a needle. He stated that he had never been informed of this symptom until that time, but that he did not consider it inconsistent with his earlier diagnosis of salpingitis. He therefore instructed Mr. Smith to keep his wife in bed and advised him that he would come out to see her later.

181 In addition to the evidence above summarized, plaintiffs' expert witness testified that in his opinion, standard medical care had not been followed by the defendant. Defendant's expert testified to the contrary.

Upon this evidence, verdict and judgment were for the defendant.

[1] Appellants' primary contention is based upon the bailiff's conduct. The jury's deliberations commenced at 2:10 in the afternoon. Four hours later the jury had not yet arrived at a verdict, and the court thereupon directed the bailiff to take them to dinner. The jury returned to continue its deliberations at 7:30 p. m. Subsequently, at approximately 7:45 or 8:00 p. m., in response to a knock on the door of the juryroom, the bailiff opened the door and the jury foreman informed him that the jury wanted the transcript of Dr. Shankman's testimony. The bailiff replied that the jury could not have that transcript. He then closed and locked the door.

Thereafter, at 8:45 p. m., appellants' counsel, Mr. Walkup, returned from dinner and was informed by his client of the jury's request. Whereupon, Mr. Walkup, in the presence of respondent's counsel, told the judge in chambers what he had learned and asked that the bailiff be questioned concerning the matter. The judge called the bailiff into chambers, found the incident had occurred, and then instructed the bailiff, upon Walkup's request, to bring the jury into open court. The bailiff went to the juryroom and returned, reporting that the jury desired a few more minutes. Before the court could take further action, the bailiff reported that the jury had reached a verdict.

At 9:05 p. m., the jury returned to court and announced that they had arrived at a verdict. The judge then asked the foreman if the jury desired any instructions or the reading of any testimony at that time. The foreman replied that they did not. Upon being asked by Mr. Walkup whether they had previously asked the bailiff for a reading of certain testimony, the foreman replied that they had requested a transcript of Dr. Shankman's testimony, but that the bailiff had told them that this could not be done. In response to questions put by the court and counsel for respondent, the foreman stated that the jury had arrived at a verdict without the necessity of having the desired testimony read to them. The verdict, being ten to two in favor of respondent, was then read by the clerk.

In addition to the evidence above summarized, appellants, in support of their motion for a new trial, produced the affidavits of two members of the jury. Both affidavits were to the effect that the jurors were extremely vague in their recollections of the testimony of Dr. Shankman and Mr. Smith concerning the three telephone calls purportedly made on the morning of Mrs. Smith's death. Since the jurors were about evenly divided and felt a definite need for clarification of these points, their foreman asked the bailiff for a "transcript" of Dr. Shankman's testimony. When this request was denied, the jurors reached a verdict by attempting to recall the relevant testimony "as best we could." 182

Appellants now contend that the bailiff's conduct deprived them of a fair trial, and that such error must be deemed so prejudicial as to require a reversal of the judgment.

Code of Civil Procedure, section 613, provides that when a case is finally submitted to the jury, they may decide in court or retire for deliberation. "Unless by order of the Court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they or three-fourths of them are agreed upon a verdict * * *." Pursuant to Code of Civil Procedure, section 614, if, after they have retired, the jurors disagree as to any part of the testimony, or desire to be informed of any point of law, they may require the officer to conduct them into court. "Upon their being brought into Court, the information required must be given in the presence of, or after notice to, the parties or counsel."

The cases construing these sections have consistently required a strict compliance with the rules therein set forth. In Halada v. Venice Lake Park, Inc. (1955) 132 Cal.App.2d 788, 283 P.2d 42, the jury, after deliberating for part of two days, requested a further reading of certain evidence, and the trial court, without consulting counsel, communicated his refusal of this request through the bailiff. On appeal, the judgment was reversed, with the court stating: "The incident was by no means trivial, nor, was it unimportant. Counsel, who were present, were entitled to be informed as to the jury's request. Whether the outcome or the verdict would have been any different is beside the issue. The verdict was 9 to 3. In the circumstances, the action of the trial judge must be held, as a matter of law, to have been prejudicial." (Pp. 789–790, 283 P.2d page 43.) Similarly, in Davis v. Erickson (1960) 53 Cal.2d 860, 3 Cal.Rptr. 567, 350 P.2d 535, the jury, after deliberating ⊥183 for some time, asked the court to reread the instructions on negligence and assumption of risk. The court inadvertently failed to read all of the instructions pertaining to these subjects, and, upon being informed of its error, refused to recall the jury. On appeal, court's action was held to constitute prejudicial error. The court said: "We can only reasonably assume that the jury's request for a rereading of all of the instructions on negligence was properly motivated either by a failure of the jury to clearly recollect the full import of such instructions or by a disagreement among the jurors as to the instructions which had been actually given." (P. 864, 3 Cal.Rptr. p. 600, 350 P.2d 538.) In Nelson v. Southern Pacific Co. (1937) 8 Cal.2d 648, 67 P.2d 682, the court communicated with the jury after their retirement by sending them a message through the bailiff without the presence of counsel. The appellate court pointed out that such conduct was clearly not in accord with Code of Civil Procedure, section 614, which requires that the jurors be brought into court and given the information requested in the presence of counsel. "Any other method of communication is held to go to the substance of the right of trial by jury and because of its nature is deemed to be prejudicial except in very exceptional circumstances." (P. 655, 67 P.2d p. 686.)

In James v. Key System Transit Lines (1954) 125 Cal.App.2d 278, 270 P.2d 116, the court shed further light on the "exceptional circumstances" which would render an improper communication with the jury non-prejudicial. In that case, the jury, after deliberating for almost an hour, asked to see a deposition of which only certain portions had been read into evidence. Although counsel for the defendant requested that the court instruct the jury that they could have a rereading of any parts which had already been read at the trial, the court refused to so inform them and merely denied their request to see the deposition. On appeal from the resulting judgment for the plaintiff, the court held that the lower court, at the very least, ought to have informed the jury that it had a right to have at least a portion of the deposition read. "But to refuse to inform it of its rights in this respect, when the judge was, in effect, informed that the jury was in difficulty in some way about the deposition, clearly prevented a fair trial, *unless the matters in the deposition were inconsequential.*" (P. 283, 270 P.2d p. 119; emphasis added.) The court accordingly concluded that there had been no miscarriage of justice because nothing in the deposition contradicted the plaintiff's testimony or affected his credibility in any way.

⊥184 When the facts in the instant case are viewed in the light of these authorities, there can be no doubt that the conduct of the bailiff constituted error. Pursuant to Code of Civil Procedure, section 613, the bailiff was specifically prohibited from communicating with the jurors in any manner other than to ask them if they had agreed upon a verdict. By informing them of his own understanding of the rules governing what evidence might be brought into the juryroom, he clearly overstepped the bounds of his authority and infringed upon the right of the parties to have their case tried by a jury free from outside influence. Although it is true, as respondent points out, that the bailiff was technically correct in instructing the jurors that the written transcript itself could not be given to them, it does not follow that his misconduct was of no consequence. "While the jury's action did not constitute in so many words a request for a reading of some portion of the transcript, such action can reasonably be interpreted only as such a request * * *." (James v. Key System Transit Lines, supra, at p. 283, 270 P.2d p. 119.) Had the bailiff properly deferred action on the jury's request until the trial judge had returned from dinner, the jury could then have been brought into open court, pursuant to Code of Civil Procedure, section 614, and the judge could have inquired whether they desired to have portions of the relevant testimony reread. As a result of the bailiff's failure to follow this procedure, the jury's request for the transcript was denied in such a manner as to indicate that there was no alternative method by which they could review testimony which they obviously considered important.

[2] Appellants assert that the affidavits of the two jurors concerning the divided state of the jury and their inability to recall significant portions of the testimony may properly be considered by this court. There is little merit to this argument. The California courts have consistently held that affidavits of jurors may be used to impeach their verdict in two instances only—to show that the verdict was reached by lot or by chance, Code of Civil Procedure, section 657, subdivision 2; and to show that the bias or disqualification of a juror was concealed by false answer on voir dire. (Kollert v. Cundiff (1958) 50 Cal.2d 768, 773–774, 329 P.2d 897; Watson v. Los Angeles Transit Lines (1958) 157 Cal.App.2d 112, 116, 320 P.2d 890.) The affidavits in the case at bar clearly fall within neither category. Appellants contend, however, that this court ought to follow the reasoning of Wilkins v. Abbey (1938) 168 Misc. 416, 5 N.Y.S.2d 826, where the court held ⊥185 that the use of affidavits of jurors to show misconduct on the part of *third parties* did not fall within the prohibition of the rule that jurors will not be heard to impeach their verdict. This precise argument was rejected by the California Supreme Court in People v. Gidney (1937) 10 Cal.2d 138, 146–147, 73 P.2d 1186, 1191, where the court stated that "the evil, if any, [in the California rule] is established in this state by the legislative authority, and can only be cured by amendment." In any event, even if this state were in accord with the New York rule, the affidavits in the present case were completely unnecessary to establish the misconduct of the bailiff, whose actions were already attested to by himself and by Mr. Smith. Under such circumstances, the jurors' affidavits would be purely cumulative on this issue, and, if used to show the state of their deliberations and their inability to recollect testimony, would clearly serve no other purpose than impeachment of their own verdict.

In view of the California law, we must determine whether the evidence, exclusive of the jurors' affidavits, is sufficient to show that appellants were in all probability prejudiced by the acts of the bailiff or whether this case is one in which there are "exceptional circumstances" rendering the error harmless. In resolving this question, we proceed on the reasonable assumption that the jury, in making its request for the transcript, felt a definite need to review certain portions of Dr. Shankman's testimony. (See Davis v. Erickson, supra, 53 Cal.2d at p. 864, 3 Cal.Rptr. at p. 570, 350 P.2d at p. 538.) Had the court at that time offered to have the relevant testimony reread to the jury, it is entirely possible, as a practical matter, that its verdict might have been affected. The fact remains, however, that the trial judge, immediately upon being informed of the bailiff's conduct in denying the jury's request, ordered the jurors brought into court, and, before receiving their verdict, asked if they desired to have any portions of the transcript read to them. The foreman replied that they had been able to reach a verdict without the need to review the testimony they had earlier requested. In People v. Warren (1900) 130 Cal. 678, 63 P. 87, the jury had asked to have reread certain testimony which the reporter estimated would take approximately two hours. Since it was then late in the day, the judge announced that he would adjourn court until 9 a. m. the following day and have the testimony read at that time. Shortly before 9 a. m., the jury announced that it had reached a verdict. On appeal from the resulting judgment, the court held that it was entirely proper to receive the verdict without requiring a rereading of the testimony ⊥186 earlier requested. In the case at bar, the jury similarly stated that it no longer desired to review any testimony since it had been able to reach a verdict without it. In view of this statement, the bailiff's misconduct alone cannot be deemed to have resulted in prejudice sufficient to compel a reversal.

[3] Appellants also direct this court's attention, however, to certain errors in the instructions given by the trial court. They first complain of the giving of instructions that:

"Physicians and surgeons are not bound to use any particular method of treatment, and if among physicians and surgeons of ordinary skill and learning more than one method of treatment is recognized, it is not negligence for the defendants to adopt either of such methods; and the fact that some other method of treatment existed or some other physician or surgeon might or would have used or advised the other different method, does not establish negligence on the part of the defendant. * * *

"Where there is more than one recognized method of diagnosis or treatment, and no one of them is used exclusively and uniformly by all practitioners of good standing, it is not negligence for a physician and surgeon if, in exercising his best judgment, he selects one of the approved methods, which later turns to be a wrong selection, or one not favored by certain other practitioners."

It is appellants' position that both of the above-quoted instructions were without any basis in the evidence and were therefore calculated to mislead the jury and to divert its attention from the actual issues before it. Appellants are clearly correct in this contention. The sole issue presented by the facts in the case at bar was whether Dr. Shankman's failure to diagnose a tubal pregnancy was the result of negligence on his part. A review of the entire record discloses no evidence whatever that the treatment actually given by the doctor was a proper or recognized method of treating a tubal pregnancy. Dr. Shankman himself testified that standard medical practice would require that a patient with a ruptured tubal pregnancy should immediately be hospitalized for surgery. In response to a question as to whether he had given Mrs. Smith any treatment which would aid in curing a ruptured tubal pregnancy, the doctor replied, "I did not." When asked whether the treatment he had given would in any way help to prevent a tubal pregnancy from rupturing, he replied, "None whatsoever." Under such circumstances, it cannot be doubted that the instructions complained of were utterly unsupported by the evidence and were calculated to divert the jurors from the real issues before them. (Maertins ⌊187 v. Kaiser Foundations Hospitals (1958) 162 Cal.App.2d 661, 666–667, 328 P.2d 494, 75 A.L.R.2d 807; Pierce v. Black (1955) 131 Cal.App.2d 521, 529, 280 P.2d 913; Balthrop v. Atchison, T. & S. F. Ry. Co. (1959) 167 Cal.App.2d 437, 445–446, 334 P.2d 1041.) Neither can it be assumed that the giving of these instructions had no substantial effect on the outcome of the trial.

[4] Appellants also contend that the instructions given overly emphasized the defense side of the case. Appellants point out that, in addition to the two instructions above set forth, the jury was instructed that: the difficulties and uncertainties in the practice of medicine are such that no practitioner can guarantee results; a physician is not responsible for unexpected occurrences or an unsuccessful result; neither a failure to cure nor a bad result from treatment is evidence of negligence; mere mistakes in judgment do not constitute malpractice; the law does not require of a physician infallible judgment or perfection, nor does it condemn him because his efforts prove unsuccessful; difficulties and uncertainties in the practice of medicine, and unpredictable variations in response to treatment are such that no practitioner can guarantee results; a physician may err in judgment or be unsuccessful in treatment without being negligent. Although none of these instructions, standing alone, would appear to be prejudicially erroneous, it may well be doubted whether such an extensive array of defense-oriented axioms was necessary to properly apprise the jury of the relevant legal principles. To the contrary, the overall effect of these instructions, which are to a large degree repetitive, in our appraisal thereof tended to clothe the doctor in a cloak of legal immunity in the eyes of the jury. At the very least, it may be said that the defense aspects of the case were given undue prominence. Such a practice is not to be commended (Taha v. Finegold (1947) 81 Cal.App.2d 536, 544, 184 P.2d 533), and undoubtedly resulted in substantial detriment to appellants. (Clark v. State of California (1950) 99 Cal.App.2d 616, 624, 222 P.2d 300.)

The cumulative effect of the errors above discussed clearly compels a reversal of the judgment and it becomes unnecessary to discuss the other contentions raised by appellants.

Judgment reversed.

KAUFMAN, P. J., and AGEE, J., concur.

PEOPLE of the State of California, Plaintiff and Respondent,
v.
William JACKSON, Defendant and Appellant.
Cr. 4016.

District Court of Appeal, First District, Division 2, California.
Oct. 11, 1962.

For Opinion on Hearing, see 30 Cal.Rptr. 329, 381 P.2d 1.

Defendant was convicted in the Superior Court, County of San Francisco, Harry J. Neubarth, J., of unlawfully offering to sell narcotics and he appealed. The District Court of Appeal, Kaufman, P. J., held that instruction on specific intent to offer heroin was not inconsistent or in irreconcilable conflict with portion of instruction to effect that it was no defense to crime charged that there exists in mind of person who makes offer to sell heroin an unexpressed intention never to perform offered act and reversal was not required.

Affirmed with directions to correct judgment.

1. Poisons ⚷4

Section of Health and Safety Code prohibiting offering to sell narcotic encompasses offer to sell and subsequent failure to deliver. West's Ann.Health & Safety Code, § 11501.

2. Poisons ⚷9

In absence of evidence that defendant's offer to sell narcotic was false one, evidence was not insufficient to support conviction for selling narcotic, even though delivery was not made. West's Ann.Health & Safety Code, § 11501.

3. Criminal Law ⚷1141(1)

Reviewing court must assume in support of judgment the existence of every fact which jury could reasonably deduce from evidence.

4. Criminal Law ⚷1172(4)

Instruction on specific intent to offer heroin was not inconsistent or in irreconcilable conflict with portion of instruction to effect that it was no defense to crime charged that there exists in mind of person who makes offer to sell heroin an unexpressed intention never to perform offered act and reversal was not required. West's Ann.Health & Safety Code, § 11501.

5. Criminal Law ⚷422(6)

Declarations of co-defendant not made in presence of defendant nor in performance of any common design are inadmissible against defendant.

6. Criminal Law ⚷673(4), 1172(2)

In view of admission of statement of co-defendant made out of defendant's presence, it was duty of court to instruct that statement could be considered only as evidence against person who made it, and erroneous reference in instruction to statement "after arrest," instead of "after offense" was not prejudicial.

7. Criminal Law ⚷1163(4)

Error cannot be presumed from mere giving of instruction containing erroneous statement and burden is on appellant to show prejudice, inasmuch as it is assumed that instruction having no application to case does not injure defendant.

8. Criminal Law ⚷1177

Erroneous statement of offense will not vitiate judgment when record fully discloses crime.

9. Criminal Law ⚷1177

Erroneous pronouncement of judgment to effect that defendant had been convicted of sale of heroin rather than offering to sell heroin was not prejudicial, where defendant was properly charged in indictment, verdict was returned in form of indictment and punishment was identical for sale of heroin and offer of sale. West's Ann.Pen. Code, § 1404; West's Ann.Health & Safety Code, § 11501.

◆

McCaw & Barnum, Donald B. McCaw, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., John S. McInerny, Edward P. O'Brien, Deputy Attys. Gen., San Francisco, for respondent.

KAUFMAN, Presiding Justice.

Appellant, William Jackson, and his co-defendant, Joseph Holiday, were convicted by a jury of unlawfully offering to sell narcotics in violation of section 11501 of the Health and Safety Code. Jackson alone appeals from the judgment of conviction entered on the order and from the order denying his motion for a new trial.[1] The sole contentions on appeal are that: 1) the trial court erred in its instructions to the jury and in denying the motion for a new trial because the offense of offering to sell a narcotic is not encompassed in section 11501 of the Health and Safety Code; 2) the evidence is insufficient to support the judgment; 3) the court erred in its instructions relating to the admissibility of certain evidence and in rendering judgment on a crime not charged in the indictment. There is no merit in any of these contentions.

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[1] Notice of appeal was filed July 12, 1961, before the effective date of the legislation abolishing the appeal from an order denying a motion for a new trial in criminal cases.

The only evidence at the trial was the testimony of one Horace Lawrence, an officer of the San Francisco Police Department, who was working as an undercover agent in the narcotics detail. In December, 1960, Lawrence contacted the co-defendant, Joseph Holiday, and informed him he was interested in buying some heroin. Holiday indicated that while he himself did not deal in heroin, he would find someone to help Lawrence. Lawrence saw Holiday several times a week. On January 8, 1961, Lawrence met Holiday and informed him he wished to buy a "spoon" of heroin and was willing to pay $50. Holiday said he would attempt to find a dealer and agreed to meet Lawrence at the Booker T. Washington Hotel the next day.

When Lawrence arrived at the hotel at the prearranged time on January 9, Holiday informed him he had talked to two persons about the purchase of heroin; that one person was to meet them at the hotel at 8:00 p. m.; the other at the nearby Blue Mirror bar at 9:00 p. m. Holiday also indicated he had talked to a man known as "Jay Bo."

Lawrence and Holiday waited at the hotel for about half an hour. When no one appeared, they proceeded to the Blue Mirror bar, arriving just before 9:00 p. m. Shortly thereafter, the appellant entered and Holiday said to Lawrence: "Here he is." When the appellant approached, Holiday said to Lawrence: "This is Jay Bo" and told the appellant that Lawrence was a friend who was interested in making a buy. The appellant replied that he would have to go across the street to make the purchase, that the transaction would take some time and inquired whether Lawrence was still interested in a $50 "spoon." Lawrence replied: "Well, I am, but I'd like to test it first by purchasing a $20 balloon first" and gave the appellant a $20 bill. The appellant indicated he was going across the street and left the Blue Mirror bar. About ten minutes later, the appellant returned to inform Holiday that the contact had been made and that it would take a while. Appellant again left.

When the appellant did not reappear, Lawrence and Holiday decided to look for him. As they left, they observed the appellant across the street leaning against a parking meter, in front of the B & B Cafe. When approached by Lawrence, who asked what had happened, the appellant replied that he knew neither Lawrence nor Holiday. Lawrence said: "Well, we've been waiting over there in the bar for an hour for you to come back with the balloon, and we decided to come out and see what happened to you." Holiday asked the appellant: "What are you trying to do? I'm sure you remember the transaction we had in the Blue Mirror a few minutes ago." The appellant walked away and talked to several men standing in front of the B & B Cafe and appeared to be borrowing money, as he received a dollar bill from two of them. When Lawrence attempted to reopen the conversation, the appellant became belligerent, cursed and entered the B & B Cafe. Lawrence and Holiday waited outside. When the appellant reappeared with a 14" butcher knife and began to walk away, Lawrence then informed Holiday: "Well, it's not worth talking to Mr. Jackson any longer." Lawrence indicated that he knew the appellant only as "Jay Bo" and did not know his real name until after he had reported the transaction to Officers Toomey and Higgins who knew "Jay Bo" was William Jackson.

[1] The first contention on appeal is that the trial court erred in instructing the jury as section 11501 of the Health and Safety Code does not encompass an offer to sell narcotics and the subsequent failure to deliver. Appellant relies on certain language of the Subcommittee on Narcotics of the Assembly Interim Committee of the Judiciary in 1953, quoted and discussed in People v. Brown, 55 Cal.2d 64 at 67, 9 Cal. Rptr. 816, at 817, 357 P.2d 1072 at 1073. However, in the Brown case, the Supreme Court rejected the identical argument (at

page 68, 9 Cal.Rptr. at page 818, 357 P.2d at page 1074) and affirmed the conviction of offering to sell narcotics in a situation similar to the instant one where the defendant had not delivered any substance to the officer in return for the money.

Although the language prohibiting an offer to sell was enacted in 1909 (Stats.1909, ch. 279, § 4), there were no appellate decisions under this portion of the statute until our decision in 1960 in People v. Blake, 179 Cal.App.2d 246, 3 Cal.Rptr. 749. In that case, we rejected a contention that the statute [then section 11500 of the Health and Safety Code] was unconstitutional as it was void for vagueness, approved an instruction defining the elements of the offense as a specific intent to make an offer to sell a narcotic and a direct act done toward making of the offer, and rejected a contention that in order to be guilty of the offense, the offeror must have in his possession the object to be sold. The interpretation of the statute was approved by the Supreme Court in People v. Brown, supra, at page 68, 9 Cal.Rptr. 816, 357 P.2d 1072, and more recently followed in People v. Shepherd, 200 A.C.A. 305, 19 Cal.Rptr. 234.

Appellant next contends that unlike the three cases cited above, in the instant case, the evidence is insufficient to support the judgment as there is no evidence of his specific intent to consummate the sale. However, as the Supreme Court pointed out in People v. Brown, supra, at page 68, 9 Cal.Rptr. at page 818, 357 P.2d at page 1074: "We agree with defendant's contention that a specific intent to sell a narcotic is an essential element of the crime of offering to make such a sale under section 11501. See Pen.Code, § 20; Matter of Yun Quong, 159 Cal. 508, 514–515, 114 P. 835 [Ann.Cas. 1912C 969]; People v. Winston, 46 Cal.2d 151, 158 [293 P.2d 40]; People v. Vogel, 46 Cal.2d 798, 801, 299 P.2d 850. In view, however, of defendant's subsequent admission that 'he had [the stuff] and he was on his way back but the police rousted him and he had to get rid of it,' and the absence of any compelling evidence that defendant's offer was false, the trial court could reasonably conclude that defendant meant what he said when he stated to the officer that for $9 'he would get it for me. * * * He would get the stuff for me.' Moreover, there is nothing in section 11501 to support the contention that an offer to sell means an attempt to sell, for it proscribes both 'offers to transport, import into this State, sell, furnish, administer or give away' and 'attempts to import into this State or transport any narcotic * * *.' By thus distinguishing between offers and attempts the Legislature made clear that the requirement of a direct, unequivocal act toward a sale necessary for an attempt to make a sale is not an implied element of an offer to sell."

[2, 3] In the instant case, there was no evidence that the appellant's offer to sell was a false one so that from the evidence presented, the trier of fact could reasonably conclude that the appellant meant what he said when he took the $20 bill and told Lawrence that he would obtain the $20 balloon. We must assume in support of the judgment the existence of every fact which the jury could reasonably deduce from the evidence (People v. Newland, 15 Cal.2d 678, 104 P.2d 778).

[4] Appellant also contends that the trial court committed prejudicial error by its instruction on specific intent. Appellant concedes that the instruction given was substantially like the one approved in People v. Blake, supra, but argues that the instruction was nullified by the last portion which was as follows: "It is no defense to the crime charged herein that there exist in the mind of the person who makes an offer to sell heroin an unexpressed intention never to perform the offered act." We cannot agree that there is either inconsistency or an irreconcilable conflict in the instruction requiring a reversal.

Appellant next contends that the trial court erred in giving the following instruction relating to the admission of a statement of the co-defendant, Holiday, and made out of his presence: "Where evidence has been received against one of the defendants but is not received as against the other, the jury may consider such evidence only as against the defendant against whom it was permitted to be received. It may not be considered by the jury for any other purpose or against any other defendant. Where evidence has been received by a statement by one of the defendants after his arrest, in the absence of his co-defendant, such statement can be considered only as evidence against the defendant who made such statement and cannot be considered for any purpose as evidence against his co-defendant."

Appellant contends that the entire last sentence of the above instruction regarding the statements after arrest was completely inapplicable under the facts and, therefore, highly prejudicial.

[5–7] The above instruction was based on testimony by Lawrence that after Jackson left, he drove Holiday home and Holiday stated he would try to locate Jackson the next day. Declarations of a co-defendant not made in the presence of the defendant nor in the performance of any common design are inadmissible against the latter but are admissible as against the defendant who made them (People v. Dresser, 17 Cal. App. 27, 117 P. 688). Thus, it was the duty of the trial court to instruct the jury as it did. There was, however, in the statement an error in that the trial court referred to statements *after arrest* rather than statements *after the offense*. Under the circumstances here presented, however, we do not deem this error to be serious or prejudicial. Error cannot be presumed from the mere giving of such an instruction, as the burden is on the appellant to show prejudice, as the assumption is that an instruction having no application to the case does not injure a defendant (People v. Russell, 59 Cal.App. 2d 660, 139 P.2d 661).

Appellant's final contention is that the trial court committed prejudicial error in its pronouncement of the judgment by stating he had been convicted of the felony of the sale of heroin rather than the felony of offering to sell heroin.

[8, 9] Section 1404 of the Penal Code provides: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." However, it is well established that an erroneous statement of the offense will not vitiate the judgment when the record fully discloses the crime (People v. Becker, 80 Cal.App.2d 691, 181 P.2d 958), and furthermore, we cannot find any prejudice as the appellant was properly charged in the indictment and the verdict was returned in the form of the indictment. Furthermore, the punishment for each of the various acts prohibited by section 11501 is identical and, therefore, we can see no basis for appellant's claim of prejudicial error.

Judgment of conviction and order denying motion for a new trial affirmed, with directions to the trial court to correct the judgment to read "offer to sell narcotics" instead of "the sale of heroin."

SHOEMAKER and AGEE, JJ., concur.

Hearing granted; WHITE, J., sitting pro tem.

208 Cal.App.2d 188

⊥ **In re ESTATE of James R. TRISSEL, Deceased.** ⊥188

Muriel McELHINNEY, Petitioner, Objector, and Appellant,

v.

William R. TRISSEL, Objector, Cross-Petitioner, and Respondent.

Civ. 26259.

District Court of Appeal, Second District, Division 3, California.

Oct. 3, 1962.

Rehearing Denied Oct. 24, 1962.

Hearing Denied Nov. 28, 1962.

Proceeding on appeal from an order of the Superior Court, Los Angeles County, Emmett E. Doherty, J., appointing testator's son administrator with the will annexed. The District Court of Appeal, Files, J., held that even though son, who had been provided for by will, had petitioned for revocation of the will on the ground of incompetency and had thereby rendered operative the will's provision that if any beneficiary contested or attacked it his share would be forfeited, and even though son would succeed to entire estate as sole heir at law if will contest were successful, will would be deemed effective pending determination of son's petition and son was not entitled to a priority of appointment as administrator as one "entitled to succeed to the estate" within Probate Code provision, requiring that case be returned to trial court to permit it to exercise its discretion in weighing the merits of the applicants for administrator, both of whom were to be considered as members of a single class of persons "legally competent".

Reversed.

1. Executors and Administrators ⚷21(2)

Beneficiary under will, as a person financially interested in estate, was entitled to appear and oppose application of testator's son to be named administrator with the will annexed. West's Ann.Prob.Code, §§ 442, 512.

2. Executors and Administrators ⚷21(1)

Under statute setting out priority of persons entitled to appointment as administrators with will annexed, a relative of decedent, even though an heir at law, has no priority if the will effectively disinherits him. West's Ann.Prob.Code, §§ 409, 422.

3. Executors and Administrators ⚷17(1)

Even though testator's son, who was provided for by will, had petitioned for revocation of will on ground of incompetency, fraud, and undue influence, and had thereby rendered operative will's provision that if any beneficiary contested or attacked will his share would be forfeited, and even though son would succeed to entire estate as sole heir at law if will were invalid, will would be deemed effective pending determination of beneficiary's petition and son would not be deemed one "entitled to succeed to the estate" within Probate Code provision covering priority of persons for appointment as administrator. West's Ann. Prob.Code, § 422.

See publication Words and Phrases for other judicial constructions and definitions.

4. Executors and Administrators ⚷20(10)

Where testator's son had been appointed administrator through erroneous application of Probate Code provision giving him a priority, but where a proper appointment would require rather a weighing of the merits as between the applicants considered as members of a single class of persons "legally competent", appointment would be reversed and case returned to permit trial court to exercise its discretion. West's Ann.Prob.Code, § 422.

5. Executors and Administrators ⚷18

Statutory scheme for probate embodies a policy of law to place administration in hands of person most likely to convert property to advantage of those beneficially interested. West's Ann.Prob.Code, §§ 409, 422, 442, 512.

◆

John W. Brooks and Don Edwin Raney, Long Beach, for appellant.

Samuel Hurwitz, Orange, for respondent.

FILES, Justice.

This is an appeal from an order appointing the decedent's son administrator with will annexed. The facts are not in dispute. The question is whether, as a matter of law, the son had priority over the appellant.

The will of the decedent was admitted to probate, without opposition, on December 27, 1960, and the executor qualified. The will bequeaths $500 to decedent's son, William, and the residue to appellant, who is not related by blood or marriage. The estate was appraised at $87,684.40. The will provides ⊥190 that if any beneficiary shall in any manner contest or attack it, the share given to any such contesting beneficiary is revoked and shall be disposed of as though the contesting beneficiary had predeceased the testator. Decedent left no surviving spouse or any relatives who would be entitled to succeed in the event of intestacy except William.

On June 7, 1961, William filed a petition for revocation of probate upon the several grounds of incompetency, fraud and undue influence. This will contest is pending, and has not been brought to trial.

On July 1, 1961, the executor died. Thereupon appellant petitioned the court for appointment as administrator with will annexed. William filed a counterpetition asking that he be appointed. He alleged that he is a son of the deceased and "entitled to succeed to the estate of deceased or some portion thereof." The two petitions for appointment came on for hearing at the same time. The matter was heard on a stipulation of facts, which provided that the will and the petition for revocation of probate would be deemed in evidence. After submission, the trial court made a minute order stating that the petition of appellant is denied and the petition of William is granted, and directing counsel to prepare formal findings of fact and conclusions of law. After signing findings, the court then signed a formal document bearing the title, "ORDER APPOINTING SUCCESSOR ADMINISTRATOR WITH WILL ANNEXED," which document declared that William is appointed administrator with will annexed. Thereafter appellant filed a timely notice of appeal whereby she appealed "from the Order Appointing Successor Administrator With Will Annexed."

[1] William's attorney now contends that appellant has no standing on this appeal because she did not specifically state that she appealed from the denial of her petition for letters of administration. There is no merit in this contention. In the first place, the notice of appeal accurately describes the only formal order which the trial court made disposing of the two petitions. The appointment of William fully disposed of appellant's request for her own appointment.

Furthermore, irrespective of her own claim to the office, appellant, as a person financially interested in the estate, was entitled to appear in the probate court and oppose William's application. (Prob.Code, §§ 512, 442.) From an adverse ruling she is entitled to appeal and raise the same objections in this court.

⊥191 [2] Probate Code, section 409, provides that, "Persons are entitled to appointment as administrators with the will annexed in the same order of priority as in the appointment of administrators * * *."

Probate Code, section 422, so far as applicable, provides:

> "Administration of the estate of a person dying intestate must be granted to one or more of the following persons, who are entitled to letters in the following order, the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof: * * *
>
> "(2) The children. * * *
>
> "(10) Any person legally competent."

Under this statute it is settled that a relative of the decedent, even though an heir at law, has no priority if the will effectively disinherits him. (Estate of Winbigler, 166 Cal. 434, 137 P. 1; Estate of Selb, 93 Cal.App.2d 788, 210 P.2d 45.)

[3] When William filed his petition to revoke the probate of the will on the grounds of incompetency, fraud and undue influence, he thereby forfeited the provisions made for him in the will. The will provides that if any beneficiary "shall in any manner contest or attack this Will," his share is revoked. William has brought himself within that provision even though he may hereafter withdraw his contest before trial. The law on this subject is reviewed in Estate of Fuller, 143 Cal.App.2d

820, 300 P.2d 342. Although the language of the will in that case was somewhat different from the will here, the reasoning of the Fuller opinion is fully applicable here and need not be repeated.

Since the will contest has not been decided, there remains the possibility that William may succeed to the entire estate as an heir at law if his contest is successful. We must consider whether this contingency is enough to place him in the category of one "entitled to succeed to the estate" within the meaning of Probate Code, section 422.

Neither party has suggested that the probate court should have or did pass upon the merits of the will contest in order to determine whether William had a prior right to letters. Although the language of section 422 makes it sometimes necessary that the court decide questions of heirship in a contest over letters of administration (Estate of Bevilacqua, 31 Cal.2d 580, 584, 191 P.2d 752), it is not necessary or proper to adjudicate the will contest in this collateral ⌊192 proceeding to fill a vacancy in the office of administrator with will annexed.

Although the precise question which is before us has not been raised in any case known to us, courts generally have assumed that after a will is admitted to probate it must be treated as valid until probate is revoked. In Castro v. Richardson, 18 Cal. 478, the court said, "Until the probate is revoked, it is conclusive of the validity of the will in all collateral proceedings. * *" In Tracy v. Muir, 151 Cal. 363, at 370, 90 P. 832, at 834, the court said, "Under this rule, as long as the probate stands, the will must be recognized and admitted in *all* courts to be valid, the unrevoked decree of probate standing as absolute and conclusive proof of its genuineness." These cases are not factually analogous because they arise out of attempts to litigate the validity of a will in a civil action. The opinions are pertinent here because they recognize that an order admitting a will to probate has the force and effect of a final judgment unless and until it is set aside either by the direct proceedings provided for by statute or upon the limited grounds by which a final judgment may be attacked in equity.

For the probate court to appoint an administrator with the will annexed necessarily presupposes that the will is in effect. We conclude that the application for letters, after probate, must be heard and decided on the assumption that there is a valid will, until there is a judgment revoking probate. This means that the application for letters must be determined on the hypothesis that William is not entitled to succeed to any part of the estate, there being a will, prima facie valid, which gives the entire estate to appellant after the forfeiture of William's conditional bequest. Since William has no priority under Probate Code, section 422, both he and appellant, as applicants for letters, must be considered within the tenth and last class as "Any person legally competent."

This brings us to the question of whether the appointment of William can be sustained as an exercise of discretion, since neither applicant has any statutory priority over the other.

[4] Appellant's application for letters alleged that she is a resident of California, of legal age, and competent to act. William's opposition did not deny these allegations, but relied upon his claim of statutory priority. The trial court made a finding that William was entitled to succeed to the estate or some portion thereof. Thus the trial court based ⌊193 its decision upon the supposed statutory priority of William, and not upon a weighing of the merits as between two applicants of the same statutory class. Therefore the case must be returned to the trial court to permit it to exercise its discretion. (Steele v. Superior Court, 56 Cal.2d 402, 405, 15 Cal.Rptr. 116, 364 P.2d 292.)

[5] Underlying the statutory scheme, the policy of the law is to place administration in the hands of the persons most likely to convert the property to the advantage of those beneficially interested. (See Estate of Stickelbaut, 54 Cal.2d 390, 395, 6 Cal.

Rptr. 7, 353 P.2d 719; Estate of Crites, 155 Cal. 392, 393, 101 P. 316.) In Estate of Guzzetta, 97 Cal.App.2d 169, 217 P.2d 460, an order removing an administratrix with the will annexed was held not to be an abuse of discretion where the administratrix had filed a petition to revoke probate. The court pointed out that one of the duties of the administratrix with the will annexed is to defend the will against a contest—a duty which the administratrix who filed the contest was not prepared to perform. In Estate of Selb, 93 Cal.App.2d 788, 210 P.2d 45, the daughter of the decedent contested the will and lost, thereby forfeiting her legacy under the terms of the will. She was appointed administratrix with the will annexed in preference to the son of a deceased beneficiary who had a derivative interest but no statutory priority. This order was reversed as an abuse of discretion.

Estate of Knowlton, 118 Cal.App.2d 374, 257 P.2d 1031, relied upon by respondent, presents a state of facts which are distinguishable. There the decedent's son, David, contested the will unsuccessfully and thereby forfeited his legacy. David's son was the beneficiary of a testatmentary trust created under the will. When David applied for letters of administration with the will annexed, there was no other applicant having statutory priority. The only other applicant was the trustee named in the will. It appeared that there was no hostility between David and his son, who was the beneficiary of the greater part of the estate. Under these circumstances the appellate court refused to overturn the discretion of the probate court in appointing David. That case can afford no precedent for favoring a decedent's son whose interest is in all respects hostile to the sole beneficiary who opposes him.

We shall not make any assumption as to what the record may show as to the qualifications of any applicant on a retrial. It is sufficient to say that on the present record, where ⊥194 the qualifications of neither applicant are questioned, one being entitled prima facie to the entire estate and the other prima facie to receive nothing, it would be an abuse of discretion to select William over appellant.

The order is reversed.

SHINN, P. J., and FORD, J., concur.

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208 Cal.App.2d 402

⊥402 **PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Karl L. HOERLER, Defendant and Appellant.

Cr. 3986.

District Court of Appeal, First District, Division 2, California.

Oct. 11, 1962.

Rehearing Denied Oct. 29, 1962.

Hearing Denied Dec. 5, 1962.

Defendant was convicted in the Superior Court, County of San Francisco, Charles S. Peery, J., of burglary of automobile and he appealed. The District Court of Appeal, Kaufman, P. J., held that defendant was not entitled to have separate jury impaneled to try alleged prior convictions.

Affirmed.

1. Criminal Law ⇨641(1)

Defendant who chose to be his own attorney must be prepared to be treated as having qualifications and responsibilities concomitant with burden he undertook.

2. Criminal Law ⇨1036(1)

In absence of proper objection in trial court to admission of exhibits, defendant's complaints in District Court of Appeal were too late.

3. Criminal Law ⇨1030(1)

Objections not made in trial court cannot be raised for first time on appeal.

4. Criminal Law ⇨1202(1)

Sole purpose of prior conviction procedure is to provide increased punishment of those whose prior convictions fall within scope of statutes. West's Ann.Pen.Code, §§ 969, 1025, 1093, 1158.

5. Criminal Law ⟹1202(4)

Defendant was not entitled to have separate jury impaneled to try alleged prior convictions. West's Ann.Pen.Code, §§ 969, 1025, 1093, 1158.

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Roger W. Findley, Morrison, Foerster, Holloway, Clinton & Clark, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., of the State of California, John S. McInerny, Eric Collins, Deputies Atty. Gen., San Francisco, for respondent.

⊥404 ⊥KAUFMAN, Presiding Justice.

Appellant, Karl L. Hoerler, and his codefendant, William H. Bryant, were charged by information with burglary of an automobile, in violation of section 459 of the Penal Code; appellant was also charged with two prior convictions, which he denied. Hoerler alone appeals from the judgment[1] entered on a jury verdict finding him guilty as charged, contending that: (1) certain exhibits were erroneously admitted, to his prejudice; (2) the trial court erred in its instructions to the jury; and (3) the procedure of proving prior convictions, together with the substantive offense, is an unconstitutional denial of the right to a fair and impartial trial.

The record reveals the following: About 8:00 p. m. on February 7, 1961, Benjamin E. Ford, who lived on the ground floor at 645 Leavenworth Street in San Francisco, entered his unlighted kitchen, which overlooked Leavenworth Street. Ford looked out his window, saw the appellant about 1½ feet away looking up and down the street, while Bryant stepped up to a 1959 Chevrolet station wagon which was parked at the curb, and made a motion with his hand. Immediately thereafter, Ford heard breaking glass. Ford then saw Bryant open the door and enter the automobile. Ford left the kitchen and telephoned the police.

An undercover car cruising in the neighborhood arrived immediately. As the officers turned into Leavenworth Street, they saw the appellant step away from the building toward the car and walk south, while Bryant, who was crouched by the hood of the car, stood up and walked away in the opposite direction. The officers arrested both. By the hood of the station wagon, the officers found an electric drill which had been underneath the back seat; Bryant had a chain and screws which had also been in the car. Bryant stated that "we were going to fix some screws in the wall" but neither his apartment nor the appellant's indicated any signs of this kind of work. The appellant first acknowledged he and Bryant were together but later asserted that he had never known Bryant; that he was walking down the street to make a telephone call and had stopped at an apartment house door to put some ⊥405 telephone numbers into his billfold when he was suddenly stopped, searched and handcuffed.

The first contention on appeal is that People's Exhibits 7, 8 and 9 were erroneously admitted into evidence as these exhibits contained irrelevant and prejudicial matters that resulted in a miscarriage of justice. Appellant contends that except for these exhibits, the evidence connecting him with the burglary and with Bryant was slight. We cannot agree, as we think there is ample evidence in the record to support the judgment. The uncontroverted evidence established that Ford saw the appellant acting as a lookout, while Bryant broke into and entered the locked car. The owner of the car testified that she knew neither the appellant nor Bryant, and had not given them permission to use her car. Ford testified that the street was well lit and his identification of appellant and

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[1] The appeal was filed on May 16, 1961, in pro. per., and is from the judgment only. No motion for a new trial was made.

Bryant positive. Bryant did not take the stand. Appellant took the stand in his own behalf and testified he had been walking by himself on the street and that he did not know Bryant.

The exhibits in question are People's Exhibit 7, a San Francisco police card, which indicated that the appellant was arrested on January 19, 1957, for vagrancy and turned over to the California Youth Authority; People's Exhibit 8, certified copies of several documents from the department of corrections, indicating that on July 3, 1958, the appellant was convicted of attempted burglary, served a 3½ year term therefor, and that in 1957, appellant was convicted of receiving stolen property in violation of section 496 of the Penal Code, and sentenced to one year in the county jail; People's Exhibit 9, an abstract of judgment, indicating that the appellant had been convicted of attempted burglary in 1958 and of receiving stolen property in 1957. People's Exhibit 8 includes a photocopy of Exhibit 9 and a letter to the director of corrections from the sentencing court in the burglary matter, pointing out that the abstract of judgment did not show that appellant had been sentenced to the county jail for the violation of section 496 of the Penal Code.

There is no question that these three exhibits were admitted during the prosecution's case in chief for the purpose of proving the two prior convictions which the appellant had previously denied. The record indicates that the appellant, who conducted his own defense at the trial, after the offer of the exhibits, stated: "I served time at San Quentin for attempted burglary, but I fail to see what that has to do with ⌊408 this case we have in court right now." The trial court carefully explained the matter of the prior convictions to the appellant, who persisted in stating his reasons for the denial of the priors and in arguing with the court about the admissibility of the evidence.

Appellant, citing People v. Adams, 76 Cal. App. 178, 244 P. 106, next argues that People's Exhibit 7, the San Francisco police card, was erroneously introduced and unduly prejudicial because of the photographs of the appellant, the description of his tattoos, and the mention of the 1957 vagrancy arrest. The case cited by the appellant is not in point, as the evidence in that case was not introduced to prove a prior conviction. Here, the fingerprints shown on People's Exhibit 7 tended to prove prior conviction by way of identification.

Appellant further contends that the introduction of People's Exhibits 8 and 9 was prejudicial error as the prosecution may introduce only evidence of prior felony convictions, not evidence of misdemeanor convictions or arrests or acts of misconduct not leading to arrest (People v. Kidd, 56 Cal.2d 759, 16 Cal.Rptr. 793, 366 P.2d 49; People v. Richardson, 74 Cal.App.2d 528, 169 P.2d 44). While appellant concedes that the irrelevant portions of the exhibit were not alluded to orally during the trial, his claim of prejudice is based on the fact that the exhibits were taken into the jury room and considered by the jury before the rendition of the verdict.[2] In People v. Kidd, supra, the objectionable evidence, as in People v. Adams, supra, was not introduced to prove a prior conviction. In People v. Richardson, supra, the court reversed a conviction on the ground that the portion of the exhibit relating to the defendant's criminal record, which was not necessary for the proof of the prior convictions, should have been separated from the admissible portions of the exhibit, and the jury instructed not to consider the irrelevant matters on either the prior conviction or the main offense. The court said, however, at 537 of 74 Cal.App. 2d, at page 51 of 169 P.2d: "The statements herein should not be construed as an attempt to disapprove the rule that in proving prior convictions, finger prints and other necessary matters of identification are admissible to connect the accused with the prior conviction. People v. Santos, supra [36 Cal.App.2d 599, 97 P.2d 1050]; People v. Wilson, 139 Cal.App. 139, 33 P.2d 476; Penal Code, sec. 969b. Photographs and finger prints for identification purposes may not be deemed prej⊥407udicial as such evidence may be necessary, but 'over-emphasis' of former convictions (144 A.L.R. 420) or the introduction of evidence merely having a tendency to show that the accused is of a bad character may deprive and in this case did deprive the defendant of a fair trial. In People v. McFarlan, 126 Cal.App. 777, 14 P.2d 1066, extraneous matters connected with certificate from prison officials were held not to be objectionable on the theory that the objection did not differentiate between competent and incompetent evidence."

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[2] See jurors' affidavits attached to the March, 1962, motion to augment granted by this court.

Even assuming arguendo that the appellant's statement was a proper objection, the record here indicates that the evidence was not over-emphasized and was introduced for identification and to connect the appellant with the prior convictions.

[1, 2] The record also indicates that no timely and proper objection was made. As the appellant chose to be his own attorney, he assumes for all purposes connected with the case, and must be prepared to be treated as having the qualifications and responsibilities concomitant with the burden he has undertaken (People v. Green, 191 Cal.App.2d 280, 12 Cal.Rptr. 591; People v. Mattson, 51 Cal.2d 777, 336 P.2d 937). As no proper objection (People v. McFarlan, 126 Cal.App. 777, 14 P.2d 1066) was made, his complaints in this court are too late (People v. Horn, 187 Cal.App.2d 68, 77, 9 Cal.Rptr. 578; People v. Collins, 117 Cal.App.2d 175, 184, 255 P.2d 59).

[3] Appellant also argues that the trial court erred in its instructions to the jury by failing to give the cautionary instruction mentioned in the Richardson case, and by instructing the jury to find whether he had served time in a penal institution if they found the prior convictions to be true. As these objections were not made below, they cannot be raised for the first time on appeal.

[4] We turn now to the appellant's final and major contention, which is that the statutory procedure for proving prior convictions is a denial of the right to a fair trial guaranteed by article I, section 13 of the state Constitution and the Fourteenth Amendment of the Constitution of the United States. Appellant contends that the deprivation of the constitutional right occurs when the indictment referring to the prior conviction is read to the jury and the evidence is presented to the jury at the same time as the proof of the substantive crime. The statutory procedure relating to the proof of prior convictions outlined in sections 969, 1025, 1093 and ⊥408 1158 of the Penal Code, has long been established and its constitutionality upheld (People v. Coleman, 145 Cal. 609, 79 P. 434). Appellant, however, contends that the basis of the decision in the Coleman case,[3] i. e., that the former conviction is a fact, which constitutes the aggravated offense, has been expressly disapproved, as our Supreme Court recently held that the prior convictions are not an element of the substantive offense (In re McVickers, 29 Cal.2d 264, 270–271, 176 P.2d 40). Appellant is correct in pointing out that the sole purpose of the prior convictions is to provide increased punishment of those whose prior convictions fall within the scope of the statutes (People v. Morton, 41 Cal.2d 536, 543, 261 P.2d 523).

[5] Appellant, relying on State v. Kirkpatrick, 181 Wash. 313, 43 P.2d 44, subsequently overruled in State ex rel. Wyrick et al. v. City of Ritzville, 16 Wash.2d 36, 132 P.2d 737, 144 A.L.R. 681; Hall v. Commonwealth, 106 Ky. 894, 51 S.W. 814; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed 158; Henslee v. United States,

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[3] In People v. Coleman, the court relied on the similar result in People v. Sickles, 156 N.Y. 541, 548, 51 N.E. 288. Under the New York law, the prior conviction was an essential element of the aggravated offense charged (51 N.E. at 289).

5 Cir., 246 F.2d 190, argues that the procedure outlined by sections 969, 1025, 1093 and 1158 of the Penal Code is unconstitutional, and that the proper procedure is a bifurcated proceeding in which the fact of prior conviction is determined in a proceeding after the conviction of the primary offense.

In People v. Williams, 148 Cal.App.2d 525, 307 P.2d 48, section 1093 was construed to permit the reading of the indictment containing the prior conviction denied by the appellant. The statutory procedure here followed has also been approved in a long line of well established authorities, including People v. Santos, 36 Cal.App.2d 599, 97 P.2d 1050; People v. Wilson, 139 Cal.App. 139, 33 P.2d 476; People v. Douglas, 187 Cal.App.2d 802, 10 Cal.Rptr. 188, and People v. Zavaleta, 182 Cal.App.2d 422, 6 Cal.Rptr. 166. As the court stated in People v. Douglas, supra, at 808 of 187 Cal.App.2d at 192 of 10 Cal. Rptr: "'The law is established in California that when a defendant is charged in an information or indictment with having suffered a previous conviction, if he denies at the time of his arraignment that he has suffered such previous conviction the issue thus joined must be tried by the jury which tries the issue upon his plea of not guilty to the offense charged in the information ⊥409 or indictment. (Pen.Code, § 1025.)' People v. Kingsbury, 70 Cal.App. 2d 128, 131, 160 P.2d 587, 588."

Although section 1158 of the Penal Code requires the jury to find separately on the issue of the prior convictions and the primary crime, and the two matters are clearly severable for some purposes (People v. Morton, 41 Cal.2d 536, 543, 261 P.2d 523), it has been repeatedly held that a defendant is not entitled to have a separate jury impaneled to try the alleged prior conviction (People v. Russell, 195 Cal.App.2d 529, 16 Cal.Rptr. 9; People v. Collins, 117 Cal.App.2d 175, 255 P.2d 59), as the whole spirit of intent of the statutory provisions for proving and alleging prior convictions is that the charge of prior convictions shall be passed upon in connnection with the new offense charged and by the same jury (People v. Ysabel, 28 Cal.App.2d 259, 263, 82 P.2d 476).

No prejudicial error appearing in the record before us, the judgment is affirmed.

SHOEMAKER and AGEE, JJ., concur.

Hearing denied; WHITE, J., sitting pro tem.

208 Cal.App.2d 582

⊥582 **Arthur LEWIS, Plaintiff and Respondent,**

v.

PROTECTIVE SECURITY LIFE INSURANCE COMPANY, Defendant and Appellant.

Civ. 25785.

District Court of Appeal, Second District, Division 4, California.

Oct. 16, 1962.

Action for damages for breach of a contract of employment. The Superior Court, Los Angeles County, Clarence L. Kincaid, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Burke, P. J., held that evidence sustained finding that plaintiff's conduct did not constitute cause for discharge, and that plaintiff made an honest effort to find similar employment.

Judgment affirmed.

1. Master and Servant 🔑40(3), 41(6)

Evidence sustained finding that plaintiff's conduct did not constitute cause for discharge, and that plaintiff made an honest effort to find similar employment.

2. Appeal and Error 🔑989

Power of a reviewing court begins and ends with determination as to whether there is any substantial evidence contradicted or uncontradicted that will support trial court's findings.

Wadsworth, Fraser & McClung and Robert H. Dahl, Los Angeles, for defendant and appellant.

Robert E. Krause, Long Beach, for plaintiff and respondent.

BURKE, Presiding Justice.

This is an action for damages by plaintiff Arthur Lewis (Lewis) for $10,625 for breach of a written contract of employment with defendant Protective Security ⊥583 Life Insurance Company (Protective). Protective counterclaimed for $24,279 for expense money allegedly withdrawn from the company's funds by Lewis. The case was tried without a jury and judgment was rendered in favor of the plaintiff for $10,535 plus interest. The court ruled against the defendant on its counterclaim. Protective appeals from the judgment.

The trial court found that Protective was formed largely through the efforts of Lewis who personally advanced all or a substantial part of the costs of incorporation; that it was agreed by the incorporators and subsequent members of the board of directors that Lewis be and he was fully reimbursed for such expenses and that the amount paid him represented the amount which was owing to him; that the amount paid was approved by Protective and the Insurance Commissioner of the State of California; that the repayment of the total of these advances was subsequently approved and ratified by the corporation.

With reference to the claimed improper withdrawal by Lewis of expenses aggregating $24,279, the court found that there was no merit in Protective's counterclaim; that Lewis' expense accounts were filed regularly, monthly and were subject to and under the control of Protective's auditors for action or inaction; and that Lewis was properly credited or reimbursed therefor. The court further found that Protective's board of directors chose to relieve Lewis of the presidency of the corporation, which was its privilege, and then saw fit to enter into a new written contract of employment of Lewis as executive vice president and director of agencies. The latter contract also gave Lewis authority to incur reasonable expenses for promoting the business of the company, including entertainment, travel and similar items plus vacation and sick leave. The contract of employment was drawn by the chief counsel of the corporation and was approved by the board of directors.

On May 21, 1959, Lewis wrote a written memorandum to the man who succeeded him as president of Protective advising him that he was taking his sick leave and of necessity his vacation pay, for surgery, commencing June 8, 1959. Lewis' employment was terminated by letter from Protective June 11, 1959, "for legal cause" while Lewis was in the hospital for surgery.

On appeal Protective contends that Lewis' refusal to account for the expense funds for which Protective counter ⊥584 claimed and his disparagement of Protective's officers and general conduct constituted sufficient legal cause for his discharge. As indicated, the trial court found that there was no merit to this contention.

Protective contends that Lewis was not entitled to damages during the period he served as president of another insurance company where he was prevented from recovering compensation by his own fraud. The trial court permitted Protective wide latitude in exploring any factual basis for these contentions, and while there was some conflict in such evidence the court resolved the conflict against Protective.

Protective also contends that Lewis was not entitled to damages after he was offered other employment. A great deal of testimony was taken concerning Lewis' efforts to secure other employment and his reasons for refusing to accept employment in the several instances where tentative offers were made to him. In this respect the court specifically found "* * * that Plaintiff did make an honest effort to find similar employment in the insurance field of a character substantially similar * * *" to Lewis' employment by Protective. The court further found that Lewis had received $90 for unemployment insurance, and in the judgment gave credit to Protective for this amount against the unpaid salary due him. The court fixed Lewis' damages in the amount of the salary agreed upon less the amount earned or that Lewis "might have earned in other employment."

[1, 2] We have reviewed the entire transcript of this four-day trial and have concluded that the findings of fact are fully supported by substantial evidence. It is axiomatic that the power of a reviewing court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted that will support the trial court's findings. (Baines v. Zuieback, 84 Cal.App.2d 483, 488, 191 P.2d 67.)

Judgment is affirmed.

JEFFERSON and FORD,* JJ., concur.

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208 Cal.App.2d 419

19 ⊥ **CONSUMERS HOLDING CO., a corporation, Appellant,**

v.

The COUNTY OF LOS ANGELES et al., Respondents.

Civ. 25611.

District Court of Appeal, Second District, Division 4, California.

Oct. 11, 1962.

Condemnation proceeding. The Superior Court, Los Angeles County, Brodie E. Ahlport, J., apportioned award against owner and two lienors who were named as defendants, and owner appealed. The District Court of Appeal, 22 Cal.Rptr. 106, affirmed. The owner moved to recall the remittitur. The District Court of Appeal held that, although owner was entitled to costs of determination of apportionment as made in the trial court, he was not entitled to recover costs of his unsuccessful appeal challenging apportionment between himself and lienors from the condemnor, and in view of fact lienholders prevailed on the appeal they were entitled to recover their costs on appeal from owner.

Motion to recall remittitur denied.

1. Eminent Domain 🔑265(1)

Constitutional right to compensation for condemned property taken, although requiring payment to owner of reasonable costs incident to determination of damages, does not confer an unlimited right to costs where determination of the award is reconsidered through post-trial motions and appeals. West's Ann.Code Civ.Proc. §§ 1246.1, 1254 and subd. (k).

2. Eminent Domain 🔑265(4)

Although owner of condemned realty was entitled to costs of determination of apportionment as made in the trial court, he was not entitled to recover costs of his unsuccessful appeal challenging apportionment between himself and lienors from the condemnor, and in view of fact lienholders prevailed on the appeal they were entitled to recover their costs on appeal from owner.

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Martin L. Abrams, El Monte, for appellant.

George C. Hadley, San Diego, R. B. Pegram, Joseph A. Montoya, by Robert W. Vidor, Los Angeles, for respondent State.

⊥ PER CURIAM. ⊥420

This was an action in eminent domain. The defendants to the action below were the owner and two lienors whose liens had attached to the property. After determining the full amount of damages to be awarded against plaintiff condemner, the trial court apportioned the award among defendants pursuant to section 1246.1, Code of Civil

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* Assigned by Chairman of the Judicial Council.

Procedure, which authorizes a separate determination of the issues of total damages and apportionment of the award among several defendant claimants. The owner, finding the trial court's apportionment unacceptable, appealed from that part of the judgment. Since plaintiff was disinterested in the apportionment only defendant lienors responded and plaintiff did not become a party to the appeal.

We affirmed the trial court's judgment. In the decision we gave no direction as to costs on appeal and the clerk of this court, as is usual where the judgment is silent concerning costs, added a direction in the *remittitur* to award costs on appeal to the prevailing party, in this case defendant lienors. The dispute concerns who shall be required to pay the costs of the parties to the appeal including costs incurred by appellant.

Section 1246.1, supra, provides that the plaintiff condemner shall bear costs of determining an apportionment of the award. Appellant construes "costs of determining the apportionment" to include costs of an unsuccessful appeal from a proper determination by the trial court. Since the provision for costs in the *remittitur* was construed below to preclude taxing costs of the appeal against plaintiff condemner, appellant now brings a motion before this court to recall said *remittitur* and eliminate therefrom the words "respondent to recover costs of appeal."

[1] Appellant owner is entitled to recover his costs of determining the apportionment to the extent allowed by section 1246.1. This is consonant with the rule that a condemnee, entitled to be made whole, shall not bear any reasonable costs incident to the determination of his damages because the compensation for the property taken would not be just, as required by Article I, Section 14, California Constitution, if it were reduced by those costs. But this constitutional mandate does not confer an unlimited right to costs where the determination of the award is reconsidered through post-trial motions and appeals. See Los Angeles etc. Ry. Co. v. Rumpp, 104 Cal. 20, 37 P. 859.

421 Thus, where the owner is dissatisfied with an award in the first instance and takes an appeal or other proceeding to have a reassessment of the award, it is proper in the court's discretion to tax the costs of appeal to him if he fails to secure an increase. (Oakland v. Pacific Coast Lumber Co., 172 Cal. 332, 156 P. 468.) And where the owner secures a new trial and the second award is no greater than the first, costs of the second trial are mandatorily assessed to the owner (§ 1254(k), Code of Civ.Proc.) This has been held not to violate the constitutional requirement stated above. (Los Angeles etc. Ry. Co. v. Rumpp, supra, 104 Cal. 20, 37 P. 859.) The reason is that the condemnee has had a full determination of his damages and the Constitution does not impose on the condemner the burden of costs of his unsuccessful effort to get more. To hold otherwise would encourage unwarranted post-trial tactics on the slightest pretext.

The cases and statute noted above express an established policy in this state. An examination of the background of section 1246.1 of the Code of Civil Procedure, enacted in 1939, does not compel a departure. The legislature had previously expressed a limitation on costs assessed to the condemner with respect to new trials (§ 1254, supra), and had before it at the time of enactment of section 1246.1 the decisions of our Supreme Court expressing a similar view with respect to appeals. (Oakland v. Pacific Coast Lumber Co., supra, 172 Cal. 332, 156 P. 468.)

[2] Therefore, while appellant owner will be entitled to his costs of determination of the apportionment as made in the trial court to the extent allowed by section 1246.1, he is not entitled to recover the costs of his unsuccessful appeal from the condemner. Since respondent lien holders prevailed on the appeal they are entitled to recover their costs on appeal from appellant.

The motion to recall the *remittitur* is accordingly denied.

208 Cal.App.2d 275

275 **D. W. MERCER, Defendant, Cross-Complainant, and Appellant,**
v.
Amos W. ELLIOTT et al., Cross-Defendant and Respondent.

AVIATION FINANCE, a California corporation, Plaintiff,
v.
D. W. MERCER, D. W. Mercer doing business as Mercer Enterprises, Ruby C. Morgan, One Doe, Two Doe, One Doe Company and One Doe Corporation, Defendants.
No. 26156.

District Court of Appeal, Second District, Division 1, California.
Oct. 9, 1962.

The cross-complainant filed a cross-complaint to recover damages because of allegedly false representations of the cross-defendant with respect to airplane sold by the cross-defendant. The Superior Court of Los Angeles County, Macklin Fleming, J., rendered a judgment dismissing the cross-complaint, and the cross-complainant appealed. The District Court of Appeal, Fourt, J., held that the cross-complaint stated facts sufficient to constitute a cause of action, and that the cross-complaint asserted sufficient facts to negative application of three-year statute of limitations.

Judgment reversed.

1. **Appeal and Error 🔑917(1)**
Pleading 🔑214(1)

Allegations of pleading must be regarded as true on demurrer on ground that pleading does not state facts sufficient to constitute cause of action, and on appeal from judgment sustaining demurrer.

2. **Pleading 🔑34(1, 7)**

Pleading defects, which do not affect substantial rights of parties, are disregarded on demurrer on ground that pleading does not state facts sufficient to constitute cause of action, and on appeal from judgment sustaining demurrer.

3. **Pleading 🔑34(1, 7)**

On demurrer to pleading on ground that it does not state facts sufficient to constitute cause of action, and on appeal from judgment sustaining demurrer, pleading must be reasonably interpreted, it must be read as whole, each part must be given meaning that it derives from context wherein it appears, and allegations must be liberally construed with a view to substantial justice.

4. **Fraud 🔑41**

Pleading in action founded on false representations must allege representations of material facts by defendant, that representations were not true, that defendant either did not believe them to be true or knew them to be false when made, that defendant intended to induce action or conduct by plaintiff, that plaintiff justifiably acted in reliance on representations, and that plaintiff sustained damage as proximate result thereof.

5. **Fraud 🔑21**

Only where party to whom representation is made has means at hand to determine its truth or falsehood and resorts to such means, without interference by other party, and after investigation learns that statement was false, is he precluded from asserting that he relied on representation.

6. **Fraud 🔑11(1)**

If opinion is rendered under circumstances such that it may be regarded as amounting to positive affirmation of fact, it will be treated as representation of fact for purposes of deceit action.

7. **Fraud 🔑43**

Cross-complaint alleging that cross-defendant, to induce sale of airplane, represented to cross-complainant that modifications of airplane had been approved for commercial aviation operations by F.A.A. and that cross-defendant had all records to substantiate fact that modifications had been made and had been approved, and that such representations were false sufficiently alleged cause of action for deceit.

8. Limitation of Actions 🔑192(3)

Cross-complaint alleged sufficient facts to negative application of three-year statute of limitations to deceit action on ground that cross-defendant lulled cross-complainant into false sense of security so that he did not file cross-complaint until more than three years after discovering alleged fraud. West's Ann.Code Civ.Proc. § 338, subd. 4.

◆

Older, Cazier, Preston & Hoegh, Charles H. Older, Los Angeles, for appellant.

Fain & Lavine, Richard A. Lavine, Beverly Hills, for respondent.

277 FOURT, Justice.

This is an appeal by the cross-complainant (hereinafter referred to as "Mercer") from a judgment of dismissal after the trial court sustained, without leave to amend, cross-defendant's (hereinafter referred to as Elliott) demurrer to the third count of the *fourth amended cross-complaint.* The judgment dismissed the third count and Elliott from the action and awarded costs to Elliott. The demurrer was sustained on the grounds that the third count failed to state facts sufficient to constitute a cause of action, and that it appeared to be barred by Code of Civil Procedure section 338, subdivision 4 (three year statute of limitations).

The allegations of the third count of the fourth amended cross-complaint are set forth in pertinent part in footnote I.

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[1] "*THIRD CAUSE OF ACTION SOLELY AGAINST CROSS-DEFENDANT AMOS W. ELLIOTT*

"I

* * * * *

"II

* * * * *

"III

"Between January 1, 1957 and July 5, 1957 * * * Elliott was the owner of a * * * Doublas [sic] DC-3 aircraft * * * which said aircraft was located in Detroit, Michigan.

"IV

"At all times mentioned herein * * * [Mercer] was engaged in the business of operating aircraft used by * * * [Mercer] in various commercial aviation activities, including the transportation of persons and property for hire, all of which was known to * * * Elliott.

"V

"Prior to July 5, 1957 * * * Elliott orally offered to sell said aircraft to * * * [Mercer] or to cross-defendants Tuttle, Koenen, and Aviation Finance. On or about June 1, 1957 * * * [Mercer] informed * * * Elliott that * * * [Mercer] was financially unable to purchase said aircraft, but that cross-defendants Tuttle, Koenen, and Aviation Finance would purchase the aircraft from * * * Elliott providing that * * * [Mercer] agreed in advance of such purchase to lease said aircraft from cross-defendants Tuttle, Koenen, and Aviation Finance following such purchase.

"VI

"On or about June 12, 1957 * * * [Mercer] paid to * * * Elliott the amount of $5,000.00 for a written option to purchase said aircraft. Cross-complainant [i. e. Mercer] obtained said option for the purpose of allowing cross-defendants Tuttle, Koenen, and Aviation Finance to purchase said aircraft and lease it to * * * [Mercer] as alleged above in this paragraph.

"VII

"With the intention and for the purpose of inducing * * * [Mercer] to lease said aircraft from cross-defendants Tuttle, Koenen, and Aviation Finance, in order that * * * Elliott could consummate the sale of said aircraft to cross-defendants Tuttle, Koenen, and Aviation Finance * * * Elliott orally represented to * * * [Mercer] and cross-defendants Tuttle, Koenen, and Aviation Finance the following:

"(a) That said aircraft was complete and ready for commercial air operations except for two aircraft engines, which * * * Elliott further represented were available as part of the transaction at a price of $250.00 each, and that each of said engines had been operated approximately 800 hours since last overhaul;

"(b) That certain modifications, consisting of a conversion of the aircraft to a 'challenger 250' configuration, the exact nature of which is unknown to * * * [Mercer], had been made to the wings, wing tips, wing fillets, pitot tubes, rudder, and wheel door enclosures, which would enhance the value of said aircraft and increase its performance. That said aircraft as modified had been approved for commercial aviation operations by the F.A.A., and that * * *

Elliott had all of the aircraft records, including engineering drawings and specifications, pertaining to said modifications to substantiate the fact that said modifications had been made, and that said modifications had been approved by the F.A.A. Cross-defendant Elliott further represented that said aircraft records would be delivered to the buyer with the aircraft;

"(c) That all said aircraft required in order to obtain a certificate of airworthiness for commercial flight operations from the F.A.A. was an 8,000 hour airframe inspection. That except for the necessity of performing said inspection in order to obtain said airworthiness certificate, said aircraft was airworthy and in condition to be licensed to perform commercial air operations under the applicable requirements of the F.A.A.

"VIII

"Cross-defendants Tuttle, Koenen, and Aviation Finance purchased said aircraft from * * * Elliott on or about July 6, 1957, for a purchase price of $85,000.00, and the amount of $5,000.00 paid by * * * [Mercer] to * * * Elliott for said option referred to hereinabove was credited against the purchase price of said aircraft by * * * Elliott.

"IX

"* * * [Mercer] relied on each and all of said representations made by * * * Elliott and was induced thereby to enter into an oral agreement for the lease of said aircraft, with an option to purchase, with cross-defendants Tuttle, Koenen, and Aviation Finance on or about June 1, 1957, and to enter into a written lease and option agreement with cross-defendants Tuttle, Koenen, and Aviation Finance on or about July 26, 1957. Prior to entering into said oral lease of said aircraft with said cross-defendants * * * [Mercer] was informed by said cross-defendants that they would purchase said aircraft from * * * Elliott only if * * * [Mercer] agreed in advance to lease said aircraft from cross-defendants Tuttle, Koenen, and Aviation Finance following its purchase.

"X

"Each of said representations made by * * * Elliott to * * * [Mercer] was false and fraudulent and said representations were known by * * * Elliott to be false and fraudulent when made by him to * * * [Mercer]. In truth and in fact:

"(a) Said aircraft was not airworthy in the following respects: No certificate of airworthiness had been issued by the F.A.A., and the aircraft was not equipped or in condition to be operated in commercial flight operations. The aircraft required the installation of wing-attach doublers, an engine fire prevention and detection system, an electrical system, radio wiring and radio equipment, a pilot's seat, a complete interior, a cabin heating system including air ducts, a lavatory, passenger seats and seat tie-down fittings, modifications of fire detection and shut-off systems, recovering of the elevators, replacement of the front bulkhead, inspection and replacement or overhaul of all flight and engine instruments, repair of windshield wipers, installation of seat-belt and no smoking signs, installation of F.A.A. approved escape hatch release handles, and emergency exit markings and exit lights. In addition, the propellers, wing-tips, pitot system, rudder tab system, and engine exhaust stack system had not been certificated as airworthy by the F.A.A.

"(b) Said aircraft was not complete and fully equipped for commercial flight operations when delivered to * * * [Mercer]. In order to place said aircraft in condition for commercial flight operations * * * [Mercer] was required to and did perform the following work on said aircraft following the delivery of said aircraft to * * * [Mercer]: Installation of new radio wiring, junction boxes, and circuit breaker boxes; fabrication and installation of radio racks; installation of cannon plugs and other fittings to accommodate radio equipment; installation of new aircraft wiring; installation of new circuit breaker system; installation of fire detection and prevention system; the aircraft interior and exterior was thoroughly cleaned; the elevators were removed, repaired, and recovered; control surfaces were rejuvenated and re-silvered; the empennage was dismantled for inspection and was re-chromated; the luggage compartment was cleaned and re-chromated; temporary passenger seats were removed; control cable pulleys were greased and treated with preservatives; control cable fittings were chromated; a forward bulkhead was installed in the cabin; the nose section was opened, inspected and chromated; the landing gear was inspected and a gear retraction test was performed; the landing gear wheel doors were removed, replaced and adjusted; the aircraft skin was cleaned on four separate occasions with acid brightener; the aircraft was washed with detergent soap approximately every six weeks; the aircraft engines were turned over to prevent corrosion at least every two to three weeks; the aircraft engines were started and operated on the ground every thirty to forty-five days; all aircraft inspection holes were opened and the wing fillets were removed; a complete visual inspection was made of the aircraft, including wing-attach angles and wing fuel tanks; and an inspection of the complete aircraft was made for the purpose of detecting corrosion.

"(c) The prior modifications to said aircraft, referred to in paragraph VII(b), above, had not been approved by the F.A.A., and the F.A.A. would not issue a certificate of airworthiness for said aircraft for commercial flight operations until the aircraft records, including engineering drawings and specifications, pertaining to said modifications were made available to representatives of the F.A.A. at Burbank, California, and the design, type and quality of the modifications made to said aircraft were approved by the F.A.A. at Burbank, California. Cross-defendant Elliott failed to deliver either to * * * [Mercer] or cross-defendants Tuttle, Koenen, or Aviation Finance the aircraft records showing said prior modifications to said aircraft and their approval by the F.A.A. as represented by * * * Elliott, and as a result * * * [Mercer] has been unable to obtain a certificate of airworthiness for said aircraft from the F.A.A., and has been unable to use the aircraft in his air transportation business.

"XI

"Neither * * * [Mercer] nor any agent or employee of * * * [Mercer] inspected said aircraft or acquired any information concerning its actual condition or the actual condition and extent of the aircraft records furnished by * * * Elliott, until on or about August 1, 1957, except for a cursory inspection of the exterior of the aircraft made by * * * [Mercer] at El Paso, Texas, on or about July 5, 1957, for the purpose of detecting any damage to the exterior of the aircraft prior to the flight of the aircraft from El Paso to Burbank, California, on or about July 5, 1957. On or about August 1, 1957 * * * [Mercer] caused an inspection of the aircraft, and the aircraft records furnished to * * * [Mercer] by * * * Elliott, to be made for the purpose of performing an 8,000 hour airframe inspection on the aircraft and obtaining a certificate of airworthiness. As a result of said inspection, together with discussions with F.A.A. representatives in Burbank, California, a few days thereafter * * * [Mercer] discovered for the first time that the aircraft did not require an 8,000 hour airframe inspection as represented by * * * Elliott, that the F.A.A. would not issue a certificate of airworthiness upon the performance of such an inspection, but on the contrary that the prior modifications to the aircraft referred to in paragraph VII(b), above, had not been approved by the F.A.A. and could not be approved, nor could a certificate of airworthiness for the aircraft be issued, until the aircraft records pertaining to said modifications were made available to, and the design, type and quality of the modifications made to the aircraft by * * * Elliott were approved by, the F.A.A. at Burbank, California. The F.A.A. at Burbank refused to issue a certificate of airworthiness for the aircraft until such time as the aircraft records relating to said prior modifications, including the detailed engineering drawings and specifications relating thereto, were furnished to it, and the design, type and quality of the modifications were approved by the F.A.A. at Burbank. Although * * * [Mercer] examined the aircraft, the applicable regulations and requirements of the F.A.A. concerning the issuance of a certificate of airworthiness for the aircraft, and the aircraft records furnished by * * * Elliott to * * * [Mercer] * * * [Mercer] was unable to obtain the information required by the F.A.A. for the issuance of a certificate of airworthiness for the aircraft for the reason that the F.A.A. refused to issue a certificate of airworthiness for the aircraft until the records pertaining to said modifications, as described above, were furnished to and approved by the F.A.A. at Burbank.

"XII

"* * * [Mercer] did not perform an 8,000 hour airframe inspection on the aircraft for the reason that said overhaul was not required under the applicable F.A.A. requirements. Such an inspection does not relate to structural and design changes in an aircraft and would not furnish the information concerning said prior modifications required by the F.A.A. for the issuance of a certificate of airworthiness. An 8,000 hour inspection is primarily an inspection of the airframe in accordance with an F.A.A.-approved maintenance manual, accompanied by a replacement or repair of defective or overtime parts where necessary, but said inspection is not directed to or concerned with the design and structural changes and modifications in the configuration and basic structure of the aircraft, such as the modifications to the aircraft referred to in paragraph VII(b), above, or the methods or quality of work involved in making such changes and modifications. The adequacy and acceptability of the modifications to the aircraft referred to in paragraph VII(b), above, so as to qualify for the issuance of a certificate of airworthiness by the F.A.A., involves highly technical matters of aeronautical engineering and design which can be resolved only by a careful examination of the detailed engineering drawings and specifications for such modifications in relation to the basic design and construction of the entire aircraft, together with an inspection of the pertinent parts of the aircraft to determine that the modifications made in fact conform to those approved in theory. Cross-defendant Elliott failed to furnish the requisite records to show the engineering design and specifications involved in the modifications or the precise modifications which were in fact made to the aircraft, neither of which can be determined by an inspection of the aircraft alone. Because of the technical nature of the records required to meet the F.A.A. requirements in this case, and * * * [Mercer[s] lack of technical knowledge in this field * * * [Mercer] was unable to determine whether the records furnished from time to time by * * * Elliott between July, 1957 and October, 1958, inclusive, were adequate to meet the F.A.A. requirements in order to obtain a certificate of airworthiness, or that * * * Elliott was in fact concealing the non-existence of the records required to obtain the certificate of airworthiness.

"XIII

"* * * [Mercer] made various oral and written demands on * * * Elliott after July 5, 1957, the exact dates of which are unknown to * * * [Mercer], for said aircraft records which * * * Elliott represented would be furnished at the time of the delivery of said aircraft. Following each such demand made by * * * [Mercer] on * * * Elliott for said aircraft records * * * Elliott represented in substance that he was making every effort to secure the necessary records and that said records would be obtained by him and delivered to * * * [Mercer]. In reliance upon said representations * * * [Mercer] performed extensive repair and maintenance work on said aircraft during 1957 and 1958, as described in paragraph X, above, in order to obviate any delay in placing the aircraft in commercial operations after * * * Elliott supplied the necessary aircraft records required to obtain a certificate of airworthiness for the aircraft.

"XIV

"* * * [Mercer], in further efforts to expedite the certification of the aircraft by the F.A.A., sent letters to the former owners of said aircraft * * * requesting information concerning prior overhauls and modifications to the aircraft, and requesting pertinent records and information concerning the history of said aircraft. The correspondence between * * * [Mercer] and said former owners extended over the period from July 5, 1957, to and including September, 1958. None of said former owners furnished to * * * [Mercer] or to the F.A.A. any records or information concerning the modifications to the aircraft referred to in paragraph VII(b), above.

"XV

"During the latter part of 1957 and to and including October, 1958 * * * Elliott furnished or caused to be furnished to * * * [Mercer] or to the F.A.A. from time to time certain information and drawings relating to the prior modifications of the aircraft described in paragraph VII(b), above. On each such occasion, the exact dates of which are unknown to * * * [Mercer], that information or documents relating to the aircraft were furnished to * * * [Mercer] * * * [Mercer] in turn furnished such information or documents to the F.A.A. office at Burbank, California, for the purpose of obtaining a certificate of airworthiness for said aircraft. On each such occasion * * * [Mercer] was informed by the F.A.A. at Burbank, California, that the information and documents so furnished were insufficient and inadequate to describe the nature, type and extent of the prior modifications to said aircraft and any prior approval by the F.A.A., and that the Burbank office of the F.A.A. could not for those reasons issue a certificate of airworthiness for said aircraft.

"XVI

"Upon each such refusal of the F.A.A. to certificate said aircraft as aforesaid * * * [Mercer] thereupon made another demand upon * * * Elliott for said aircraft records necessary to permit the certification of the aircraft. On each such occasion * * * Elliott represented again to * * * [Mercer] that he would make further efforts to secure the necessary records which * * * Elliott represented, were located in or around Detroit, Michigan. On each such occasion * * * Elliott further represented that the records necessary to obtain a certificate of airworthiness for the aircraft were in existence and that every effort was being made to obtain them.

"XVII

"The last such information furnished concerning the prior modifications to said aircraft described in paragraph VII(b), above, was furnished at the instance of * * * Elliott to the F.A.A. on October 14, 1958. A copy of said letter is attached hereto as Exhibit A and incorporated by reference herein.[2] Said information was contained in a letter from Robert Dale, an F.A.A.-licensed aircraft inspector, who * * * Elliott represented to be an agent of * * * Elliott. Said Robert Dale furnished to the Burbank office of the F.A.A. certain information concerning the history and prior modifications of said aircraft. Said leter from Robert Dale of October 14, 1958, was the culmination of a series of telephone conversations and letters between said Robert Dale * * * [Mercer] and the F.A.A. representative in Burbank, California, concerning the prior history of and modifications to said aircraft. Said telephone calls and correspondence extended over the period from approximately July, 1957, to and including October 14, 1958.

"XVIII

"In addition to the foregoing * * * [Mercer] during the period from July, 1957, to and including September, 1958, exchanged numerous letters and telephone calls, the exact dates of which are unknown to * * * [Mercer] with Aircraft Conversion, Incorporated, of Detroit, Michigan, the company which had performed a number of the prior modifications to said aircraft, described in paragraph VII(b), above, for * * * Elliott. During said period, Aircraft Conversion, Incorporated, furnished to * * * [Mercer] and to the F.A.A. in Burbank, California, information and documents concerning said prior modifications, to said aircraft. Attached hereto as Exhibits B,[3] C,[4] and D,[5] and incorporated by reference herein, are copies of letters from Aircraft Conversion, Incorporated, dated June 25, June 27, and October 9, 1958, respectively, sent to * * * [Mercer] and relating to the efforts of * * * [Mercer] to obtain the aircraft records pertaining to said aircraft.

'XIX

"Both Aircraft Conversion, Incorporated and said Robert Dale represented to * * * [Mercer] on various occasions during said period that said prior modifications to said aircraft had been approved by a licensed F.A.A. representative in Detroit, Michigan. All of the information and documents furnished to * * * [Mercer] by Aircraft Conversion, Incorporated were in turn furnished to the Burbank office of the F.A.A. On each such occasion * * * [Mercer] was informed by a representative of the F.A.A. at Burbank that the information and documents submitted were insufficient and inadequate to permit the issuance of a certificate of airworthiness for said aircraft.

"XX

"Notwithstanding that * * * [Mercer] was furnished with information and documents from time to time extending over the period from July, 1957, to and including October, 1958, and notwithstanding further that Aircraft Conversion, Incorporated and said Robert Dale both stated to * * * [Mercer] that said prior modifications to said aircraft had been approved by a F.A.A. representative in Detroit, Michigan * * * [Mercer] was unable to obtain a certificate of airworthiness for said aircraft from the F.A.A. at Burbank. The Burbank office of the F.A.A. had jurisdiction of said aircraft from and after July 5, 1957, and had the sole authority to issue a certificate of airworthiness for said aircraft. No additional information or documents concerning the prior modifications to said aircraft were furnished to * * * [Mercer] after the month of October, 1958, and * * * [Mercer] has been unable to obtain a certificate of airworthiness for said aircraft from the F.A.A. for the reasons alleged hereinabove.

"XXI

"Cross-defendant Elliott at all times concealed from * * * [Mercer] the actual condition of the aircraft as alleged hereinabove, and the actual extent and condition of the aircraft records pertaining to the modifications referred to in paragraph VII(b), above, and the non-existence of the critical records required by the F.A.A. as a condition to the issuance of a certificate of airworthiness, as aforesaid, and * * * Elliott misrepresented such facts to * * * [Mercer] as alleged hereinabove for the purpose of inducing * * * [Mercer] to rely thereon and to lull * * * [Mercer] into believing that * * * Elliott in fact could and would obtain the aircraft records required for the certification of said aircraft. Until within several weeks after October 14, 1958, after * * * [Mercer] had exhausted all reasonable efforts to secure the information required by the F.A.A. as alleged hereinabove * * * [Mercer] did not discover that * * * Elliott had in fact concealed the truth and the fact of his misrepresentations from * * * [Mercer], as aforesaid; but on the contrary * * * [Mercer] believed and relied upon each and all of said misrepresentations and was thereby induced to expend his time, efforts and money in futile attempts to obtain a certificate of airworthiness for the aircraft, and to repair and preserve the aircraft, believing that * * * Elliott was making reasonable efforts to furnish the information and records required by the F.A.A. for the issuance of a certificate of airworthiness.

"XXII

"Thereafter, all efforts by * * * [Mercer] to secure said records and documents and to obtain approval from the F.A.A. for said modifications to said aircraft having failed * * * [Mercer], on or about June 2, 1959, served a notice of rescission on cross-defendants Tuttle, Koenen, and Aviation Finance, rescinding said aircraft lease between * * [Mercer] and said cross-defendants.

"XXIII

"As a proximate result of said false and fraudulent representations made by * * * Elliott to * * * [Mercer], * * * [Mercer] has been damaged in the following amounts:

"(a) The amount of $24,200.00, representing lease payments made by * * * [Mercer] since July 5, 1957, to cross-defendants Tuttle, Koenen, and Aviation Finance pursuant to the lease of said aircraft entered into between * * * [Mercer] and said cross-defendants;

"(b) The amount of $29,729.98, representing amounts actually paid by * * * [Mercer] for materials, labor, insurance, taxes, and miscellaneous items with respect to said aircraft, pursuant to said lease with cross-defendants Tuttle, Koenen, and Aviation Finance;

"(c) The cost of defending against the complaint filed by cross-defendant Aviation Finance herein, and of prosecuting the cross-complaint filed herein by * * * [Mercer] against cross-defendants Tuttle, Koenen, and Aviation Finance, including attorneys' fees in connection therewith;

"(d) The amount of $5,000.00, representing the amount paid by * * * [Mercer] to * * * Elliott for said option to purchase said aircraft;

"(e) Loss of use of said aircraft from July 5, 1957 to February 1, 1961, in the amount of $63,000.00, plus additional loss of use after February 1, 1961, in an amount as yet unascertained."

2. The letter dated October 14, 1958 (Exhibit A) provides in part as follows:

"This is to confirm our telephone conversation of today regarding Douglas DC-3. * * *

"In order to expedite the certification * * * I enclose my copy of the minutes of the meeting of the Type Certification Board for General Aircraft Co., Inc., Modified Douglas DC-3 (Challenger 250) * * *

"At the time of the approval of this project (STC SA3-2) there existed a change in CAA procedures and it was not too clear as to exactly the proper procedure to follow. In order to be sure, the 337 & TIA procedure of approval was followed, namely:

"1. Submit three copies of Form * * * to Engineering.

"2. Engineering established a TIA * * *.

"3. Engineering approves the structural and powerplant phase, subject to inspection.

"4. CAA conducts a ground airworthiness inspection of the airplane.

"5. CAA conducts a ground conformity inspection of the modifications.

"6. CAA conducts flight tests of the modified airplane.

"7. Final approval (stamp) by engineering of the modification.

"8. Issue the STC to the applicant.

"9. Ordinarily the next step would be to return the airplane to service. This was not done as the aircraft condition was such that it was impossible to recertificate it. There was no interior of any kind. A complete electrical system was required and numerous other maintenance operations were needed. Thus the returned Form * * * was never fully put into effect. However, I think you can see that the modifications had to be in conformity to the technical data otherwise STC SA3-2 would never have been issued.

"Historically this airplane was structurally rebuilt by * * *. After the basic aircraft was built up to include all structural CAA AD's & Douglas bulletins which were in effect at that time, the airplane was purchased for use by General Aircraft Company as a prototype airplane to conduct their program of modifications. These modifications are described on the reverse side of approved Form ACA 337, dated June 11, 1956, signed by me. After the testing program the * * * engines were removed as they needed overhaul. The airplane was then put in storage less engines. Later the airplane was sold and the purchaser shipped to Detroit a pair of engines and

> sent two of his crew to Detroit to install the engines. Upon completion of the installation of the engines I turned over to them Form 337's which described the rebuilding which had been accomplished by * * *. A ferry permit was obtained and the airplane was flown to California. Probably you can trace the record from here on.
>
> "The airplane can be certificated as 'N' or 'T' category providing all applicable parts of Aircraft Spec. A669 are met and further provided an approved flight manual is in the airplane when operated above 25,200 pounds gross weight (25346 with deiver). Please refer to General Aircraft Drawing 801-250. * * *"

3. The letter dated June 25, 1958 (Exhibit B) provides in part as follows:

> "Enclosed please find drawings and installation procedure for the Pitot system which will be shipped this date under separate cover * * *. I trust this will take care of this phase of your problem.
>
> "In reference to the rudder problem, I have been able to come up with information indicating that the proper 337 relating to the geared rudder tab was given to the men at time of delivery of the ship and should be found in those records. I am having our DER's file copy photostated, and will forward same to you within the next few days.
>
> "We are at this time attempting to gather sufficient information to establish the fact that the wing tip re-work was accomplished in accordance with Manual 18 and will provide sketches to substantiate this work. Also, I have contacted the A & E who was assigned to the project along with other mechanics, and I am confident a statement and 337 form will cover this problem within the next few days. * * *"

4. The letter dated June 27, 1958 (Exhibit C) provides in part as follows:

> "* * * Enclosed you will find a photostat copy of a form 337 which substantiates the proper installation of the Air Research geared rudder tab. * * *
>
> "Relative to the wing tip re-work, this is covered by a sketch which was done by the supervisor in charge of that project. It was sketched from memory and it will be necessary for you to have your mechanic remove the outboard section and vertify [sic] the modification. It was accomplished according to Manual 18 and where necessary changes were made by inspection and approval of a DER.
>
> "Your mechanics can inspect this and have an A.I. run an inspection and issue a form 337 * * *."

5. The letter dated October 9, 1958 (Exhibit D) provides in part as follows:

> "Enclosed you will find drawing * * * which will clarify for you and the local CAA inspector the application of the modifications manufactured by Aircraft Conversion, Inc. * * *"

In addition to the items set forth in paragraph XXIII (a) through (e), Mercer prayed for "interest on the above amounts at the legal rate" and for "costs of suit and for such other and further relief as to the Court seems just."

Mercer's first contention is that a cause of action for fraud and deceit is alleged. This aspect of the appeal will be discussed without regard to the possible application of the statute of limitation.

[1-3] The rules relating to the trial court's determination of a demurrer on the ground that a pleading does not state facts sufficient to constitute a cause of action and which govern a reviewing court in considering an appeal from a judgment entered on the sustaining of a demurrer on that ground are in 278 general as follows: the allegations of the complaint must be regarded as true. It is assumed that plaintiff can prove all the facts as alleged; defects in the pleading which do not affect the substantial rights of the parties are disregarded; pleadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears; the allegations must be liberally construed with a view to substantial justice between the parties and that the administration of justice shall not be embarrassed by technicalities or useless forms. (Hill v. City of Santa Barbara, 196 Cal.App.2d 580, 585 [16 Cal.Rptr. 686].)

[4] The complaint (i. e. cross-complaint in the case at bar but hereinafter sometimes referred to as "complaint") in an action founded on false representations must allege facts showing the following elements of the cause of action: *first,* representations of material facts by defendant; *second,* the representations were not true;

third, defendant either did not believe them to be true, or knew them to be false, at the time they were made; *fourth,* defendant intended to induce action or conduct by the plaintiff; *fifth,* plaintiff justifiably acted in reliance upon the representations; and *sixth,* plaintiff sustained damage as a proximate result thereof. (Gagne v. Bertran, 43 Cal.2d 481, 487 [275 P.2d 15].) It therefore follows that the absence from the complaint of any one of the six essential elements renders it defective and insufficient to state a cause of action. (Gonsalves v. Hodgson, 38 Cal.2d 91, 100–101, 237 P.2d 656.)

Testing the complaint in light of the above set forth principles, the first question is whether Mercer has made factual allegations showing that he in fact acted in reliance upon the representations, and that under the circumstances his reliance was reasonable and prudent. Mercer does allege reliance upon Elliott's representation in paragraph IX.

Elliott (i. e. respondent) contends that Mercer's inspection of the aircraft on August 1, 1957 (paragraph XI, cross-complaint) negates reliance on facts pertaining to the condition of the aircraft that are inconsistent with the opportunity that he had to inspect the aircraft for himself and to rely on what he or his agents did or could have discovered—that where a person having the opportunity to do so undertakes an inspection of obvious conditions such as the condition of an aircraft, such person is chargeable with such information and knowledge as would ordinarily flow from such inspection, ⊥279 and such person cannot claim reliance upon mere representations alone.

In paragraph XI Mercer does allege that he made "a cursory inspection of the exterior of the aircraft * * * on or about July 5, 1957, *for the purpose of detecting any damage to the exterior of the aircraft prior to the flight of the aircraft from El Paso to Burbank, California* * * *." (Emphasis added.) This "cursory inspection" was made subsequent to the time that Mercer paid the $5,000.00 for the option to purchase (June 12, 1957—paragraph VI) but prior to the date of purchase (July 6, 1957—paragraph VIII) and prior to the date that Mercer entered into an oral lease agreement with cross-defendants Tuttle, Koenen, and Aviation Finance (July 26, 1957—paragraph IX).

[5] It is only where a party to whom a representation is made has the means at hand for determining its truth or falsehood and resorts to such means, without interference by the other party, and after investigation learns that the statement was false, that he is precluded from asserting that he relied upon the representation. The rationale for this is that the investigation and ascertainment of the facts exclude the idea that any reliance was placed upon the falsehood. (Harper v. Silver, 200 A.C.A.2d 102, 19 Cal.Rptr. 78; Blackman v. Howes, 82 Cal.App.2d 275, 279, 185 P.2d 1019, 174 A.L.R. 1004.)

Since the allegations of the complaint must be regarded as true (Hill v. City of Santa Barbara, supra, 196 Cal.App.2d 580, 16 Cal.Rptr. 686) the pleading shows that Mercer did not discover the true condition of the aircraft until August 1, 1957 (paragraph XI) and therefore was justified in relying upon the representations made by Elliott.

Mercer's action for fraud is not predicated upon the representations concerning the condition of the aircraft. The alleged fraud which serves as the basis for this action consists of the representations by Elliott that the aircraft "as modified had been approved for commercial aviation operations by the F.A.A., and that * * * Elliott had all of the aircraft records * * to substantiate the fact that said modifications had been made, and that said modifications had been approved by the F.A.A. Cross-defendant further represented that said aircraft records would be delivered to the buyer with the aircraft; (c) that all said aircraft required in order to obtain a certificate of airworthiness for commercial flight operations from ⊥280 the F.A.A. was an 8,000 hour airframe inspection." (Paragraph VII.)

Elliott asserts that his representation that "all said aircraft required in order to obtain a certificate of airworthiness for commercial flight operations from the F.A.A. was an 8,000 hour airframe inspection" is merely a "statement of non-actionable opinion, for which respondent may not be charged as liable in an action for fraud and deceit." Elliott further asserts that Mercer may not justifiably rely upon such expression of opinion.

[6] The line between opinion and fact is not a distinct one; hence if the opinion is rendered under circumstances such that it may be regarded as amounting to a positive affirmation of fact, it will be treated as a representation of fact for purposes of a deceit action. (See Gilbert v. Corlett, 171 Cal.App.2d 116, 339 P.2d 960; Clar v. Board of Trade, 164 Cal.App.2d 636, 331 P.2d 89; Pearson v. Allen, 150 Cal.App.2d 638, 310 P.2d 688; Friedberg v. Weissbuch, 135 Cal.App.2d 750, 287 P.2d 785.) In any event it is clear that Elliott's representations to the effect that the modifications made to the aircraft had been approved for commercial aviation operations by the F.A.A., and that he had all the records to substantiate the fact that the modifications had been made and that they had been approved, constituted representations of fact. The falsity of the representations is set forth in paragraph X of the complaint.

[7] An examination of Mercer's cross-complaint discloses that he had stated facts sufficient to constitute a cause of action.

Mercer's next contention is that the action is not barred by the statute of limitations.

An action for relief on the ground of fraud or mistake must be brought within three years. The "cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (Code Civ.Proc., § 338, subd. 4.)

The allegations set forth in paragraph XI of the cross-complaint show that a few days after August 1, 1957, Mercer discovered for the first time that the aircraft did not require an 8,000 hour airframe inspection as represented by Elliott; that the prior modifications to the aircraft had not been approved by the F.A.A.; and that the F.A.A. at Burbank refused to issue a certificate of airworthiness for the aircraft until such time as the aircraft records relating to the prior modifications, including the detailed engineering drawings ⌊281 and specifications relating thereto, were furnished to it, and the design, type and quality of the modifications were approved by the F.A.A. at Burbank.

Mercer first filed his first amended cross-complaint against Elliott on or about February 9, 1961, more than three years after discovery of the above facts. This serves as the basis for Elliott's contention that the action is barred by the statute of limitations.

Mercer has attempted to circumvent the bar of the statute of limitations by urging that there is a distinction between his discovery in August 1957 of the fact that the aircraft could not be certified until certain records were furnished to the F.A.A. and that these records were missing, and Mercer's discovery in October 1958 that Elliott's continuing representations that he (Elliott) would provide the necessary records were false.

It is stated in Regus v. Schartkoff, 156 Cal.App.2d 382, at pages 386–387, 319 P.2d 721, 724, in pertinent part as follows:

> "[1] The equitable doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations. [2] A person by his conduct may be estopped to rely on the statute. [3] Where the delay in commencing an action is induced by the conduct of the defendant, it cannot be availed of by him as a defense. One cannot justly or equitably lull his adversary into

> a false sense of security and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought."

The facts alleged in the cross-complaint disclose that Elliott continued to represent that he would provide the necessary records; that in reliance on said representations Mercer performed extensive repair and maintenance work on the aircraft (paragraph XIII); that during the latter part of 1957 and to and including October 1958 Elliott furnished or caused to be furnished to Mercer or to the F.A.A. certain information and drawings relating to the prior modifications; but that the information so furnished was inadequate to describe the nature, type and extent of the prior modifications and any prior approval by the F.A.A. (paragraph XV); that upon each refusal of the F.A.A. to certificate the aircraft, Elliott further represented that the records necessary to obtain a certificate were in existence (paragraph XVI); that Elliott ⌊282 misrepresented such facts for the purpose of inducing Mercer to rely thereon and to lull Mercer into believing that Elliott in fact could and would obtain the aircraft records required for the certification of the aircraft (paragraph XXI).

[8] Viewing the cross-complaint as a whole, and assuming all facts stated therein as true, we believe that Mercer has asserted sufficient facts to negative the application of the statute of limitations and therefore we hold that the trial court erred in sustaining a demurrer on that ground.

There is nothing to prevent Elliott from again raising the defense in his answer to the cross-complaint and from having a separate trial of the special defense before the trial of any other issue in the case. (Code Civ.Proc., § 597.)

For the reasons stated, the judgment is reversed.

WOOD and LILLIE, JJ., concur.

DEPARTMENT OF MENTAL HYGIENE,
Plaintiff and Respondent,
v.
William A. HAWLEY, Defendant and Appellant.
Civ. 20259.

District Court of Appeal, First District, Division 3, California.
Oct. 9, 1962.
Rehearing Denied Oct. 23, 1962.
For Opinion on Hearing, see 28 Cal.Rptr. 718, 379 P.2d 22.

The Department of Mental Hygiene brought an action against a father to recover for the cost of the care of his son in a state hospital. The Superior Court, Monterey County, Anthony Brazil, J., rendered a judgment adverse to the father, and he appealed. The District Court of Appeal, Salsman, J., held that the statute providing that the husband, wife, father, mother, or children of a mentally ill person shall be liable for the mentally ill person's care in a state institution is not unconstitutional because it holds equally liable for support the relatives of persons charged with crime and later found insane and relatives of mentally ill persons committed in civil proceedings, or because charge is imposed on relatives while mentally ill person is detained in state mental hospital but not while he is in California Medical Facility.

Judgment affirmed.

Devine, J., dissented.

1. Mental Health 🔑72

Statute providing that husband, wife, father, mother, or children of mentally ill person shall be liable for his care in state institution is not unconstitutional because it holds equally liable for support the relatives of persons charged with crime and later found insane and relatives of mentally ill persons committed in civil proceedings. West's Ann.Welfare & Inst.Code, § 6650.

2. Mental Health 🔑72

Statute providing that husband, wife, father, mother, or children of mentally ill person shall be liable for his care in state institution is not unconstitutional because it imposes liability for care while mentally ill person is in state mental hospital but not while in California Medical Facility. West's Ann.Welfare & Inst.Code, § 6650.

3. Mental Health 🔑72

Statute providing that husband, wife, father, mother, or children of mentally ill person shall be liable for his care in state institution was not rendered unconstitutional by enactment of statute providing that if defendant pleads not guilty by reason of insanity, and it is found that he was insane when he committed offense but has recovered sanity, and he is committed to state hospital because of his insanity at time of commission of offense, neither such person nor his estate nor his relatives shall be liable for his care. West's Ann. Welfare & Inst.Code, §§ 6650, 6650.5.

4. Criminal Law 🔑636(1)

Constitutional and statutory requirements that defendant be present during criminal proceedings are not satisfied by mere physical presence of defendant without mental presence.

5. Statutes 🔑111

Section of constitution providing that every legislative act shall embrace but one subject, which shall be expressed in title, was not violated by title of 1947 statute making husband, wife, father, mother, or children of mentally ill person liable for care of such person in state institution. West's Ann.Const. art. 4, § 24; West's Ann. Welfare & Inst.Code, § 6650.

Emory L. Morris, Kenneth C. Gillis, San Francisco, Webster Street, Monterey, for appellant.

Stanley Mosk, Atty. Gen. of the State of California, Lawrence E. Doxsee, Deputy Atty. Gen., Sacramento, for respondent.

SALSMAN, Justice.

This action was brought by plaintiff to recover from the defendant the cost of care and maintenance furnished his son, John Powell Hawley, during the period 1956 through 1960. The trial court granted plaintiff's motion for summary judgment, and defendant appeals.

In 1952 defendant's son was admitted to Camarillo State Hospital, and in March, 1955 he was granted leave of absence from that institution. On December 9, 1955 the son was charged with the murder of his mother, Iris Hawley; he was arraigned on December 14, 1955, and on that date his counsel informed the court that the accused wished to enter a plea of not guilty by reason of insanity. Counsel also informed the court there was a question of the present sanity of the accused, whereupon the court appointed 3 psychiatrists to examine Hawley, and continued further proceedings until February 2, 1956.

On February 2, 1956 the court received the reports of the psychiatrists concerning their examination of the accused; determined that Hawley was then insane, and committed him to Atascadero State Hospital. The present action is based upon the liability created under section 6650 of the Welfare and Institutions Code.[1]

Section 6650, as amended in 1945, is set out below.[2]

[1] The defendant first contends the 1945 amendments to section 6650 are un-

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[1] When reference is made to section 6650 and section 6650.5 such reference is to the Welfare and Institutions Code; when reference is made to sections 977, 1016, 1018, 1026, 1368, 1369, 1370, 2684, 3703, 4015 and 4016, reference is to the Penal Code.

[2] "The husband, wife, father, mother, or children of a mentally ill person or inebriate, the estates of such persons, and the guardian and administrator of the estate of such mentally ill person or inebriate, shall cause him to be properly and suitably cared for and maintained, and shall pay the cost and charges of his transportation to a state institution for the mentally ill or inebriates. The husband, wife, father, mother, or children of a mentally ill person or inebriate, and the administrators of their estates, and the estate of such mentally ill person or inebriate, shall be liable for his care, support, and maintenance in a state institution of which he is an inmate. The liability of such persons and estates shall be a joint and several liability, *and such liability shall exist whether the men-*

constitutional, in that they hold equally liable for support the relatives of persons charged with crime and later found insane, and relatives of mentally ill persons committed in civil proceedings. We see no merit in this contention.

The constitutionality of imposing a financial liability upon responsible relatives of mentally ill persons committed in civil proceedings is long established. (48 A.L.R. 733; Department of Mental Hygiene v. McGilvery, 50 Cal.2d 742, 329 P.2d 689; Estate of Stobie, 30 Cal.App.2d 525, 86 P.2d 883; Estate of Gestner, 90 Cal.App.2d 680, 686, 204 P.2d 77.) Whether the cost of state hospital care of a person charged with crime, who before conviction is found to be insane, shall be borne by the taxpayers of the State, or by responsible relatives of the accused, is a matter of public policy, to be determined by the Legislature. It is the defendant's view here that relatives of persons charged with crime and who become insane before conviction should not be required to assist the accused to regain his sanity so that he may defend himself. He cites and relies upon Kough v. Hoehler, 413 Ill. 409, 109 N.E.2d 177. In that case the Supreme Court of Illinois sustained the constitutionality of a statute which imposed a financial responsibility for hospital care upon the relatives of a mentally ill person committed in civil proceedings, where the statute did not impose a similar liability upon relatives of persons charged with crime and later committed to a state hospital. The California Legislature, however, has taken a contrary view, and by its amendments to section 6650 enacted in 1945 has imposed such liability, and we find nothing in either the State or Federal Constitutions to prohibit it.

[2] The defendant places great emphasis on In re Cathey, 55 Cal.2d 679, 12 Cal.Rptr. 762, 361 P.2d 426. In Cathey the defendant was a person charged with crime, found to be presently insane, and committed to Atascadero, as was defendant's son. In Cathey, however, the defendant was of such temperament that he could not be cared for in a mental hospital. His further care required that he be transferred to an institution where greater security prevailed, and he was therefore transferred, by inter-agency agreement, to the California Medical Facility—a hospital under the jurisdiction of the Department of Corrections. It is conceded that no charge for support, maintenance or care is made in such a case. Whether in such a case a charge for care shall be imposed while the accused is detained in a state mental hospital, and not imposed when the accused is transferred to the California Medical Facility is, as previously noted, a policy determination to be made by the Legislature. In the one case, by section 6650, the Legislature in its judgment has made the legally responsible relatives liable, and in the other it has not. In so acting, no constitutional right or privilege of the defendant here has been invaded.

In 1957 the Legislature added section 6650.5 to the code.[3] The Supreme Court construed this section in People v. Brock, 57 A.C. 690, 21 Cal.Rptr. 560, 371 P.2d 296. In effect the court held the relatives of a person who comes within the language of that section are relieved of financial responsibility to which section 6650, in conjunction with section 1026 had previously subjected them. The defendant now contends this illustrates the invalidity of the 1945 amendments to section 6650, because after Brock

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tally ill person or inebriate has become an inmate of a state institution pursuant to the provisions of this code or pursuant to the provisions of Sections 1026, 1368, 1369, 1370, and 1372 of the Penal Code." (Italics for 1945 amendments.)

[3] "If in a criminal prosecution a defendant pleads not guilty by reason of insanity, and it is found that such person was insane at the time he committed the offense but has recovered his sanity, and he is committed to a state hospital because of his insanity at the time of commission of the offense, neither such person nor his estate nor his relatives shall be liable for such person's care, support, or maintenance in such state hospital."

the only class of relatives responsible for the maintenance and care of persons accused of crime and found insane are those whose liability would arise under section 1368, as incorporated in section 6650.

[3] In the Brock case the Supreme Court found it unnecessary to pass upon the constitutionality of section 6650, as amended in 1945, although the invalidity of the statutory scheme was urged upon the court by amicus curiae. We do not believe the enactment of section 6650.5 has rendered the remainder of the 1945 amendments to section 6650 unconstitutional. A person committed pursuant to section 1026 is one who has committed an act prohibited by the criminal law, while " 'laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that he was doing what was wrong,' " but who appears not to have "fully recovered his sanity." (People v. Brock, 57 A.C. 690, 21 Cal.Rptr. 560, 371 P.2d 296; section 1026.) On the other hand, a person committed pursuant to section 1368 is one who has been charged with crime, and is found by the court or jury not presently able to understand the nature and purpose of the proceedings taken against him and to assist counsel in the conduct of a defense in a rational manner. Thus the section 1026 defendant has been found to have committed an act prohibited by the criminal law, while the section 1368 defendant has not been so adjudged. We think it a reasonable legislative determination, not prohibited by any constitutional provision, to treat the relatives of a person committed pursuant to section 1026 like the relatives of a convicted criminal, and to relieve them of financial responsibility which might otherwise be imposed upon them. Likewise, we deem it a reasonable legislative decision, and not violative of any constitutional right of the defendant here, not to treat the relatives of a person committed pursuant to section 1368 like the relatives of one who has committed an act prohibited by the criminal law—in short, like the relatives of a section 1026 defendant. A person committed to a state mental hospital pursuant to section 1368 may not have committed the act charged against him at all, and his mental condition may pose no threat to society.

[4] We are likewise unimpressed by defendant's objection that the 1945 amendments to section 6650 are unconstitutional because they do not impose a financial liability upon relatives of persons convicted of crime, but who become insane after judgment,[4] while imposing such liability on the relatives of one who is committed but becomes insane before judgment is pronounced. Defendant's argument here is designed to show that his son is, in fact a convicted criminal because of the entry of the single plea of not guilty by reason of insanity. Defendant cites section 1016, which states in part: "There are five kinds of pleas to an indictment or an information, or to a complaint charging an offense triable in any inferior court: 1. Guilty. 2. Not guilty. * * * 5. Not guilty by reason of insanity. A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged." Also cited is People v. Hickman, 204 Cal. 470, 268 P. 909, 270 P. 1117; People v. Walker, 33 Cal.2d 250, 201 P.2d 6; People v. Haygood, 179 Cal.App.2d 112, 3 Cal.Rptr. 455. The cited cases correctly state the law, but on the record before us they are not appli-

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[4] Reference to sections 2684 and 3703—insanity while serving sentence or awaiting execution—is omitted from the 1945 amendments to section 6650. By implication, relatives of such persons are not liable for their hospital care.

cable to the facts of this case. Section 1018 provides in part: "Unless otherwise provided by law every plea must be put in by the defendant himself in open court." The record here shows that, upon his arraignment, the accused said not a single word. His attorney suggested a plea of not guilty by reason of insanity be entered, and at the same time suggested a psychiatric examination of the accused, to which the court readily agreed. The psychiatrists, who were appointed at the time Hawley's plea was entered, made a prompt examination and returned a unanimous report finding him presently insane. Section 977 provides: "The defendant must be personally present at the arraignment, except that if the accusatory pleading charges a misdemeanor only he may appear by counsel." Constitutional and statutory requirements that an accused be present during criminal proceedings are not satisfied by mere physical presence without mental presence (In re Dennis, 51 Cal.2d 666, 335 P.2d 657; People v. Williams, 194 Cal.App.2d 523, 15 Cal.Rptr. 191; People v. Berling, 115 Cal.App.2d 255, 251 P.2d 1017.) Thus it appears that defendant's son, rather than being one who has admitted his guilt by the entry of the single plea of not guilty by reason of insanity, is in fact one for whom no valid plea has as yet been entered to the criminal charge against him. It cannot be held, therefore, that defendant's son is a convicted criminal, as defendant asserts.

Defendant also claims a denial of due process and equal protection of the law, in that the cost of providing protection for society against the acts of persons charged with crime, sane or insane, is a governmental function, and that this burden may not be shifted from the government to any one citizen or group of citizens. (§ 4015, § 4016; City of Pasadena v. County of Los Angeles, 118 Cal.App.2d 497, 258 P.2d 28; Gov.Code § 29602.) The authorities cited relate to the duty of the county to receive and care for prisoners in county jails; they do not bear upon the problem of liability for the cost of state mental hospital care of insane persons charged with crime. Nor is the defendant here being charged with the cost of any care or custody of his son while the latter was confined in any county jail or other county detention facility. Further comment upon this portion of defendant's appeal is unnecessary.

Defendant makes two additional objections in his brief, the first being that the title of the act embracing the 1945 amendments to section 6650 is defective under California Constitution Article IV, section 24, and the second relating to claimed procedural errors by the court in the commitment proceedings. Neither charge of error is valid.

[5] Article IV, section 24 of the California Constitution provides in substance that every legislative act shall embrace but one subject, which subject shall be expressed in the title. Section 6650 was re-enacted in 1947, and hence it is the title of the later re-enactment, rather than the title of the 1945 act which is controlling here. We do not quote the title of the 1947 act herein, but we have read it carefully, and find it does not violate Article IV, section 24 of the Constitution. In fact, the sufficiency of the 1947 title is virtually conceded by the defendant in his discussion and comparison of the title of the 1945 act with the title of the 1947 act.

Defendant's claim of error in the commitment proceedings is based upon the assertion that the court did not entertain a doubt as to his son's sanity at the time the court made the appointment of psychiatrists. It is true that counsel for the son suggested to the court that psychiatrists be appointed. This suggestion was made at the time the plea of not guilty by reason of insanity was entered. The court promptly complied with counsel's suggestion. It must be remembered that at the time of plea, and at the time the psychiatrists were appointed, the son stood before the court; the judge was able to see and observe him in his actions and conduct, and to note his then physical and mental condition, whatever such may have been. We must assume the judge took such courtroom appearances into account. A court does not act idly, and without purpose. Here, with the accused before him, and a plea of not guilty by reason of insanity entered, the act of the judge in appointing the psychiatrists demonstrates some doubt in the court's mind as to the sanity of the accused.

Other questions are raised in defendant's brief relating to the sufficiency of the proceedings whereby the defendant's son was committed to the Atascadero State Hospital. We have examined these claims of error and have determined that they are without substance, and do not require discussion herein.

The judgment is affirmed.

DRAPER, P. J., concurs.

DEVINE, Justice.

I dissent. The accused is being held under processes which are essentially part of the criminal law. He is not a patient of a state hospital under the civil process, as he was before he was paroled and committed the act which the state charges was murder. The charge against him remains, and although presently he is in a hospital conducted by the Department of Mental Hygiene, he is so much regarded an accused that he could be transferred to a facility operated by the Department of Corrections, because he is, like Cathey, "not a mere mentally ill patient * * *. By contrast, he is a defendant" (In re Cathey, 55 Cal.2d 679, 691, 12 Cal.Rptr. 762, 768, 361 P.2d 426, 432). The distinction was recognized in Napa State Hospital v. Yuba County, 138 Cal. 378, 381–382, 71 P. 450, 451–452, wherein it was said: "Persons charged with crime who are or become insane naturally belong to a class distinct and different from insane persons who are not so charged with crime. Under the general law the expense of capture, detention, and prosecution of persons charged with crime is to be borne by the county. The party, though insane, is still detained under the law to answer for his crime when he shall become sane. If he were not charged with crime, though he were insane, he might not be sent to the asylum. His insanity might be of a nature not requiring that he be restrained, or his friends, relatives, or guardian might take care of him or consign him to a private institution. If, however, he is charged with crime, he must be committed to the asylum, if found insane, whatever the nature of his insanity may be. He is thus committed that he may be held in the custody of the law to await his trial or sentence, and his commitment is a part and parcel of the administration of the criminal law. If he were not insane the defendant would, on a continuance of his case, be sent to jail or released on bail. Being insane, the court, under the Penal Code provision, commits him to the asylum pending the continuance. It is perfectly natural and proper, then, that the expense of his detention in the one place should be borne by the county, as it is in the other." Although, in this case, the dispute was between the state and a county, under statutes not relevant here, the distinction between the two classes of mentally afflicted persons still exists, in my opinion.

If the accused were able to go to trial under the single plea now made, not guilty by reason of insanity, his father would not be responsible for his support thereafter, whatever the result; for if the verdict were in favor of the People, the accused would be subject to incarceration (or the death penalty), and his expenses would be paid by the state, but if he were found not guilty by reason of insanity, the father would not have to pay under the express provisions of section 6650.5 (People v. Brock, 57 A.C. 690, 21 Cal.Rptr. 560, 371 P.2d 296). The same result would occur even if the accused became fit to defend himself and were allowed to add the plea of not guilty. If he were found not guilty, the accused would be released, and the father would not have to support him in an institution unless, of course, a new proceeding under the Welfare and Institutions Code were commenced and the son were found to be mentally ill at the time of judgment in that proceeding. The possibility that the accused would be found not guilty, as distinguished from not guilty by reason of insanity, is quite suppositious; the cause having been decided on motion for summary judgment, we have before us reports of psychiatrists which show that the accused not only admitted the killing, but described it in detail, although his reasons were bizarre.

The reports of the two psychiatrists appointed by the court show that, in their opinion, the accused was legally insane at the time of the commission of the offense and at the time of the examination made in connection with the 1368 proceedings. These findings are supported by detailed statements of facts in the doctors' reports. Thus, the probability is that if the criminal case were brought to trial, a verdict of not guilty by reason of insanity would result, but, as stated above, no matter what verdict a jury might render, or what judgment a judge might make, the father would not be responsible thereafter for his son's expenses, and it is only because the trial is stalemated that the state is in position even to advance the proposition that he is liable. Since the case has not been brought to trial, the criminal case having been suspended for nearly seven years, the father, having no control over the process, has not had it in his power to have the case decided one way or another, while charges have amounted, to date of judgment, to $8,060.55, and it may be that it will never be decided, but will remain abeyant during the accused's whole lifetime, with expense charges accruing.

It seems to me that it cannot be procedural due process of law to exact payment while a criminal charge, to which defendant in this civil case is no party, and in which he has no right to demand early trial, remains untried, particularly where judgment in that case, whatever it may be, would exonerate defendant herein from responsibility for support of his son.

It is true that there is a theoretical possibility that the accused was sane at the time of the killing and is guilty, and that the insanity which has prevented the trial came upon him later; and that there is also a theoretical possibility that he did not commit a criminal act at all and, again, that his insanity is relevant only to his inability to defend himself. Bearing in mind, however, the fact that the judgment herein was a summary judgment, and that the same reports of the doctors which formed the basis for the trial judge's determination under 1368 contained the conclusion that defendant was insane at the time of the commission of the offense, it seems to me that to decide at the present time that the father is responsible for the expenses during the custodial period pending trial, with no evidence whatever to support the theoretical possibilities mentioned in the last sentence, is essentially unfair.

If the judgment were reversed, as I believe it should be, I think it would not be necessary for us to hold that any part of section 6650 is unconstitutional, but merely that, under the circumstances of this case, it cannot be constitutionally applied to the defendant, because he is denied procedural due process. By such a limited ruling, we would comply with the principle that the declaring of statutes unconstitutional should be avoided, if possible, and at the same time we would leave open questions which are not presented by the extraordinary situation that exists here, such as, whether the accused himself, or his estate, would be chargeable; or whether, if an accused did not plead not guilty by reason of insanity, but had become insane before or during trial, he or his relatives would be liable; or whether there would be liability on the part of the accused or his relatives in a case where, although the plea of not guilty by reason of insanity was made, there was no showing in the civil case, as there is a strong showing in this case, of probability that the accused was insane at the time of the commission of the offense.

I would reverse the summary judgment.

Hearing granted; WHITE, J., sitting pro tem.

208 Cal.App.2d 429

⌊429 ⌊ **Max KEROFF, Plaintiff and Respondent,**

v.

Ben SNYDER, Defendant and Appellant.

Civ. 6735.

District Court of Appeal, Fourth District, California.

Oct. 11, 1962.

Action to declare a partnership dissolved, to effect an accounting therein, and to partition real property. The Superior Court of San Diego County, Dean Sherry and George A. Lazar, JJ., entered judgment and orders from which appeals were taken. The District Court of Appeal, Coughlin, J., held that where written findings were not waived, judgment made without findings on material issues must be reversed and order denying motion for new trial was not appealable.

Judgment reversed; order denying motion to set aside second judgment and reinstate first affirmed, and appeal from order denying motion for new trial dismissed.

1. Appeal and Error ⇨167

Where examination of record disclosed that fair and reasonable interpretation of discussion between counsel and parties was that agreement to waive right of appeal concerned only judgment entered on settlement agreement, but no such agreement preceded judgment appealed from, right to appeal was not waived.

2. Appeal and Error ⇨1071(6)
Trial ⇨391

Written findings are required on all material issues raised by pleadings and evidence, unless waived, and judgment rendered without making findings on all material issues must be reversed. West's Ann. Code Civ.Proc. § 632.

3. Appeal and Error ⇨1071(6)

Judgment rendered by court which made no findings of fact on material issues must be reversed where there was no indication that findings were waived either by written consent on file or by oral consent expressed in open court and recorded in minutes. West's Ann.Code Civ.Proc. § 632.

4. Appeal and Error ⇨110

Order denying motion for new trial is not appealable and attempted appeal therefrom must be dismissed.

5. Appeal and Error ⇨113(1)

Order denying motion to set aside second judgment in case and reinstate first was properly denied since such proceeding was not sanctioned by law.

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Adams & Tom and Richard E. Adams, San Diego, for appellant.

Gostin & Katz and Louis S. Katz, San Diego, for respondent.

⌊ COUGHLIN, Justice. ⌊430

These appeals arise out of an action to declare a partnership dissolved; to effect an accounting therein; and to partition real property. The dissolution had been accomplished by a written agreement executed prior to commencement of the action; the partition issues were settled thereafter; and the accounting was the sole remaining matter requiring court action. Although several defendants were joined in the action, the partnership and accounting phases thereof involve only the defendant, Ben Snyder, the appellant herein.

On February 15, 1961, the court entered a judgment, based on findings of fact and conclusions of law made by a referee appointed by it pursuant to stipulation of the parties, which declared the partnership dissolved and stated an accounting between them. The plaintiff, who is the respondent herein, moved for a new trial, based on several grounds, including insufficiency of the evidence. This motion was heard on April 11, 1961. At the time of this hearing, the parties, their counsel, and the court, the honorable Dean Sherry presiding, preliminarily engaged in an off-the-record discussion. Thereafter, as appears from the augmented record before us, the court granted a new trial because of the insufficiency of the evidence; counsel for defendant were permitted to withdraw as attorneys in the case; at his request he undertook to represent himself; and thereupon the trial judge, undoubtedly having in mind the preliminary unreported discussion heretofore noted, referred to a stipulation and engaged in a further discussion with the parties and the plaintiff's attorney as follows:

> "THE COURT: It is now stipulated that the plaintiff has given his attorney full authority to make a settlement agreement here; and that when that agreement is made for the settlement of this case, there will be no further motion for a new trial, there will be no appeal from the decision of the Court.
>
> "Is that your understanding, Mr. Katz? [Attorney for plaintiff.]
>
> "MR. KATZ: That is my understanding, Your Honor.
>
> ⊥431 ⊥"THE COURT: And Mr. Keroff [plaintiff], is that your understanding?
>
> "MR. KEROFF: It is.
>
> "THE COURT: And you Mr. Keroff,—you are giving your attorney, Mr. Katz, full authority to make such settlement, is that right?
>
> "MR. KEROFF: Yes, sir.
>
> "THE COURT: And you understand that that is the arrangement,—
>
> "MR. SNYDER [defendant]: Yes, sir.
>
> "THE COURT: —Mr. Snyder?
>
> "MR. SNYDER: Yes, sir.
>
> "THE COURT: That when the Court has entered a judgment in this case after discussion with you and Mr. Katz, that my decision on all matters that are presented to the Court at this hearing and the judgment itself will be final?
>
> "MR. SNYDER: I so understand.
>
> "THE COURT: And there will be no motion for a new trial and there will be no appeal from that decision?
>
> "MR. SNYDER: I accept.
>
> "THE COURT: Yes. All right.
>
> "Now, gentlemen, I will suggest the matters that we can discuss."

This exchange was followed by a discussion which was not reported. From the amended minute order purporting to reflect the proceedings on the day in question, it appears that this unreported discussion terminated in a decision by the court to render judgment, and a direction to counsel for the plaintiff to prepare the same for signature. On April 17, 1961, a written judgment was signed and filed, the terms of which vary substantially from the judgment originally entered.

Forthwith, the defendant reemployed his counsel, and through them moved the court, the honorable George A. Lazar presiding, to vacate and set aside the second judgment; to reinstate the original judgment; and, in the alternate, to grant a new trial. This motion was denied. Thereupon the defendant appealed from the second judgment and from the order denying the aforesaid motion. No appeal was taken from the order granting a new trial as to the first judgment, and that order has become final.

[1] Heretofore the plaintiff moved this court to dismiss this appeal upon the ground that the defendant had waived his right to appeal. This motion was denied. The waiver⊥relied upon is that expressed in the ⊥432 course of the discussion following the court's setting aside the original judgment and granting a new trial. A fair and reasonable interpretation of that discussion convinces us that it concerned a judgment upon a "settlement agreement." No such agreement preceded the second judgment. Consequently, there was no waiver of an appeal from the latter.

[2, 3] The record does not indicate what transpired in the course of the unreported discussion between the court, the parties, and counsel for the plaintiff, which preceded the decision to render judgment as reflected in the minutes. The judgment appealed from recites that the parties "stipulated and agreed to have the case tried by

the court at this time, without jury and without a court reporter and after submission of all of the issues to the court and informal discussion thereon, it was further stipulated that the court would render a final judgment herein as to all issues raised in the pleadings relating to the partnership accounting and the First Cause of Action herein." This recital is contrary to the facts as established by the record heretofore considered. The stipulation in question referred to a judgment to be agreed upon by the parties. In any event, the proceedings are fatally defective because no findings of fact were made by the court. It is an elementary rule that written "findings are required on all material issues raised by the pleadings and evidence, unless they are waived, and, if the court renders judgment without making findings on all material issues, the case must be reversed." (James v. Haley, 212 Cal. 142, 147, 297 P. 920, 922; In accord: Edgar v. Hitch, 46 Cal.2d 309 312, 294 P.2d 3; Krum v. Malloy, 22 Cal.2d 132, 136, 137 P.2d 18; Morrow v. Morrow, 201 A.C.A. 294, 297, 20 Cal.Rptr. 338; Perry v. Jacobsen, 184 Cal.App.2d 43, 49, 7 Cal.Rptr. 177; Estate of Ingram, 99 Cal.App. 660, 662, 279 P. 208; Frascona v. Los Angeles Ry. Corp., 48 Cal.App. 135, 137–138, 191 P. 968.) Section 632 of the Code of Civil Procedure, which imposes the requirement of written findings, provides that they may be waived "by consent in writing filed with the clerk or judge, or by oral consent in open court, entered in the minutes." The recitals in the instant judgment do not indicate a waiver of findings; no written consent to such a waiver is on file; and no oral consent, thereto expressed in open court is recorded in the minutes. In this regard it may be noted that in a declaration filed in resistance to the plaintiff's motion to dismiss the appeal, the defendant ⊥433 stated that he requested the court to make findings of fact and conclusions of law, but the judge told him these were not necessary. This statement was not denied. The failure to make findings was error, and the judgment must be reversed.

[4, 5] The order denying the defendant's motion for a new trial is not appealable and, therefore, the attempted appeal therefrom should be dismissed. (Rodriguez v. Barnett, 52 Cal.2d 154, 156, 338 P.2d 907.) The order denying the defendant's motion to set aside the second judgment and reinstate the first properly was denied as there is no such proceeding sanctioned by law. (Ransom v. Los Angeles City High School Dist., 129 Cal.App.2d 500, 507, 277 P.2d 455; Levy v. Brill, 107 Cal.App.2d 204, 205, 236 P.2d 603; Biggs v. Biggs, 103 Cal.App.2d 741, 742, 230 P.2d 32.)

The judgment appealed from is reversed; the order denying the motion to set aside the second judgment and reinstate the first is affirmed; and the attempted appeal from the order denying the motion for a new trial is dismissed. Appellant to recover costs on appeal.

GRIFFIN, P. J., and SHEPARD, J., concur.

208 Cal.App.2d 207

⊥207 **Con S. SHEA, Administrator of the Estate of Ruth Guthrie, Deceased, Plaintiff and Respondent,**

v.

David A. PAUL and Pauline L. Paul, Defendants and Appellants.

Civ. 19834.

District Court of Appeal, First District, Division 3, California.

Oct. 4, 1962.

Suit to establish trust in certain realty the record title to which stood in the name of original plaintiff and defendant contractor. The Superior Court, County of Marin, Harold J. Haley, J., rendered judgment for plaintiff and defendants appealed. The District Court of Appeal, Devine, J., held that the evidence permitted the court to find a trust and to reject defendant's claims for consideration assertedly advanced by him.

Affirmed.

1. Trusts 🔑**89(2)**

Evidence supported conclusion that record title to lot in name of contractor together with that of deceased plaintiff was in trust for deceased plaintiff to whom contractor had given receipts for purchase price.

2. Evidence 🔑**271(19)**

Letters from plaintiff's decedent, offered not for truth of anything said therein but simply to show demand upon defendant, were admissible to negative intent to vest title to property in question in defendant.

3. Trial 🔑**45(1)**

Court properly rejected offer of proof of missing "holographic document" which defendant asserted that original plaintiff, suing to establish trust in property, had drawn devising property to defendant, absent any offer of proof as to the date of making of the document which could show intent on original plaintiff's part at time property was placed in names of both parties.

4. Trusts 🔑**39(1)**

Court establishing trust in certain realty which had stood in name of original plaintiff and defendant building contractor who asserted claims for consideration he assertedly advanced was free to reject his contention that he had made a $1,000 payment of consideration for lot despite fact that he issued receipt to decedent therefor and never retrieved it, and likewise to reject his claim for payment made to title company which made receipt to decedent though payment was made by defendant's personal check.

5. Licenses 🔑**39.40**

Court correctly disallowed fee for preparation of building plans in favor of one who was not licensed as an architect and who had not informed person for whom plans were drawn of such fact. West's Ann.Bus. & Prof.Code, §§ 5536, 5537.

Raymond H. Levy, San Francisco, for appellants.

Robert H. Andresen, Mill Valley, for respondent.

⊥DEVINE, Justice. ⊥208

This action was commenced by Ruth Guthrie, now deceased, to establish a trust in a certain lot of real⊥property in Mill ⊥209 Valley, and to compel the defendants to convey title to plaintiff. Defendant David A. Paul is a building contractor who had transactions with plaintiff, and record title to the lot has been in his name and that of the deceased plaintiff since the date of its purchase in 1954. (Mr. Paul's wife is a defendant but her joinder is merely formal, and reference herein is made to Mr. Paul only, as defendant.) The action was commenced by Ruth Guthrie, a single woman, on December 9, 1958. Plaintiff Ruth Guthrie died on March 17, 1959, and the action has been carried on by the administrator of her estate.

The complaint, which has remained unaltered except for the substitution of the administrator, alleges that the entire purchase price of the lot, $5,000, was paid by plaintiff out of her own money solely and none other, and that it never was the intention of plaintiff that any interest be vested in the defendant, that plaintiff demanded of defendant that he convey his legal or record interest in the title and that he refused. Although defendant in his original answer, which was unverified, set forth a somewhat different theory of defense than had been contained in his pretrial statement, his contentions as asserted in the statement were adopted in the pretrial order. They are: that he, Paul, a licensed contractor, did certain work upon other properties for Miss Guthrie, that he obtained a modernization loan for this work, part of the proceeds of which he contributed toward the purchase price of the subject lot, and that he did other work on the subject lot, for which he was not paid, and that as a result title was placed in both names and he became part owner of the property, having a 73 per cent interest therein, or that, at the least, the title was held in both names as security for indebtedness due to Paul.

The court found that the entire purchase price was paid by Miss Guthrie, that she did not intend any vesting of title in Paul, and that she is entitled to conveyance; but also found that defendant is entitled to the sum of $594 for services in the improvement of the subject property, for moneys advanced and for payment of taxes, and ordered payment of said sum upon delivery of the deed.

Ruth Guthrie having died prior to the trial, her personal representative, as substitute plaintiff, relied in his case in chief upon receipts to show payment of the purchase price of $5,000, plus $100 closing costs, and to letters written by Miss Guthrie to defendant to show demand. The receipts are ⊥210 five in number, two being issued to Miss Guthrie and signed by defendant Paul, each in the amount of $1,000, and three issued by a title insurance company in the sums of $1,000, $1,600 and $500, the receipts being made out to Miss Guthrie. The two letters were addressed to Mr. Paul some three years after the property was purchased, and in each of them Miss Guthrie called upon defendant to clear her title to the lot. Plaintiff relies on the receipts and letters to sustain the judgment.

Appellant made an offer of proof that sometime in 1956 Miss Guthrie showed him a letter which was in the nature of an holographic will written by Miss Guthrie and disposing of the property to defendant. The offer was not to establish the document as a lost will, but to indicate the frame of mind of Miss Guthrie. The offer was rejected.

Defendant testified that he is a licensed contractor but not a licensed architect, and he admitted that he did not disclose to Miss Guthrie the fact that he is not a licensed architect. He testified that he undertook two operations for Miss Guthrie. The first was work on a dwelling in Mill Valley, and the second, the preparation of plans and the doing of preliminary work on the subject lot. After he had commenced the latter work he was informed by Dr. Gertrude Jones, the owner of the property, that Miss Guthrie had not made payment of the purchase price and had not received a deed. Thereupon, arrangements were made for the payment of the price in installments. Mr. Paul testified that the first $1,000 payment was delivered to him by Miss Guthrie for deposit with the title insurance company for the account of Dr. Jones, and he signed a receipt to Miss Guthrie. As to the second $1,000, for which he also gave a receipt to Miss Guthrie, he testified that actually the funds were not supplied to him by Miss Guthrie and that, although he gave her a receipt and did not demand its return, he had borrowed the money from a third person. Although this was the subject of spirited contest at the trial, defendant did not produce the third person, and although he testified that he had repaid the third person, he testified that the whole dealing was in cash, and he was unable to produce any cancelled check. He testified that he had given the third person a receipt but that he had not demanded return thereof, nor had he obtained any receipt for the repayment. He further testified that a modernization loan had been obtained for the work performed at 278 Summit Avenue, Mill Valley, in amount $2,500, and that he had paid $1,200 thereof to the ⊥211 title company for the purchase of the subject lot, although the title company receipt was made in favor of Miss Guthrie. Finally, he testified to certain relatively minor work done on the subject lot and to payment made for drawing of plans to one Anderson, who, like defendant himself, is not a licensed architect. The allowance of the $594, mentioned above, covers items of work claimed to have been done on the subject property, with the exception of the plans. Under interrogation by the court, defendant virtually conceded that his only claim to the property was by way of security, and not by way of ownership.

[1] Plaintiff's claim of resulting trust is based upon section 853 of the Civil Code,

which reads: "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." Since all of the receipts were made out to Miss Guthrie, there was substantial evidence to support the conclusion that a trust existed. The claim asserted by defendant at the time of pretrial, that he had an interest in the property other than by way of security, failed completely by his own testimony, referred to above.

[2] At this point, we observe that there was no error in the admission of the two letters sent by Miss Guthrie to Paul. Plaintiff offered them not for the truth of anything said therein, but simply to show demand. This would tend to negative intent of plaintiff to vest title in the defendant, and the letters were admissible. (Wilcox v. Salomone, 118 Cal.App.2d 704, 711, 712, 258 P.2d 845.)

[3] Nor was there error in rejecting the offer of proof of the missing "holographic document," as appellant called it. There was no offer of proof as to the date of the making of this document, so it could not possibly show intent on the part of Miss Guthrie at the time the property was placed in the names of both parties, in 1954; and if it was shown to Paul, as he testified it was, in 1956, the document would not negative the demand made by Miss Guthrie in 1957. The whole offer was of no substance.

[4] The receipts to Miss Guthrie having shown, prima facie, that she paid the entire purchase price, it remains for us to discuss whether, as defendant contends, he is entitled to credit in excess of the amount allowed by the court, and we consider this in two parts: first, claimed credits on the purchase price, and, second, claimed credit for
212 fee for plans. As to the purchase price, there are two items to be considered. The first is the $1,000 payment claimed by Paul to have been made by him despite the fact that he issued the receipt to Miss Guthrie and never retrieved it, and had obtained the funds by the loan described above. This asserted transaction was so unbusinesslike, at best, that the court was entirely free to discredit it. As to the $1,200 payment, the receipt from the title company was made in favor of Miss Guthrie. The check paid into the title company for the benefit of the grantor, Dr. Jones, was Mr. Paul's personal check. He testified that the source of this $1,200 was the modernization loan. It is the position of respondent that the modernization loan of $2,500 having been obtained, substantially less than this figure was required to perform the work, and that the balance of the proceeds of the loan made to Miss Guthrie was refunded to her by Paul in the form of his check in the amount of $1,200. The receipt issued by the title company to Miss Guthrie is substantial evidence to support this contention. Defendant had the opportunity to offer proof of the cost of the work, but instead of offering such proof, he objected to cross-examination on the subject, and presented cancelled checks which show payments of less than $500. Although he testified to other expenses, he did not support his testimony with records. His application for building permit gave the total cost as $500. We need only say that the trial court was not obliged to accept the testimony of Mr. Paul against the receipt in favor of Miss Guthrie.

[5] The court was correct in disallowing the fee for preparation of building plans, because Paul is not licensed as an architect, and had not informed Miss Guthrie of this fact. (Bus. & Prof.Code, §§ 5536, 5537; Force v. Hart, 209 Cal. 600, 605, 289 P. 828; Baer v. Tippett, 34 Cal.App.2d 33, 92 P.2d 1028.) Appellant's contention that he need not have shown licensing because the plans were for his own building, falls with the determination that the property was not his but decedent's. Appellant's point that the plans were merely preliminary is defeated by the plans themselves, which were admitted in evidence and which show themselves to be detailed plans.

Finally, we reject appellant's contention that a stipulation by the parties, made at the end of the trial, that the court should have full authority to declare all the rights of the parties in the property, causes a widening of the issues beyond anything contained in the answer, pretrial statement 213 of defendant, or pretrial conference order, to include the now asserted defenses of laches and the statute of limitations.

Judgment affirmed.

DRAPER, P. J., and SALSMAN, J., concur.

208 Cal.App.2d 426

426 **The PEOPLE, Plaintiff and Respondent,**
v.
James Alfred DALY, Defendant and Appellant.
Cr. 8422.

District Court of Appeal, Second District,
Division 4, California.
Oct. 11, 1962.

Prosecution for possession of marijuana. The Superior Court of Los Angeles County, Maurice C. Sparling, J., entered a judgment of conviction and the defendant appealed. The District Court of Appeal held that the evidence sustained the conviction.

Affirmed.

Poisons ⚿**9**

Evidence sustained conviction of unlawful possession of marijuana. West's Ann.Health & Safety Code, § 11530.

James Alfred Daly, for defendant and appellant, in pro. per.

No appearance for plaintiff and respondent.

PER CURIAM.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with a violation of section 11530 of the Health and Safety Code, possession of a narcotic, marijuana.

Defendant pleaded not guilty. Trial was by the court, trial by jury having been duly waived and pursuant to stipulation of defendant and all counsel the cause was submitted to the court on the testimony contained in the transcript of the proceedings had at the preliminary hearing. It was further stipulated that both defendant and the People reserve the right to put on additional testimony if they so desired. There was additional evidence offered. Defendant testified in his own behalf. Defendant was found guilty as charged.

A probation report was ordered. The criminal proceedings were adjourned and the sheriff was directed to file a petition 427 under section 6451 of the Penal Code in order to determine if the defendant is addicted to narcotics or is in imminent danger of becoming addicted. Two regularly qualified and appointed medical examiners of the County of Los Angeles made an examination of defendant, filed a certificate of such examination and were later sworn and testified at the hearing on such petition. After the hearing, the petition was ordered dismissed by the court and the defendant was remanded to the sheriff to be returned to the trial court for further proceedings. Probation was denied and defendant was sentenced to the state prison for the term prescribed by law. Narcotic and psychiatric care were recommended.

Defendant prosecutes this appeal "from the decision and judgment of the Superior Court."

Defendant applied for appointment of counsel to assist him on this appeal. This court having made an independent investigation of the record and having determined it would be neither advantageous to defendant nor helpful to the court to have counsel appointed denied the application, whereupon defendant prosecutes this appeal from the judgment of conviction in propria persona. Defendant was notified and given ample time to file his opening brief and upon defendant's request this court extended the time to file such brief. None has been filed. The entire record of the preliminary and trial proceedings are before this court, and we have given the appeal full consideration.

There was evidence of the following facts: Vernon S. Dossey of the Los Angeles Police Department testified he was investigating a burglary report near the intersection of Ninth and Gaffey Streets in the County of Los Angeles. He observed defendant driving a 1945 pickup truck with a license plate partially obscured by the body of the truck. He turned on the red light and pulled defendant over to the curb. He observed defendant was leaning to the right in the truck as though reaching for something. He then straightened up and leaned forward as though placing something on the floorboards. The vehicle was swerving backward and forward on the street approximately four to five feet in each direction. The officer observed a white package approximately three by three inches drop from below the vehicle at a point near the curb and at about the center of the truck. The package then struck the street beneath the truck and bounced to a stop in the highway.

Defendant was apprehended and the officer recovered the ⌊428 package. The package contained two packages of cigarette papers and numerous scored white capsules; also a cellophane-wrapped package containing a green, leafy substance. These items were received in evidence as a People's exhibit.

The officer testified he walked up to the defendant who was still seated in the vehicle and asked him to get out of the car. He opened the package and showed all of the contents to defendant and asked him what they were. Defendant stated to him that he knew what the green leafy material was and what the pills were. The officer told defendant it looked to him like marijuana and defendant replied, "You know I can't tell you that. You are trying to put me on the spot." Defendant further stated to him, "I told you what they are and that the green material is marijuana and the pills are amphetamine." The officer asked defendant where he obtained the articles and defendant replied, "You know that I can't tell you that. That is all I am going to say."

On examining the vehicle he found an opening in the floorboards which was approximately six by eight inches in size. Lying on the battery just inside of the opening was a reddish colored cigarette paper package. Another cigarette package was to the left of the opening and beneath the floorboards. The opening went directly to the pavement.

Pursuant to stipulation of defendant and counsel, W. G. Penprase was deemed to have been called, sworn, qualified as an expert forensic chemist and to have testified that he made a clinical examination of the items received in evidence and that he formed the opinion that the 29 grams of green, leafy substance was cannabis sativa (commonly known as marijuana).

Defendant testified in his own behalf. He admitted he owned the 1945 pickup truck and stated he was arrested in the truck in the City of San Pedro; the officer approached him and showed him a package; the officer unwrapped the package in his presence; he told the officer it looked like marijuana to him but he was no expert at it; there was a hole in the floorboard of the car; that this hole was for a service area in the battery. He denied he threw the package from the car or that he let it drop from his truck. He denied the marijuana was his. He admitted he told the officer that he knew what marijuana was because he had done "hard time" for possession.

We find no error in the trial. The evidence fully supports the conviction and the appeal is entirely without merit. The judgment is affirmed.

208 Cal.App.2d 78

⊥78 ⊥**PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Eddie FISHER, Defendant and Appellant.

Cr. 3997.

District Court of Appeal, First District, Division 2, California.

Oct. 1, 1962.

Rehearing Denied Oct. 15, 1962.

Hearing Denied Nov. 28, 1962.

Defendant was convicted on three charges of unlawful sale of narcotics. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., entered judgment, and defendant appealed. The District Court of Appeal, Kaufman, P. J., held, inter alia, that prosecution by means of information instead of indictment for unlawful sale of narcotics was authorized by state Constitution, West's Ann.Const. art. 1, § 8, and did not deprive defendant of any federal right.

Judgment affirmed.

1. Poisons 🔑9

Conviction for unlawful sale of narcotics was supported by substantial evidence. West's Ann.Health & Safety Code, § 11501.

2. Constitutional Law 🔑265

Prosecution by information instead of indictment on charges of unlawful sale of narcotics was authorized by state Constitution and did not deprive defendant of due process of law or any federal right. West's Ann.Health & Safety Code, § 11501; West's Ann.Const. art. 1, § 8.

3. Indictment and Information 🔑2(2)

Federal Constitution guarantees right to indictment by grand jury only in proceedings in federal courts.

4. Criminal Law 🔑1116

Contention that failure to rebook and re-examine defendant after dismissal of original indictment deprived him of due process of law could not be considered on appeal from conviction on information thereafter filed, where matters on which such contention was based were not in record before reviewing court.

5. Criminal Law 🔑1114(1)

Reviewing court cannot consider contention based on matters outside the record.

6. Criminal Law 🔑1032(4), 1044

Contention that failure to rebook and re-examine defendant after dismissal of original indictment deprived him of due process of law could not be raised for first time on appeal from conviction on information subsequently filed, where defendant made no objection to filing of information, no motion to set aside information and no contention that alleged delay was fatal or prejudicial.

7. Criminal Law 🔑419(1)

Officers' testimony as to conversation between informer-participant and third person, overheard by means of transmitter placed in informer-participant's automobile, concerning arrangements for sale of heroin by defendant to informer-participant, which was later observed by officers, was not inadmissible as hearsay in prosecution for sale of narcotics. West's Ann.Code Civ. Proc. § 1845; West's Ann.Health & Safety Code, § 11501.

8. Criminal Law 🔑394.3
Telecommunications 🔑495

Where tape recording of defendant's telephone conversation regarding sale of heroin was made in presence of police officer with consent of other party to conversation, there was no invasion of privacy or violation of law, and, in prosecution for sale of narcotics, recording was admissible in evidence over objection that it was obtained by illegal wire tap. West's Ann. Health & Safety Code, § 11501.

9. Criminal Law 🔑662(1)

Right of defendant to be confronted with witnesses is right to have witnesses who testify do so in presence of and subject to cross-examination by defendant, and prosecution is not required to call any particular witness or to produce all evidence relating to charge so long as all material evidence is fairly presented in such manner as to accord a fair trial to defendant.

10. Criminal Law 🔑543(1)

Testimony taken at preliminary examination, at which defendant had opportunity to cross-examine, may be read at trial in absence of witness upon satisfactory showing that with due diligence he could not be found within state. West's Ann.Pen.Code, § 686.

11. Criminal Law 🔑543(1), 1153(6)

What constitutes due diligence to secure presence of witness as prerequisite to introducing his previous testimony is largely within discretion of trial court and depends upon facts of particular case, and trial court's decision will not be disturbed on appeal except for abuse of discretion. West's Ann.Pen.Code, § 686.

12. Criminal Law 🔑543(2)

Permitting testimony given by informer-participant at preliminary examination at which defendant had opportunity to cross-examine, to be read at trial on charges of unlawful sale of narcotics, in absence of such witness, was not abuse of discretion, in view of showing of due diligence to secure presence of witness. West's Ann. Health & Safety Code, § 11501; West's Ann.Pen.Code, § 686.

◆

Edward Fisher, Los Padres, appellant in pro. per.

Stanley Mosk, Atty. Gen. of the State of California, John S. McInerny, Eric Collins, Deputies Atty. Gen., San Francisco, for respondent.

⊥80 ⊥KAUFMAN, Presiding Justice.

This is an appeal in pro per from a judgment rendered on a jury verdict finding the appellant, Eddie Fisher, guilty of three counts of the sale of narcotics, in violation of section 11501 of the Health and Safety Code.

[1] On this appeal, appellant raises numerous contentions, many of which relate to the credibility of witnesses and the sufficiency of the evidence to sustain the judgment. We have examined the record and conclude that the judgment is supported by substantial evidence and that it is not necessary to discuss all of the contentions in detail. We will, therefore, concern ourselves only with contentions relating to matters of law.

Appellant contends that: (1) he was denied due process of law and deprived of his federal right to indictment by Grand Jury because he was prosecuted by information; (2) the court was without jurisdiction as he was not re-booked and re-examined after dismissal of the original indictment; (3) certain hearsay evidence and evidence obtained by an illegal wire tap were erroneously admitted; and (4) the absence of the informer-participant at the trial deprived him of due process of law. There is no merit in any of these contentions.

[2, 3] The first contention on appeal is that appellant was denied his constitutional right to be indicted by a Grand Jury because he was charged by an information. Appellant contends that as a result of this fatal error in the proceedings, his detention is unlawful, and the trial court was without jurisdiction. The state Constitution authorized the prosecution by way of an information instead of indictment (art. I, § 8). It has long been well established that the federal Constitution guarantees the right to Grand Jury indictments only to proceedings in the federal courts (Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232), and that the proceeding by information is not a denial of a federal right (People v. Sullivan, 101 Cal.App.2d 322, 225 P.2d 645).

[4–6] Appellant next contends that he was deprived of due process of law because he was not re-booked and re-examined after the dismissal of the original indictment. The matters which form the basis of this argument are not in the record before us. We cannot consider a contention based upon matters ⊥outside the record (People v. ⊥81
Grey, 180 Cal.App.2d 683, 4 Cal.Rptr. 561). Furthermore, no objection was made by the appellant to the filing of the information

nor was any motion to set aside the information made nor any contention made that the alleged delay was fatal or prejudicial, and these matters cannot be raised for the first time on appeal (People v. Feeley, 179 Cal.App.2d 100, 3 Cal.Rptr. 529).

[7] Appellant next contends that the May 3 conversation between Hawkins and the informer-participant, one Rosas, was inadmissible hearsay. The record reveals that Rosas was searched and sent to the home of appellant to buy narcotics. A transmitter was placed in Rosas' automobile and two police officers followed in another automobile equipped with a receiver. After arriving at the appellant's home, Rosas honked his horn. One Hawkins came out and after ascertaining that Rosas wanted to "score", arrangements were discussed for the appellant to meet Rosas later at Rosas' home. This conversation was overheard by the officers on their transmitter. Subsequently, the officers observed the sale of one capsule of heroin to Rosas by the appellant. This sale took place in front of Rosas' house. There is no question that the evidence of conversation between Hawkins and the informer was properly admitted (People v. Bodkin, 196 Cal.App.2d 412, 16 Cal.Rptr. 506; On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270). No hearsay question is involved as the officers testified as to what they heard over the receiver of the transmitter (Code Civ. Proc., § 1845).

[8] We turn next to appellant's contention that the record of his telephone conversation with Rosas on May 5 was the result of illegal wire tap. The uncontroverted evidence indicates that the telephone conversation was recorded by an induction coil attached to a tape recorder. A police officer was present when Rosas made the call. The record reveals that on May 5, 1960, Rosas telephoned the appellant at the restaurant where he worked and arranged to buy some heroin. The appellant said he could not leave the restaurant where he worked but would send one Al Loshard out with the narcotics. The officers watched Rosas drive to the restaurant and receive two capsules of heroin from Loshard. Rosas, one of the participants in the conversation, consented to the recording. Under these circumstances, there is no invasion of privacy and no violation of the law (People v. Hughes, 203 A.C.A. 671, 21 Cal. Rptr. 668; People v. Morgan, 197 A.C.A. 87, 16 Cal.Rptr. 838; People v. McShann, 177 Cal.App.2d 195,⊥82 2 Cal.Rptr. 71; People v. Atchley, 53 Cal.2d 160, 346 P.2d 764).

[9] Finally, appellant argues that the absence of Rosas at the trial deprived him of due process and that the trial court erroneously admitted the record of Rosas' testimony at the preliminary examination. As we recently pointed out in People v. McKoy, 193 Cal.App.2d 104 at 108, 13 Cal. Rptr. 809, the right of an accused to be confronted with witnesses is the right to have witnesses who testify do so in the presence of and subject to cross-examination by the defendant. The prosecution is not required to call any particular witness, nor to put on all the evidence relating to a charge so long as all material evidence bearing thereon is fairly presented in such a manner as to accord to the defendant a fair trial.

[10–12] As to Rosas' testimony at the preliminary examination where the appellant had an opportunity to cross-examine, such testimony may be read at the trial upon a satisfactory showing that he could not be with due diligence found within the state (People v. Hanz, 190 Cal.App.2d 793, 12 Cal.Rptr. 282). The record reveals that a subpoena was issued for Rosas, that the officers twice checked at the home of Rosas' parents, at the public utilities office where he worked, at the post office, and at another address obtained from the bureau of criminal investigation. The trial court ruled that under these circumstances, there had been due diligence pursuant to section 686 of the Penal Code and permitted the reading of the testimony. What constitutes due diligence to secure the presence of a witness is largely within the discretion of the trial court and depends upon the facts of each particular case. The decision of a trial judge on the question of diligence and of the propriety of receiving or refusing evidence will not be disturbed on appeal unless it appears there was an abuse of discretion (People v. Cavazos, 25 Cal.2d 198, 153 P.2d 177). We can find no abuse of discretion here (cf. People v. Gardner, 192 Cal.App.2d 357, 13 Cal.Rptr. 477).

Judgment affirmed.

SHOEMAKER and AGEE, JJ., concur.

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208 Cal.App.2d 496

496 The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Max J. GUTKOWSKY, Defendant and Appellant.

Cr. 8174.

District Court of Appeal, Second District, Division 2, California.

Oct. 15, 1962.

Defendant was convicted in the Superior Court, Los Angeles County, Walter R. Evans, J., of forgery, and he appealed. The District Court of Appeal, Ashburn, J., held that where corpus delicti was proved by independent evidence that defendant tendered certain checks to merchants drawn by purported makers who had no accounts at banks on which checks were drawn, defendant's confession that he had made up names of the makers and knew the checks were no good at time they were presented was competent to connect defendant with commission of the crime.

Judgment affirmed.

1. Criminal Law ⚷982.6(1)

There was no error in denying defendant a continuance at time set for sentencing and hearing of probation application on ground defendant was releasing public defender who had represented him and desired other counsel, where defendant had been represented at his preliminary hearing, did not testify then or at his trial, and no legal questions of any substantiality emerged from the record.

2. Criminal Law ⚷517(4)

Where corpus delicti was proved by independent evidence that defendant tendered certain checks to merchants drawn by purported makers who had no accounts at banks on which checks were drawn, defendant's confession that he had made up names of the makers and knew the checks were no good at time they were presented was competent to connect defendant with commission of the crime.

◆

Max J. Gutkowsky, in pro. per.

No appearance, for respondent.

ASHBURN, Justice.

This court having denied four applications for appointment of counsel, notice having been given under Rule 17(a) and no opening brief having been filed by or on behalf of the appellant, we have submitted the appeal upon the merits.

Charged in three counts with forgery of fictitious name (Pen.Code § 470), defendant, who was represented at the trial by counsel of his own choice, waived a jury trial and was convicted of all three charges. The court found to be true allegations of two prior convictions of felony, viz., burglary in Illinois and forgery and robbery in California, for each of which convictions he served a term in state prison. 497 Probation was denied and sentences in the instant case were ordered to run concurrently.

The case was submitted upon the transcript of the preliminary hearing with the understanding that any exhibits that were received in evidence at that time be received in evidence at the superior court trial. The trial judge announced that he had read the preliminary transcript and both sides rested, whereupon the judge said: "I don't think there is any doubt in this matter. Find the defendant guilty as charged in Counts I, II and III of the Information on file herein." This was on October 16, 1961.

[1] On November 21, 1961, the time set for sentencing and hearing of probation application, defendant through his attorney, Mr. Dunham, sought a further continuance. The attorney said he did not know what ground his client had and so: "THE COURT: What is the ground for a continuance? THE DEFENDANT: I am releasing Mr. Dunham as of now, and I have Mrs. Root and Mr. McPherson handling it, and—THE COURT: Mr. Gutkowsky, Mrs. Root has called the court this morning, and indicated she is not representing you, and does not intend to, so I see no reason for any further delay in this matter * * *. THE DEFENDANT: Well, then, I would like to have an attorney, then. THE COURT: Well, I am sorry, Mr. Gutkowsky. This matter has been going on now for some time, and I see nothing that could be gained by additional counsel or other counsel." Thereupon sentence was imposed. Manifestly there was no error in this ruling.

At the preliminary hearing defendant was represented by a deputy county public defender. He did not testify then or at his trial in the superior court. No legal questions of any substantiality emerge from the record, no question of admissibility of evidence or of involuntary nature of confession, no problem of weighing conflicting evidence.

It appears without conflict that defendant on Saturday, June 26, 1960, presented to Sidney Bush a check drawn on California Bank, Sixth and Western Branch, payable to defendant and purporting to be signed by John J. Gorman; it was endorsed by defendant in Bush's presence. Defendant had selected certain items of merchandise and gave the check to Bush in payment, receiving $18.05 in change. Then defendant selected additional merchandise and tendered to Bush another check for $78.98 drawn on Security-First National Bank, Sixth and Oxford Branch, payable to defendant and purporting to be signed by Frank C. Kempo; defendant ⊥498 also endorsed this in Bush's presence. When Bush saw this check he told defendant there seemed to be a similarity in the signatures of John J. Gorman and Frank C. Kempo; that he should leave all merchandise and return on Monday when Bush could check with the banks and see if the checks were good and he would then deliver the merchandise. Defendant left the goods but did not return.

On June 24, 1960, defendant bought from Lilly Freistat, who ran a jewelry store, three items and gave her in payment three checks which were made payable to him. One of them is the subject of Count III of the information—a check for $86.45 dated June 24, 1960, drawn on California Bank, Sixth and Western Branch, and purporting to be signed by Fredrick C. Eberly. Defendant endorsed it. Mrs. Freistat told defendant she would keep the merchandise until she cashed the checks in the morning. He said he would return at 6:00 p. m. and take her to the Hilton Hotel, would there cash the check, give her the cash and then pick up the merchandise. He did not return. The purported makers had no accounts at the California Bank and Frank C. Kempo had no account at Security-First National Bank.

Over a year after occurrence of the above events and a few days before the preliminary hearing defendant told Investigating Officer C. W. Rogers that the name on the back of each of the three checks (exhibits 1, 2 and 3) was his; that he got the checks from the office of J. C. Williams Company and made out the entire face of the three checks, including the names of the makers; that he made up those names; that he presented the checks to Mr. Bush and Mrs. Freistat and knew at that time they were no good. That is the whole story.

[2] The corpus delicti having been proved by independent evidence, defendant's confession was competent to connect

him with commission of the crime. (People v. Cullen, 37 Cal.2d 614, 624–625, 234 P.2d 1.)

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

208 Cal.App.2d 338

38 **The CITY OF LOS ANGELES, a municipal corporation, and Department of Water and Power of the City of Los Angeles, a municipal corporation, Plaintiffs and Respondents,**

v.

Eugenia IGNA, Defendant and Appellant.

Civ. 26014.

District Court of Appeal, Second District, Division 3, California.

Oct. 10, 1962.

Rehearing Denied Nov. 8, 1962.

Action by easement owners to quiet title to easement for electric power transmission and for injunctive relief to compel removal of obstructions. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Shinn, P. J., held that reservation clause in deed granting easement was not exclusive, but constituted part of definition of the easement and not a statement of rights which attached to ownership of the fee interest, and therefore fee owner could only be excluded from those uses inconsistent with rights granted under the easement or which interfered with such rights.

Judgment modified in accordance with opinion, and as modified affirmed.

1. Appeal and Error ⚷1135

Portions of decree entered in action by easement owners for a decree quieting title and for injunctive relief, ordering removal of obstructions placed upon easement by defendant, had to be affirmed where appeal was on a judgment roll, and court upon evidence not made a part of the record on appeal found objects placed upon easement by defendant were obstructions to the easement as expressly granted.

2. Easements ⚷38

Generally, a servient owner has right to use the land in any way not inconsistent with rights granted under an easement or in any such way as not to encroach upon or interfere with means and facilities which owner of the easement might lawfully use.

3. Easements ⚷61(10)

Reservation clause in deed granting easement was not exclusive, but constituted part of definition of the easement and not a statement of rights which attached to ownership of the fee interest, and therefore fee owner could only be excluded from those uses inconsistent with rights granted under the easement or which interfered with such rights.

David C. Marcus, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Gilmore Tillman, Chief Asst. City Atty., O. M. Lloyd, Deputy City Atty., for respondents.

SHINN, Presiding Justice. 339

The question on appeal concerns the extent of the burden on the servient tenement of an easement, presently existing in behalf of the plaintiff-respondent, City of Los Angeles, and the Department of Water and Power thereof, both of whom hereinafter are referred to jointly as the "city." There is no controversy as to the existence of the easement in favor of the present plaintiffs. The easement in question was acquired in 1936 for the purpose of bringing into Los Angeles the power to be generated at Hoover Dam, then under construction.

The source of respondent's title to the subject right of way is in two deeds. There being no dispute as to the wording of either, and the one being the same as the other with minor variances of no significance in this case, the two will be construed and referred to as one.

Appellant, Eugenia Igna, owns and operates a trailer park. The business consists of the renting of mobile homes, space and living quarters to tenants. The trailer park is located upon lot 12, as described in the findings below, a portion of which is burdened by the 120 foot power transmission right of way of respondents.

Plaintiff, the city, brought suit to quiet title to the easement and right of way and for injunctive relief to compel the removal of certain objects complained of as obstructions and to enforce the proposed quiet title decree excluding uses of the easement area by the servient owners other than limited agricultural and mineral uses expressly reserved.

The obstructions complained of were the use of the easement area by appellant for the parking of automobiles and other vehicles by the tenants of the trailer park, by the maintenance in the easement of one of said mobile homes, or trailers, and portions of other such trailers, and by the maintenance in the easement of fences, an automobile barrier, consisting of old power poles, a metal trash bin, a water pipe, or faucet, 2 feet high, a metal post and sign, 15 feet high, and the accumulation of miscellaneous items in the easement area. Appellant has blacktopped a portion thereof and has installed and maintained septic tanks, cesspools, trees, shrubbery, etc., in furtherance of her enterprise but denies that she has encroached upon the easement 340 of the city and asserts that she, being the fee owner of the premises in question, is entitled to the possession of the premises and to the free and complete enjoyment thereof, subject to the claimed easement of the city.

The granting words in the deed convey "all and every those permanent and *exclusive* easements and rights of way * * *" (emphasis added) for the expressed purposes of constructing and maintaining, etc., "poles, towers, wires, cables, and/or any other structures, including ground wires both overhead and/or underground necessary or convenient * * * together with the right and easement for roads, ingress, egress and other convenient purposes needed or desired at any time * * * and the right and easement to construct, reconstruct, maintain and operate same and to clear and keep said real property free from explosives, buildings, structures, brush and natural wood growth, and inflammable materials, for the protection from fire, and/or other hazards; in, under, upon, over and across all that certain real property * * *" (followed by a description of that portion of the servient tenement bound by the easement).

The reservation clause, on the other hand, is narrowly worded by the use of words "excepting and reserving unto the grantor *only* such grazing, agricultural and mineral rights and the right to maintain, cultivate, *use*, plant, and replant said real property * * * and erect noninflammable fences upon said real property, as will not interfere with or prohibit the free and complete use and enjoyment by grantee, its successors or assigns, of the rights or easements hereby granted, *provided, however, that no building, inflammable fence, other structure, material or explosive of whatever nature or kind shall be placed, maintained or erected upon any portion of the above described real property by grantor, his successors or assigns.*" (Emphasis added.)

The court found and by its judgment decreed that the city is the owner of an exclusive easement, with all rights pertinent thereto as listed in the deed; that appellant is the owner of the fee with such reserved rights, and only such rights, over the easement-bound portion of the property as expressed in the reservation clause, and further ordered, directed and enjoined defendant Igna to remove within 30 days after notice all of said obstructions then within the boundaries of the right of way except a 50 foot chain link fence.

Defendant Igna was further "restrained, enjoined and debarred from erecting, stor-

⊥341 ing, placing, parking, or maintaining said obstructions, or any other obstructions, upon said real property, within the boundaries of said right of way, or causing or inducing the same to be done by others, and from conducting business, commercial, industrial, or residential activities thereon * * *" other than as reserved in the deed of easement.

Neither appellant nor respondent claims that there is any ambiguity or uncertainty and they refer only to the terms of the deed.

[1] This is an appeal on the judgment roll. The trial court upon evidence not made a part of the record on appeal found the objects placed upon the easement by defendants to be obstructions to the easement as expressly granted (for the reasonableness of the judgment in this regard, see Collins v. Alabama Power Co., 214 Ala. 643, 108 So. 868, 46 A.L.R. 1459; Kesterson v. California-Oregon Power Co., 114 Or. 22, 228 P. 1092; 17 Am.Jur., Easements, section 130; Carolina Power & L. Co. v. Bowman (1949), 229 N.C. 682, 51 S.E.2d 191, 6 A.L.R.2d 194; McCormick v. Great Western Power Co., 214 Cal. 658, 8 P.2d 145, 81 A.L.R. 678), and those portions of the decree ordering removal of such obstructions must be affirmed. (See Pasadena v. California-Michigan, etc., Co., 17 Cal.2d 576, 579, 110 P.2d 983, 133 A.L.R. 1186.)

[2] The remaining question is whether the judgment is too broad, as contended by appellant, in that it states in part that the appellant does not have "any rights in said real property within the boundaries of said right of way whatsoever * * *" except as reserved in the deed, and enjoins defendant from using the property for any purpose except as reserved in the deed. This contention is well-founded since generally the servient owner has the right to use the land in any way not inconsistent with the rights granted under the easement or in such way as not to encroach upon or interfere with the means and facilities which the owner of the easement may lawfully use. (6 A.L.R.2d 205; 1962 Supplement Issue 99; Horky v. Kentucky Utilities Co., Ky., 336 S.W.2d 588; Pasadena v. California-Michigan, etc., Co., supra, 17 Cal.2d 576, 110 P.2d 983, 133 A.L.R. 1186.)

[3] The city's argument *expressio unius est exclusio alterius* is not applicable to the case at bar. It is not inconsistent to maintain the fee together with the rights appurtenant thereto while at the same time reserving from an easement granted out of said fee a more limited expressed right, for the reservation is a part of the definition of the easement and ⊥342 is not a statement of the rights which attach to the ownership of the fee interest.

The judgment must be modified so as to exclude only those uses by the servient owner which are shown to be inconsistent with the rights granted under the easement or which interfere with those rights.

Paragraph II of the judgment is stricken and the following is substituted therefor:

"Defendant Igna has the right to use said property in any way which does not interfere with plaintiffs' use of said property as set forth in the deeds from Anita M. Baldwin and the City of Covina, respectively; provided, however, that defendant Igna may not place or maintain on said premises any building, or other structure, material or explosive, except nonflammable fences.

The following are hereby declared to be obstructions to the plaintiffs' lawful enjoyment of said easement:

The motor vehicles, trailers, mobile homes, metal trash bins, water pipes, metal post and sign, wooden fences, barrier of power poles, clothes lines, children's playground equipment, piles of old boards, brush and miscellaneous junk and litter, all of which were on the premises prior to the commencement of this action."

Paragraph VI of the judgment is stricken and the following is substituted therefor:

"Defendants, and each of them, and their successors, heirs and assigns are forever enjoined from using said land in any way inconsistent with the rights granted under easement or in such a way as to encroach upon or interfere with the means and facilities which the owner of the easement may lawfully use."

The judgment is modified to conform to the foregoing changes and, as modified, is affirmed.

FORD and FILES, JJ., concur.

208 Cal.App.2d 390

⊥390 ⊥ **Frank E. LUNDQUIST, Petitioner and Appellant,**

v.

MARINE ENGINEERS BENEFICIAL ASSOCIATION NO. 97, INC., et al., Respondents.

Civ. 19852.

District Court of Appeal, First District, Division 1, California.

Oct. 11. 1962.

As Corrected on Denial of Rehearing Nov. 2, 1962.

Hearing Denied Dec. 5, 1962.

Proceeding for a writ of mandate to compel reinstatement in union and for damages and costs of the suit. The Superior Court, County of San Francisco, Theresa Meikle, J., rendered judgment ordering reinstatement but denying damages and the petitioner appealed. The District Court of Appeal, Bray, P. J., held that evidence supported finding that petitioner suffered no damage from wrongful expulsion from defendant marine engineers' union, in view of substantial showing that he would not have taken seagoing employment if his status would have permitted it and lack of evidence of physical and mental pain, humiliation and segregation from expulsion.

Affirmed.

1. Appeal and Error 🔑989
Damages 🔑163(1)

Burden of proving damages with reasonable certainty was on petitioner, and reviewing court's duty, on appeal questioning denial of damages, was not to be concerned with weight of evidence but with determining whether there was substantial evidence to support finding that petitioner had suffered no pecuniary damage.

2. Labor Relations 🔑119

Evidence supported finding that petitioner suffered no damage from wrongful expulsion from defendant marine engineers' union, in view of substantial showing that he would not have taken seagoing employment if his status would have permitted it and lack of evidence of physical and mental pain, humiliation and segregation from expulsion.

3. Labor Relations 🔑120

Damages for shame and humiliation caused by wrongful suspension or expulsion from union are recoverable but there must be evidence from which court may determine that injury was suffered in such respect.

4. Labor Relations 🔑119

Findings as to whether petitioner had been wrongfully denied reinstatement in union and whether he had been thereby monetarily damaged involved two separate elements, and the burden of proof on each was on petitioner.

5. Appeal and Error 🔑170(1)

Unless a theory of damages is presented to trial court it may not be considered on appeal.

6. Damages 🔑87(2)

Statute providing for exemplary damages is preconditioned on recovery of actual damages. West's Ann.Civ.Code, § 3294.

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Marshall W. Krause, Staff Counsel, American Civil Liberties Union of Northern California, San Francisco, for appellant.

Roos, Jennings, Haid & Gartland, Eugene L. Gartland, John Victor Tilly, San Francisco, for respondents.

⊥ BRAY, Presiding Justice. ⊥392

Petitioner appeals from that portion of the judgment ordering "that petitioner recover no damages from respondents."

QUESTION PRESENTED.

Was there substantial evidence that petitioner suffered no damage from his wrongful exclusion from respondent, a trade union?

RECORD.

Petitioner filed a petition for writ of mandate in the San Francisco Superior Court praying that he be restored to the rights and privileges of membership in respondent union, and for damages and costs of suit. After a trial, judgment was entered ordering petitioner reinstated as a member, but denying him damages. His appeal is only as to the denial of damages.

Petitioner has been a marine engineer since August, 1920, when he received his license and his membership in the union. The union, its president and its business manager refused to reinstate petitioner to membership from November, 1956, to July, 1960. Under the particular conditions prevailing in the employment of marine engineers this refusal practically deprived petitioner of his right to earn a living from his profession of marine engineer.

Sometime in 1951 petitioner was "screened" by the United States Coast Guard under the authority of the Magnuson Act. (50 U.S.C.A. §§ 191, 192, 194.) This meant that petitioner could not sail under his license. Because he could not sail, and because union dues would be a drain on his finances, petitioner received a "withdrawal card" from the union. Under the constitution and by laws of the association of which 393 ⊥ the union is a subordinate, petitioner was entitled to reinstatement on the payment of certain fees, provided that he had not sailed as a marine engineer during the time of his withdrawal. In 1955 Parker v. Lester (9 Cir.) 227 F.2d 708, was decided, declaring the entire Coast Guard screening program unconstitutional. Thereupon, petitioner applied for and received his validated Coast Guard license to sail as a marine engineer.

On November 27, 1956, petitioner applied to respondent union for reinstatement. He was neither granted nor denied reinstatement until on July 1, 1960, the trial court in this proceeding ordered him reinstated. The court found that petitioner had been wrongfully excluded from the rights and privileges of union membership from the time of his application for reinstatement in 1956, but found that he had suffered no monetary or financial damages because of said wrongful exclusion.

DAMAGES.

[1] The burden of proving damages with reasonable certainty was on petitioner. (Tremeroli v. Austin Trailer Equip. Co. (1951) 102 Cal.App.2d 464, 480, 227 P.2d 923.) Our duty on this appeal is not to be concerned with the weight of evidence but with the determination of whether there is substantial evidence, including the reasonable inferences therefrom, to support the court's finding that petitioner suffered no pecuniary damage from his wrongful exclusion by the union. (Overton v. Vita-Food Corp. (1949) 94 Cal.App.2d 367, 370, 210 P.2d 757; Estate of Bristol (1943) 23 Cal.2d 221, 223–224, 143 P.2d 689.) Apparently it was the trial court's determination that petitioner would not have gone to sea as a marine engineer in the period 1956 to time of trial even had he at the time of application been reinstated in the union. Supporting this determination is the evidence concerning petitioner's employment record. In the 13 year period from 1937 to 1950 he spent only 17 or 18 months at sea. In 1941 he withdrew from the union and took a shoreside job in 1942. From 1942 to 1947 he was employed by the War Shipping Board as a marine surveyor. From 1940 to 1950 his total time at sea amounted to only approximately 13 months. In 1951 his license was withdrawn by the Coast Guard. (The union had nothing to do with this matter.) The very day in November, 1956, when his license ⊥394 was restored he returned to his old position as a marine surveyor with the federal government. His position as marine surveyor terminated March 20, 1957. He was then within 7 months of his 65th birthday. There was evidence that it was then the general practice of certain steam-

ship companies to impose a 65-year age limit for employment on their ships, although the union in 1949 negotiated a hiring hall agreement with management whereby requests for employment were filled on a rotating basis without regard to age. From the time petitioner's position as marine surveyor terminated until the time of trial, petioner was engaged in managing, repairing and maintaining rental units which belonged to him.

It was stipulated that marine engineer jobs were available at the time petitioner applied for reinstatement in the union. Petitioner testified that he had desired reinstatement as he thought that he would be able to get a permanent "good job and recoup some of my earnings that I had lost during the ensuing years." However, in spite of this statement, a reasonable inference could be drawn (and was drawn by the court) that during the denial of his reinstatement in the union he did not intend to go out to sea, even for the 6 months' employment which would have qualified him for night relief work on vessels in port. When asked by the dispatcher of the union if he intended to come back into the union with the intent of creating dissension or of going to sea, petitioner answered that his reason for going back was none of the manager's business.

[2] While the evidence would possibly have supported a finding that petitioner would have taken seagoing employment if his union status would have permitted it, there is substantial evidence that he would not have done so, and that therefore his nonreinstatement caused him no loss of wages.

This brings us to the question as to whether there was substantial evidence that he suffered no monetary damages for physical and mental pain, humiliation and degradation.[1]

[3] Damages for shame and humiliation caused by wrongful suspension or expulsion from a union are recoverable. (Carson v. Glass Bottle Blowers Assn. (1951), 37 Cal.2d 134, 142, 231 P.2d 6, 21 A.L.R.2d 1387; Taylor v. Marine Cooks & Stewards Assn. (1953) 117 Cal.App.2d 556, 562–563, 256 P.2d 595.) The "difficulties of assessing these damages with anything like mathematical accuracy should not be allowed to defeat an award reasonably supported by the evidence." (Taylor, supra, and cases there cited, pp. 563–564, 256 P.2d p. 600.)

Petitioner testified that the union's action had been a terrific blow to his pride and that being denied the opportunity to follow his profession was "an affront."

Although damages are recoverable there must be evidence from which the court may determine that the petitioner did suffer injury in these respects. Petitioner referred to the blow to his pride, and that the action of the union "is more of an affront, I would say, besides the economic question that figures in." Having in mind that the court felt from petitioner's testimony that even if reinstated petitioner would not have taken seagoing employment, there is no indication that petitioner would have participated in the union activities or association with its members. Just how the court could have measured damages upon the meagre testimony concerning humiliation does not appear. At no time did petitioner testify that the situation worried him. A reading of the transcript of testimony indicates that it was probably petitioner's theory that the wrongful act of the union alone was sufficient proof of damages in all the categories charged. This was not a sufficient showing upon which the court could award damages.

Prosser in Insult and Outrage, (1956) 44 California Law Review, pages 40, 43, points out that generally for a recovery for emotional distress, there should be some showing of either "physical consequences which can be attested objectively" or of "defendant's conduct and the circumstances of the case." The showing made in the trial court was not sufficient to meet this test.

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[1] Petitioner conceded that he had suffered no physical disability.

[4] Petitioner urges that the findings are inconsistent because the court found that he had wrongfully been denied reinstatement in the union and yet the court refused to find that petitioner had thereby been monetarily damaged. These are two separate elements, the burden of proof of each being on the petitioner. As pointed out, the mere fact of wrongful denial of membership does not in itself prove monetary damage.

Petitioner contends that he was deprived of the right to the status of membership, entitling him "to participate in union activities by voting, running for office, associating with his fellows" and otherwise participating in the rights of a member in good standing.

396 ⊥ [5] However, this contention was not in issue in the trial court. In his petition, he stated that he had been "deprived of his rights as a member of said respondent trade union * * *." He then alleges inability to secure employment, and loss of earnings in the sum of $10,500, and then states that at the trial he will ask to insert such "additional damages as may be suffered by your petitioner from the date hereof to the date of trial." The petition then alleges damages for pain and suffering and humiliation, and asks for exemplary damages. Petitioner did not seek to amend the complaint to seek damages for loss of association. Unless a theory of damages is presented to the trial court it may not be considered on appeal. (Kantlehner v. Bisceglia (1951) 102 Cal.App.2d 1, 6, 226 P.2d 636.) Moreover, no evidence was offered upon which the trial court could place a valuation on petitioner's being deprived of these rights.

[6] So far as exemplary damages are concerned, petitioner concedes that section 3294, Civil Code (providing for exemplary damages) is preconditioned on the recovery of actual damages. (Sasser v. Miles & Sons Trucking Service (1953) 119 Cal.App.2d 239, 243–244, 259 P.2d 488.)

Petitioner complains of the sustaining of objections to certain questions asked his expert, Howard A. Thor. The questions related to showing that employment as a marine engineer would have been available to petitioner had he had his membership restored when he applied therefor. Mr. Thor did testify at considerable length on the subject, discussing wages and the availability of employment, including that of night shore work provided petitioner spent six months at sea. In view of the fact that respondent stipulated that jobs would have been available, and that the court found that petitioner did not intend to go to sea, there could have been no prejudice to petitioner even if the court's rulings were erroneous.

Judgment affirmed.

SULLIVAN and MOLINARI, JJ., concur.

Hearing denied; WHITE, J., sitting pro tem.

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208 Cal.App.2d 452

⊥ **The PEOPLE, Plaintiff and Appellant,** 452
v.
Edward Louis ARGUELLO, Defendant and Respondent.
Cr. 1835.

District Court of Appeal, Fourth District, California.
Oct. 11, 1962.

Rehearing Denied Oct. 26, 1962.
Hearing Denied Dec. 5, 1962.

From an order of Joseph A. Kilgarif, J., granting a writ of habeas corpus the People appealed. The District Court of Appeal, Coughlin, J., held that order issuing writ of habeas corpus releasing defendant, who had been indicted for murder, from custody on ground that he had not been brought to trial within 60 days after finding of indictment was invalid as such remedy was not available under statute which prescribed the dismissal of action as the remedy.

Order reversed.

1. Habeas Corpus 🔑25.1(4)

Habeas corpus did not lie to enforce provision of statute which requires defendant to be brought to trial within 60 days after finding of indictment, unless good cause is shown. West's Ann.Pen.Code, § 1382, subd. 2; West's Ann.Const. art. 1, § 13.

2. Courts ⇨91(1)

Determination of superior court and of District Court of Appeal as to use of writ of habeas corpus to enforce statutory provision requiring trial within 60 days of finding of indictment was governed by Supreme Court decision. West's Ann.Pen.Code, § 1382, subd. 2.

3. Constitutional Law ⇨29
Criminal Law ⇨574
Habeas Corpus ⇨25.1(4)

Constitutional guarantee of speedy trial is self-executing and will be enforced by writ of habeas corpus if no other plain, speedy or adequate remedy is available, but statute requiring that defendant be brought to trial within 60 days after finding of indictment is a legislative construction of constitutional provision which affords plain, speedy and adequate remedy of dismissal of action. West's Ann.Pen.Code, § 1382, subd. 2; West's Ann.Const. art. 1, § 13.

4. Habeas Corpus ⇨25.1(4)

Writ of habeas corpus order releasing defendant, who had been indicted for murder, from custody on ground that he had not been brought to trial within 60 days after finding of indictment was invalid as such remedy was not available under statute which prescribed dismissal of action as remedy. West's Ann.Pen.Code, § 1382, subd. 2; West's Ann.Const. art. 1, § 13.

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Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., James Don Keller, Dist. Atty., and Donald L. Meloche, Deputy Dist. Atty., for plaintiff and appellant.

George A. Westover, San Diego, and A. Brigham Rose, Los Angeles, for defendant and respondent.

⊥453 ⊥COUGHLIN, Justice.

This is an appeal from an order granting a writ of habeas corpus which directed that the defendant and respondent above named, who had been indicted for⊥murder, ⊥454 be released from custody, upon the ground that he had not been given a speedy trial.

The defendant was arrested on November 9, 1961, for an alleged murder committed on that day. A complaint charging him therewith was filed in the Municipal Court of San Diego on November 13, 1961. A preliminary hearing thereon was scheduled for December 4, 1961, but, over his objection, on motion of the district attorney, was continued to December 13, 1961, and on the latter date the complaint was dismissed. In the meantime, i. e., on December 7, 1961, he had been indicted for the same offense; on December 11, 1961 was arraigned upon and entered a plea of not guilty to the charge contained in the indictment; and his trial was set for January 29, 1962. Prior to the trial date, i. e., on January 26, 1962, on motion and over his objection, a continuance was granted and the trial reset for February 26, 1962. Four days before the second trial date, i. e., on February 21, 1962, a further continuance was granted, on motion and over his objection, and his trial reset for March 26, 1962. Thereafter he filed the instant petition for a writ of habeas corpus, which was heard and granted on March 9, 1962.

On January 25, 1962 and Febraury 20, 1962, respectively being the day before the first and second motions for a continuance were heard, the defendant's attorney was advised by telephone that the motion in question would be made the following day. The defendant and his attorney appeared at the time the motions were heard; made no requests for a continuance of the hearings; participated therein; and opposed the motions. At such hearing evidence was adduced which was legally sufficient to support a finding that a material witness for the People was seriously ill and would be unable to attend upon the dates set for the trial. It is not necessary that we detail the subject evidence. (Fomco, Inc. v. Joe Maggio, Inc., 55 Cal.2d 162, 164, 10 Cal. Rptr. 462, 358 P.2d 918; Edwards v. Container Kraft Carton etc. Co., 161 Cal.App.

2d 752, 756, 327 P.2d 622.) In each instance the court expressly considered the defendant's right to a speedy trial, but granted the continuance because of the illness of the witness in question. Upon granting the second continuance the court offered to release the defendant on bail, but his attorney advised that he would be unable to post the same.

The foregoing facts appear in the subject petition for a writ of habeas corpus; the return thereto; the traverse to ⊥455 that return; and the evidence before the court which heard the matter.

At the hearing both sides argued the issue respecting the speedy trial required by Section 1382 of the Penal Code which provides that:

> "The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases:
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> * * * * * *
>
> "2. When a defendant is not brought to trial in a superior court within 60 days after the finding of the indictment * * *."

The district attorney contended that the court by its previous orders had determined that good cause existed for continuing the trial of the case, and for this reason the petition should be denied. At this time also the court was informed that the defendant was on a "hold" for an alleged violation of his probation after conviction of a prior offense, and that further proceedings in connection therewith were set for sometime in April. The previous orders had been made by a judge other than the one hearing the petition for a writ of habeas corpus. The defendant claimed that the continuances in question had been granted without a showing of diligence; referred to the fact that the notices which his counsel received of the district attorney's intention to move therefor had been given orally on the day preceding the making of such motion; contended that the reporter's transcript of the proceedings before the grand jury did not establish probable cause that he had committed the offense for which he was indicted; talked about the proceedings before the municipal court; and asked that the writ issue.

The trial judge expressed his belief that the delay of four months was excessive; declared that: "There's no question in my mind that this Section 1382 is mandatory about bringing them to trial within sixty days"; stated: "I suspect that this granting of the writ is just going to be purely academic, because they will just file over again, * * *"; and asserted: "the petition will be granted * * *. Just for the sixty-day matter." Both the petition and the traverse filed by the defendant asked that he be discharged from custody; neither requested that the indictment be dismissed. By minute order the court found "that defendant was not brought to trial within sixty days of the finding of the indictment, and no good cause for such delay was shown," and ordered that "the petition for a writ of habeas corpus is granted, and the ⊥456 prisoner is discharged from custody." A concurrent written order of release declared: "IT IS ORDERED that said Defendant be forthwith released from the custody of the sheriff. WRIT OF HABEAS CORPUS GRANTED". There was no order that the indictment be dismissed.

[1, 2] The only reasonable interpretation of the proceedings in question is that the trial court granted the writ of habeas corpus releasing the defendant from custody because he had not been brought to trial within the 60 day period prescribed by Section 1382 of the Penal Code. As noted, the section in question requires the dismissal of a criminal action, upon application by a defendant, for failure to bring it to trial within the time therein designated, "unless good cause to the contrary is shown." The Supreme Court of this state has held that a writ of habeas corpus does not lie to enforce the provisions of this section, stating:

> "It is very apparent that section 1382, supra, was not intended to serve as a handmaid of the writ of *habeas corpus.*

> The process by which an accused is detained may be invulnerable as against the writ of *habeas corpus* and yet, by force of the statute and by no other right, the prosecution will be dismissed unless the accused has been brought to a public trial within 60 days after the charge is laid unless cause is shown to the contrary. No other ground of release need exist except the one which the statute has specifically created. The method provided by the statute for enforcing the remedy is by motion to dismiss the prosecution. If the trial court wrongfully refuses to dismiss the prosecution, a writ of mandate will lie to compel its dismissal." (In re Alpine, 203 Cal. 731, 739, 265 P. 947, 58 A.L.R. 1500; In accord: In re Rosenberg, 23 Cal.App.2d 265, 268, 72 P.2d 559.)

The action of the trial court, as of this court, is governed by this decision. (Auto Equity Sales, Inc. v. Superior Court, 57 A.C. 490, 495–496, 20 Cal.Rptr. 321, 369 P.2d 937.)

[3] The defendant contends that a writ of habeas corpus lies to enforce the provisions of the constitutional guarantee of a speedy trial (Art. I, sec. 13, Calif. Const.); that this guarantee exists independent of the provisions of Section 1382; and that the order granting his application in the instant proceeding should be sustained upon this ground. The subject provisions of the constitution are self-executing and will be enforced by a writ of habeas corpus if no other plain, speedy or adequate remedy is available. (In re Alpine, supra, 203 Cal. 731, 740, 265 P. 947.) However, Section
⊥457 1382 is a legislative con⊥struction of the constitutional provisions and, in a case such as the one at bar, affords a plain, speedy and adequate enforcement remedy. (People v. Godlewski, 22 Cal.2d 677, 682, 140 P.2d 381; In re Alpine, supra, 203 Cal. 731, 739, 265 P. 947; In re Rosenberg, supra, 23 Cal. App.2d 265, 268, 72 P.2d 559.) Although the defendant directs considerable attention to a castigation of the proceedings under the original complaint, the issue at hand is concerned with the proceedings instituted by the filing of the indictment; his demand for a speedy trial involves only the latter proceedings; and any alleged delay must be found in the period commencing with such filing. (People v. Godlewski, supra, 22 Cal.2d 677, 683, 140 P.2d 381.) It is evident that the procedure prescribed by Section 1382 controls the facts at hand.

From the record before us it appears that on the day the writ of habeas corpus was granted, the defendant was in custody of the sheriff under an indictment for murder; he also was in custody because of an alleged violation of probation in connection with a prior conviction; not being dismissed, the indictment remained in full force and effect; and the hearing upon the probation matter had been set for a date subsequent to the order granting the application in question.

[4] This court is not authorized to adjudicate the validity of the order under review upon a supposition that the trial court intended to dismiss the indictment when in fact that order did not do so. Even if it be assumed that the defendant intended to move for a dismissal under Section 1382 rather than for an order discharging him from custody under a writ of habeas corpus, and even if it further be assumed that the court believed it was passing on issues presented by an appropriate proceeding to enforce the provisions of Section 1382 of the Penal Code, it is apparent that the order as made did not apply the remedy prescribed by that section, i. e., dismissal of the action but, instead, was limited to a direction to the sheriff to release a prisoner who was in his custody under existing valid processes of law. For this reason we deem it unnecessary to determine whether a trial court, in passing upon a motion under Section 1382, may disregard its former orders which, by implication, determined upon sufficient evidence that good cause existed for continuing a trial beyond the 60 day period; to decide whether the manner of noticing the motions in question was proper;

to determine the effect thereof, if any, upon the propriety of the orders made in this case; or to ⌊458 review the sufficiency of the evidence to support a finding that good cause for delay did not exist in the instant case.

The order appealed from is reversed.

GRIFFIN, P. J., and STONE, J.,* concur.

Hearing denied; WHITE, J., sitting pro tem.

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208 Cal.App.2d 317

⌊317 The PEOPLE of the State of California, Plaintiff and Respondent,

v.

George Leonard BENNETT, Defendant and Appellant.

Cr. 3331.

District Court of Appeal, Third District, California.

Oct. 9, 1962.

Prosecution for first degree robbery. The Superior Court of El Dorado County, Robert E. Roberts, J., entered judgment of conviction and the defendant appealed from that judgment and the order denying his motion for new trial. The District Court of Appeal, Peek, P. J., held that the evidence showing that the robbery victim suffered 15 to 20 deep lacerations about the head with resultant skull fractures was sufficient to support finding that defendant used dangerous or deadly weapon within first degree robbery statute, and an order denying a motion for new trial was nonappealable.

Affirmed.

1. Searches and Seizures 🔑7(27)

When defendant freely consents to search of premises under his control, any search made pursuant thereto is reasonable.

2. Searches and Seizures 🔑7(29)

When defendant freely consents to search, it is not necessary for prosecution to show that such search and seizure were reasonable as incident to proper arrest.

3. Criminal Law 🔑394.6(4)

Evidence sustained finding that defendant had freely consented to police officer's search of motel room after defendant had been arrested at another place for first degree robbery.

4. Robbery 🔑11

In determination of whether instrument not inherently deadly or dangerous assumes such characteristics within first degree robbery statute, recourse may be had to nature of object or instrument, manner of use, location on body of injuries inflicted, and extent of such injuries. West's Ann.Pen. Code, § 211a.

5. Robbery 🔑24(1)

Evidence disclosing that robbery victim suffered 15 to 20 deep lacerations about head with resultant depressed skull fractures and that defendant had admitted kicking victim with shoes was sufficient to support finding that defendant used dangerous or deadly weapon within first degree robbery statute. West's Ann.Pen.Code, § 211a.

6. Criminal Law 🔑438

While it is error to receive gruesome photographs in evidence for sole purpose of arousing passions of jurors, such photographs are admissible when relevant to issues before court and their probative value is not outweighed by danger of prejudice to defendant.

7. Criminal Law 🔑438

Whether or not gruesome photographs may be admitted in evidence is within sound discretion of trial court.

8. Criminal Law 🔑438

Admission of photographs showing numerous injuries inflicted upon robbery victim was not an abuse of discretion in prosecution for first degree robbery.

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* Assigned by Chairman of Judicial Council.

9. Criminal Law 🔑1023(13)

Order denying motion for new trial is nonappealable.

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Frank Hue, Sacramento, under appointment by the Third District Court of Appeal, for appellant.

Stanley Mosk, Atty. Gen., by Doris H. Maier, Asst. Atty. Gen., and Edward A. Hinz, Jr., Deputy Atty. Gen., Sacramento, for respondent.

318 PEEK, Presiding Justice.

Defendant was found guilty of robbery in the first degree. He now appeals from the judgment of conviction and from the order denying his motion for a new trial. It is the conclusion of this court that none of his contentions are meritorious.

The victim of the robbery, Jesse H. Mitchell, and his companion, Donald H. Carnegie, became acquainted with defendant at the bar of a gambling casino at Lake Tahoe. At their suggestion, defendant joined them for dinner, during which it was agreed that he would also join them on an excursion to Squaw Valley the following day. It was also suggested that defendant spend the night with them at their motel, since he had spent all of his money except a small pay roll check and had checked out of his motel.

Shortly after dinner, Carnegie returned to the motel while Mitchell and defendant stayed on at the night club. They subsequently went to another club where Mitchell won approximately $25 and defendant lost approximately $10. About 5:30 a. m. they returned to the motel where they found Carnegie asleep in one of the double beds. They undressed and occupied the remaining bed. Shortly thereafter, defendant got up, stating he was going back to the casino and try to win back some of the money he had lost. He returned at approximately 8 a. m., just as Carnegie was leaving for breakfast. When Carnegie returned he found Mitchell alone, covered with blood, the room in a chaotic condition and all of their personal effects as well as all of their clothing missing. Mitchell was unable to give a coherent statement to police officers who arrived shortly thereafter. He was taken to the Al Tahoe Medical Center where it was found he had received 319 15 to 20 deep lacerations about the head. There was also a suggestion of a fractured skull. He remembered nothing from the time Carnegie left the motel until he regained consciousness in a Reno hospital nine days later.

Defendant was arrested in Reno when he attempted to cash a check at a gambling casino under the name of Mitchell. When questioned as to his identity he showed the officers various cards with Mitchell's name on them. However, when pressed for his driver's license he became belligerent and was placed under arrest. Among the items found in his possession was a motel key. When the officers stated they would go to his motel and bring back what they found there, defendant stated, "I wish you would. I would like to have it all here." Among the articles which were found, some of which were introduced in evidence, were a transistor radio, electric razor, camera, and a plaid carrying case, all of which were identified by Mitchell as belonging to him.

It is defendant's first contention that the articles mentioned were improperly admitted into evidence because they were produced as the result of an unlawful search and seizure. In support of this contention, defendant argues that he did not consent to the search and that the search was not made contemporaneously with his arrest, in that he was neither present nor in the immediate vicinity.

[1–3] Defendant's denial of consent in the face of the statements made by the officers merely presented a conflict in the evidence which the court resolved against him. It is well established that when a defendant freely consents to a search of the premises under his control, any search made pursuant thereto is reasonable. (People v. Gorg, 45 Cal.2d 776, 291 P.2d 469.) It is the further rule that when a defendant freely consents to a search it is not necessary for the prosecution to show that such search and seizure were reasonable as incident to a proper arrest. (People v. Burke, 47 Cal.2d 45, 301 P.2d 241.)

Defendant also contends that there was insufficient evidence to support the verdict of robbery in the first degree, in that there was no evidence that he used a "dangerous or deadly weapon," within the meaning of section 211a of the Penal Code. The record in this regard, as noted, shows that Mitchell suffered 15 to 20 deep lacerations about the head with resultant depressed skull fractures. Defendant admitted to the El Dorado County officers that he had kicked Mitchell with his shoes and had later disposed of them because they were covered with blood. He also admitted to Carnegie ⊥320 that he ⊥ had struck Mitchell repeatedly. Furthermore, while testifying in his own behalf, he stated he had struck Mitchell with "everything God gave me. My knees, my elbows, my hands and everything like that." His defense was that Mitchell had made improper advances which had angered him.

[4, 5] In the determination of whether an instrument not inherently deadly or dangerous assumes such characteristics, recourse may be had to the nature of the object or instrument, the manner of its use, the location on the body of injuries inflicted, and the extent of such injuries. (People v. Russell, 59 Cal.App.2d 660, 139 P.2d 661.) Thus, it has been held that a shod foot, although not a weapon in the strict sense, is capable under the above rule of being used as such. (People v. Wood, 192 Cal.App.2d 393, 13 Cal.Rptr. 339.)

As a part of the state's case and in order to show the injuries inflicted upon Mitchell, photographs were introduced into evidence. It is defendant's contention that such evidence was introduced solely for the purpose of inflaming the jurors' emotions against him, inasmuch as there was no dispute that the victim had been injured. Four of the photographs were taken at the Washoe Medical Center and depicted Mitchell's head injuries. The remaining two photographs were taken at the emergency hospital shortly after Mitchell had been discovered by Carnegie.

[6–8] While it is true that it is error to receive in evidence gruesome photographs for the sole purpose of arousing the passions of the jurors, such photographs are admissible when they are relevant to the issue before the court and their probative value is not outweighed by the danger of prejudice to the defendant. Necessarily, therefore, whether or not photographs may be admitted is lodged in the sound discretion of the trial court. We find no abuse of that discretion. In view of the contentions made by defendant, the photographs of Mitchell's condition were relevant to the issue of whether or not the shod feet of defendant had been used as a deadly weapon in inflicting the injuries

[9] The order denying the motion for a new trial being non-appealable, the appeal therefrom is dismissed and the judgment is affirmed.

SCHOTTKY and PIERCE, JJ., concur.

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208 Cal.App.2d 442

⊥ **Merton HALL, Edward L. Williamson, Thomas Henderson and L. Dee Tallent, Petitioners,** ⊥442

v.

The SUPERIOR COURT OF the State of California, IN AND FOR the COUNTY OF RIVERSIDE, Respondent.

Civ. 7147.

District Court of Appeal, Fourth District, California.

Oct. 11, 1962.

Proceeding on petition for a writ of prohibition to restrain a Superior Court from taking further steps under a grand jury indictment charging petitioner with violating the Elections Code by aiding and abetting a city clerk in neglecting to perform her duties. The District Court of Appeal held that fact that petitioner turned over to city clerk names of persons desiring absentee ballots was insufficient to support charge of aiding and abetting city clerk in neglecting to perform her duties on basis of her failure to deliver in person or by mail absentee ballots to persons who had signed applications therefor.

Petition granted.

Elections ⚷322

Fact that a party turned over to a city clerk names of persons desiring absentee ballots was insufficient to support charge against him of violating the Elections Code by aiding and abetting the city clerk in neglecting to perform her duties by failing to deliver in person or by mail certain absentee ballots to persons who had signed applications therefor. West's Ann.Pen. Code, § 995; West's Ann.Elections Code, § 29102.

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Shaw, Morgan & Miceli, Riverside, for petitioners.

William O. Mackey, Dist. Atty., Riverside County, for respondent.

⊥443 ⊥PER CURIAM.

Petitioner sought a writ of prohibition, praying that the Superior Court of Riverside County be restrained, under Penal Code, section 995, from taking further steps or proceedings under a grand jury indictment charging each with the crime of violating Elections Code, section 29102, by aiding and abetting the city clerk in neglecting to perform her duties, in that she was accused of failing to deliver in person or by mail certain absentee ballots to persons who had signed applications therefor.

The petition for the writ was heretofore denied as to all petitioners except L. Dee Tallent. The only evidence pertaining to him was that he turned over to the city clerk the names of persons desiring the absentee ballots. This was insufficient to support the charge. An order to show cause was issued as to him, and on the hearing the district attorney, counsel for the County of Riverside, agreed that the evidence was insufficient to support the charge as to petitioner L. Dee Tallent.

Petition for writ of prohibition as to L. Dee Tallent granted as prayed for in the petition.

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208 Cal.App.2d 329

⊥In re Andrew E. POPE, on Habeas Corpus. ⊥329

Cr. 3359.

District Court of Appeal, Third District, California.

Oct. 9, 1962.

Petitioner, who had received concurrent sentence in state court, brought an original habeas corpus proceeding to require his transfer to federal authorities so that state sentence would run concurrently with federal sentence. The Attorney General of the State of California made a motion to dismiss the petition, on ground that the matter was moot. The District Court of Appeal, Schottky, J., held that the matter was moot, where federal authorities had designated a state institution for service of the federal sentence.

Order to show cause discharged and petition dismissed.

1. Criminal Law ⚷1216(1)

Computation of time on federal sentence begins to run only from date on which prisoner is received at federal penitentiary for service of his sentence.

2. Criminal Law ⚷1216(2)

State prisoner is entitled to be transferred to custody of federal authorities to serve his sentence under prior federal conviction so that prisoner may gain benefit of state judgment provision that state sentence be served concurrently to any other sentence outstanding, where federal judgment has been brought to attention of state court.

3. Habeas Corpus 🔑87

Habeas corpus proceeding brought by petitioner, who had received concurrent sentence from state court, to require transfer of petitioner to federal authorities so that state judgment would run concurrently with federal sentence would be dismissed on ground that case was moot, where federal authorities had designated state institution for service of federal sentence. 18 U.S.C.A. § 4082.

Andrew E. Pope, appellant, in pro. per.

Stanley Mosk, Atty. Gen., by Raymond M. Momboisse, Deputy Atty. Gen., Sacramento, for respondent.

SCHOTTKY, Justice.

This is a motion by the Attorney General of the State of California to dismiss a petition for a writ of habeas corpus filed by Andrew E. Pope on the ground that the matter is moot.

[1, 2] Pope filed a petition for a writ of habeas corpus in this court in which he alleged that he was convicted in April 1955 of ⌊330 violation of section 476a of the Penal Code. The judgment was ordered to run "concurrently with any sentence heretofore imposed." Prior to the time the state judgment was imposed Pope had been convicted in a federal court of juvenile delinquency and assisting in causing a mutiny in a federal prison. He had been given a conditional release by the federal authorities. He violated the terms of his parole, and at the time of the imposition of the California judgment a federal warrant was outstanding against Pope for his arrest and return to the custody of the federal authorities to serve the remainder of his sentence. Pope seeks a transfer to the federal authorities so that the state judgment will run concurrently with the federal one. Under the federal rules the computation of time on a federal sentence begins to run only from the date on which the prisoner is received at the federal penitentiary for service of his sentence. (Zerbst v. McPike, 5 Cir., 97 F.2d 253, 254.) It is the rule in this state that a prisoner confined to state prison under a judgment of conviction in a state court is entitled to be transferred to the custody of federal authorities to serve his sentence under a prior federal judgment of conviction so that the prisoner may gain the benefit of the provision of a state judgment subsequently entered which orders that the state sentence be served concurrently to any other sentence now outstanding where the federal judgment has been brought to the attention of the trial court. (In re Stoliker, 49 Cal.2d 75, 315 P.2d 12.)

Upon this statement of facts this court issued an order to show cause why a writ of habeas corpus should not issue. The basis of the motion to dismiss by the Attorney General of California is that the Federal Bureau of Prisons "have" designated the California state institution for service of the federal sentence.

Section 4082 of title 18 of the United States Code Annotated permits the Attorney General of the United States to "designate any available, suitable, and appropriate institutions, whether maintained by the Federal Government or otherwise," as the place where the sentence of a federal prisoner may be served.

It is clear that if a California penal institution were designated as such an institution in compliance with the section Pope would be obtaining all the relief to which he would be entitled and the matter could be dismissed. However, the letter upon which the Attorney General of the State of California ⌊331 relied merely stated: "The Federal Bureau of Prisons will designate the California State institution for service of the Federal sentence."

At the oral argument on the motion to dismiss, this court pointed out to the Attorney General of the State of California that the letter stated a California institution would be designated for service of the federal sentence and that before this court would be justified in dismissing the petition for habeas corpus as moot there must be filed with the court a certified copy of a document showing that such an order had been made.

[3] Since that time documents have been filed with this court which disclose that the section has been complied with and that the time served by Pope in the California institution will apply on his federal sentence. Since Pope is now receiving all the relief to which he is entitled the proceedings are moot. The order to show cause heretofore issued is discharged and the petition is dismissed.

PEEK, P. J., and PIERCE, J., concur.

208 Cal.App.2d 343

⌊343 ⌊**Luther S. MALONE, Plaintiff and Appellant,**

v.

Homer Campbell JONES, Defendant and Respondent.

Homer JONES, Plaintiff and Respondent,

v.

Luther S. MALONE, Defendant and Appellant.

Civ. 25529.

District Court of Appeal, Second District, Division 4, California.

Oct. 10, 1962.

First former partner brought action against second former partner for breach of contract and for alleged fraud, and the second former partner brought action against the first former partner for money due on note, and the actions were consolidated. The Superior Court of Los Angeles County, Alfred P. Peracca, J., rendered summary judgments for the second former partner, and the first former partner appealed. The District Court of Appeal, Burke, P. J., held that summary judgments for the second former partner were improper, where counter affidavits of the first former partner established the existence of triable issues of fact.

Judgments reversed.

1. Judgment 🔑186

Issue to be determined by trial court in consideration of motion for summary judgment is whether party opposing motion has presented any facts which give rise to triable issue or defense, and not to pass on or determine issue itself. West's Ann.Code Civ.Proc. § 437c.

2. Judgment 🔑185.2(6)

Affidavits filed on behalf of party opposing motion for summary judgment should be liberally construed so that he will not be summarily deprived of full hearing available as trial of action and rights incident thereto. West's Ann.Code Civ.Proc. § 437c.

3. Judgment 🔑185.2(6)

Affidavits of party moving for summary judgment should be strictly construed and those of opponent liberally construed. West's Ann.Code Civ.Proc. § 437c.

4. Judgment 🔑185.2(7)

Facts alleged in affidavits of party against whom motion for summary judgment is made must be accepted as true. West's Ann.Code Civ.Proc. § 437c.

5. Judgment 🔑185.2(5)

Affidavits of party, against whom motion for summary judgment is made, to be sufficient need not necessarily be composed wholly of strictly evidentiary facts. West's Ann.Code Civ.Proc. § 437c.

6. Judgment 🔑185.3(1)

Counter affidavits of first former partner established existence of triable issues of fact in his action against second former partner for breach of contract and for alleged fraud and in action by second former partner against first former partner for money due on note, and therefore it was error to grant motions of second former partner for summary judgments. West's Ann.Code Civ.Proc. § 437c.

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Herbert Hafif, Claremont, for appellant.

Ben T. Kayashima, Pomona, for respondent.

⌊344 ⌊BURKE, Presiding Justice.

This is an appeal from judgments entered granting motions for summary judgment in two separate cases which were consolidated in the trial court.

In the first action Luther S. Malone (Malone) sued Homer Campbell Jones (Jones) for breach of contract and for fraud. The second action was a complaint for money brought by Jones against Malone.

The two men were partners in a sewer business which involved two basic divisions in operations: one, the construction of septic tanks, cesspools and sewers, termed the "construction segment"; the other involved the pumping out and servicing of septic tanks and cesspools, termed the "pumping segment."

The parties dissolved their partnership approximately fourteen months prior to the commencement of these actions, with the "construction segment" going to Malone and the "pumping segment" to Jones.

As partial consideration for obtaining the more valuable part of the operation, Malone gave Jones credit for $23,000[1] worth of materials and inventories and purchased the following aspects of the "construction segment" for $25,000:

1. the going concern value;
2. the right to all referrals from the "pumping segment" of the business; and
3. Jones' covenant not to compete with the "construction segment" of the business within a 50-mile radius of Pomona for a period of 18 months.

Within thirty days Malone paid Jones $8,000 as a down payment for his part of the business and agreed to pay the balance of $17,000 in six equal installments evidenced by a non-interest bearing promissory note. At the time Malone filed his complaint in his action for breach of contract and for fraud, he had paid Jones nearly $14,000 for the "con⌊345struction segment" of the business, together with other rights described above.

In May of 1960, prior to the 18-month period having expired, Jones placed in the classified section of the telephone directory in the Pomona area an advertisement reading in part as follows: "New septic tank-cesspool and sewer installations and repairs."

In the period since the partnership dissolution agreement was executed Jones referred four or five "construction segment" jobs to Malone. Malone contends that this is an unreasonably low number of referrals inasmuch as his experience in the "pumping segment" of the business was that on the average one construction or repair job arose out of every four or five pumping jobs and that Jones had done approximately four or five pumping jobs per day during the period from the date of the agreement to the date of suit.

Malone's first cause of action was based upon Jones' alleged breach of the covenants to refer construction jobs to him and not to compete. Malone's second cause of action was based upon fraud.

Jones' cause of action was for a money judgment for the balance due on the promissory note.

After demurrers were sustained twice to each cause of action alleged by Malone in his complaint, motions for summary judgment were granted in Jones' favor in the breach of contract and fraud actions and in the action for money.

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[1] For simplicity the figures given are approximate only.

On appeal Malone claims that triable issues of fact existed as disclosed by his counter affidavits and that the trial court's ruling on the motions for summary judgment denied him his day in court and was therefore reversible error.

Jones claims that Malone's alleged causes of action are so lacking in merit that his complaint amounts to a sham.

[1–5] Motions for summary judgment are provided for in section 437c of the Code of Civil Procedure. The principles to be observed in proceeding under that section are stated as follows in Eagle Oil & Refining Co. v. Prentice, 19 Cal.2d 553, 555–556, 122 P.2d 264, 265: "The issue to be determined by the trial court in consideration of a motion [for summary judgment] is whether or not [the party opposing the motion] has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case. [Citations.] * * * Because the procedure is summary and presented on affidavits without the benefit of cross-examination, a trial by ⌊346 jury and opportunity to observe the demeanor of witnesses in giving their testimony, the affidavits filed on behalf of the [party opposing the motion] should be liberally construed to the end that he will not be summarily deprived of the full hearing available at a trial of the action and the rights incident thereto.

* * * * * *

"For these reasons * * * affidavits of the moving party * * * should be strictly construed and those of his opponent liberally construed. [Citations.] * * * [T]he better rule is that the facts alleged in the affidavits of the party against whom the motion is made must be accepted as true, and that such affidavits to be sufficient need not necessarily be composed wholly of strictly evidentiary facts. [Citation.]"

[6] Construing the counter affidavits in the instant case liberally, Malone establishes the existence of triable issues of fact. If the allegations therein are true they would provide Malone with a basis for a cause of action for breach of contract. They would also serve as a defense to Jones' cause of action for money due on the purchase money promissory note.

As pointed out in Eagle Oil & Refining Co. v. Prentice, supra, 19 Cal.2d 553, 555, 122 P.2d 264, 265, it is not the function of this court to determine these issues; we need only determine the existence of triable issues of fact.

The judgments are reversed.

JEFFERSON and FORD,[*] JJ., concur.

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[*] Assigned of Judicial Council.

58 Cal.2d 542, 375 P.2d 169

542 **H. A. CALL, Plaintiff and Respondent,**
v.
THUNDERBIRD MORTGAGE CO., Inc., et al., Defendants and Appellants.
L.A. 26200.

Supreme Court of California,
In Bank.
Oct. 11, 1962.

Action to quiet title and for declaratory relief. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment for plaintiff and defendants appealed. The Supreme Court, McComb, J., held that grantee of 1955 deed from judgment debtors was a "successor in interest" to judgment debtors within meaning of redemption statute, and having such status it was entitled to redeem from purchaser at mechanic's lien judgment execution sale held in 1957, to enforce a judgment of foreclosure entered in 1953, and having paid full redemption price and having received certificate of redemption it was entitled to a quieting of title as against purchaser at mechanic's lien judgment execution sale.

Judgment reversed with directions.

Opinion, 20 Cal.Rptr. 383, vacated.

1. Execution 🔑268
Liens 🔑19

Ordinarily purchaser at a foreclosure or execution sale takes title as of date the lien vested and all subsequent or junior liens are eliminated, but rule is different where judgment debtor is the purchaser and in such case the result is that lien levied upon or foreclosed is satisfied and discharged, the effect of the sale is terminated, and the property remains subject to subsequent and junior liens.

2. Execution 🔑302

Where a judgment debtor redeems property after an execution sale the redemption wipes out effect of the sale and the property is still subject to junior liens. West's Ann.Code Civ.Proc. §§ 701, 703.

3. Mechanics' Liens 🔑298

Where title to property following a mortgage foreclosure sale on July 10, 1957 stood in name of judgment debtor's grantee subject to mechanic's lien judgment of foreclosure entered in 1953 but not enforced until July 12, 1957 purchaser at mechanic's lien foreclosure sale acquired interest of judgment debtor in the property as it existed at time mechanic's lien became effective.

4. Liens 🔑23

Ordinarily, a subsequent judgment lien creditor can redeem from a sale on a prior lien, since such sale wipes out his lien and he is given right of protection. West's Ann.Code Civ.Proc. § 701, subd. 2.

5. Judicial Sales 🔑59
Mortgages 🔑594(3)

A "successor in interest" respecting right to redeem property is one who has acquired or succeeded to interest of the judgment debtor in the property, subject to the effect of the judgment and sale, and a grantee of mortgagor-defendant, claiming under an unrecorded deed made prior to foreclosure, would be a "successor in interest" as would a grantee of the "judgment debtor" taking by deed after judgment or sale.

See publication Words and Phrases for other judicial constructions and definitions.

6. Execution 🔑293

Under statute providing that property sold subject to redemption may be redeemed by judgment debtor or his successor in interest, it is the status that is the determining factor and not date of the deed or conveyance. West's Ann.Code Civ.Proc. § 701, subd. 1.

7. Mechanics' Liens 🔑299

Grantee of 1955 deed from judgment debtors was a "successor in interest" to judgment debtors within meaning of redemption statute, and having such status, it was entitled to redeem from purchaser at mechanic's lien judgment execution sale held in 1957 to enforce a judgment of foreclosure entered in 1953, and having paid full redemption price and having received certificate of redemption it was entitled to a quieting of title as against purchaser at mechanic's lien judgment execution sale. West's Ann.Code Civ.Proc. § 701, subd. 1.

James F. Healey, Jr., Donald J. Burdine, Los Angeles, George R. Pfeiffer, Santa Monica, Arthur G. Bowman, John R. Engman, Los Angeles, and Alvin R. Isenberg, Beverly Hills, for defendants and appellants.

Benjamin P. Riskin, Los Angeles, for plaintiff and respondent.

544 McCOMB, Justice.

This cause was transferred to this court after decision by the District Court of Appeal, Second Appellate District, Division 4. On further examination of the record, we adopt the opinion of that court prepared by Mr. Justice Balthis, with such omissions and additions as hereinafter appear, as and for the opinion of this court. As modified, it reads:

Plaintiff, who acquired an assignment of a mechanic's lien judgment and who later purchased the property involved at the foreclosure sale on such judgment, brought a quiet title action and sought declaratory relief against defendant Thunderbird Mortgage Co., Inc. (hereinafter called "Thunderbird"). The action also named as defendants certain parties who were grantees from Thunderbird and encumbrancers from such grantees. Any reference to defendant in the singular is to defendant Thunderbird in view of the fact that the rights of all other defendants are derivative and are based upon the legal position of Thunderbird. Thunderbird based its claim of title upon a deed from the original owner (and judgment debtor) and upon a certificate of redemption issued by the marshal.

The trial court, sitting without a jury,
declined to give effect to the certificate of
545 redemption issued by the marshal to
Thunderbird and rendered judgment in
favor of plaintiff, and from this judgment
defendants appeal.

The facts may be summarized as follows:

In 1951, Mr. and Mrs. McGinnis (hereinafter referred to as "debtors" or "judgment debtors") purchased a large lot in the Culver City area of Los Angeles from the Oswalds. The McGinnises executed two purchase money deeds of trust in favor of the sellers, a first in the sum of $4,000, and a second in the sum of $1,500. Both deeds of trust were recorded on May 22, 1951.

In connection with a work of improvement on the property, a mechanic's lien in the sum of $315 was recorded by the Colich Construction Company on July 14, 1952 (hereinafter sometimes referred to as the "mechanic's lien"). This claim was assigned to V. O. Matchett for collection; action to foreclose the lien was filed on October 10, 1952; judgment of foreclosure was entered on April 2, 1953.

In addition to the two deeds of trust and the mechanic's lien, there were numerous liens and encumbrances subsequently recorded against the property including judgments, state and federal tax liens and other mechanic's liens, none of which are in dispute here.

The debtors conveyed their land by grant deed to Thunderbird through which deed it now claims its rights as a successor in interest of such judgment debtors. This deed was dated and executed on June 2, 1955, and was recorded February 8, 1957.

The second deed of trust was in default and was assigned by the Oswalds (the original sellers) to V. O. Matchett, who brought a court action to foreclose on October 14, 1954. The defendants named in said action included, among others, the debtors and Thunderbird, who were represented by an attorney, Mr. Isenberg. On May 2, 1957, a judgment of foreclosure was entered in said 1954 action, the amount of the judgment totaling $4,568.85.

Before the foreclosure sale of the second deed of trust Thunderbird, as record owner, decided on a plan whereby it would subdivide the one large lot in question into three smaller residential lots. The plan contemplated that the funds from the proposed sale would be used to pay off all existing encumbrances totaling around $20,000. In early May 1957 plaintiff saw a "for sale" sign on the property; inquired of the realtors the asking price and found they were asking $9,000 per lot, totaling $27,000 for the three; was ⊥546 directed by a third party to Mr. Riskin who was in the process of foreclosing the second deed of trust for his client Matchett; and entered into an alleged agreement with Mr. Riskin whereby he would be able to obtain the property for about $20,000 by buying up the liens on said property.

On May 23, 1957, prior to the sale, Mr. Riskin obtained an assignment of the mechanic's lien judgment from his client V. O. Matchett for plaintiff. Under instructions from Mr. Riskin to Commissioner R. E. Allen, a sale under the deed of trust foreclosure decree was had on June 10, 1957. Thunderbird and plaintiff Call were the bidders at the sale with Thunderbird being the successful bidder at $6,500. Subsequent to the sale, on June 12, 1957, Mr. Riskin, for plaintiff Call, obtained an assignment of Matchett's right to the proceeds of the sale for the sum of $4,005.17. Plaintiff also took an assignment of the first deed of trust from the Oswalds.

On June 10, 1957, plaintiff through his attorney Riskin issued instructions to the marshal to levy upon and sell the parcel pursuant to the 1953 mechanic's lien judgment of foreclosure. This sale complied with the statutory requirements (notice was posted and publication had), but no notice was given to Thunderbird. On July 12, 1957, plaintiff became the purchaser at that sale of the judgment debtor's interest in the property for the sum of $475.40. It is through this sale that plaintiff asserts his status as successor in interest of the judgment debtor.

It should also be noted that the three lots were sold, one each to the defendants Elmer and Fleming for $9,500 per lot and one to Mercn for $8,375. Escrows on these sales were opened in June 1957 and closed on July 31, 1957. Defendants Markworth and Lavoie each hold encumbrances issued by the new purchasers. The title company issued policies of title insurance after Thunderbird on July 5, 1957, agreed to enter into an indemnity agreement whereby Thunderbird agreed to obtain releases of all of the liens and encumbrances disclosed in the preliminary reports of title, including the mechanic's lien judgment and the first deed of trust which was subsequently assigned to plaintiff. By the time this cause was heard in the trial court, the three purchasers had built homes on these lots, which properties, defendant asserts, are now worth over $100,000.

After the escrows were closed on July 31, 1957, Mr. Riskin (on behalf of plaintiff) made demand upon R. E. Allen as commissioner for a certificate of redemption from the second ⊥547 trust deed foreclosure sale on the basis that plaintiff, by purchasing at the mechanic's lien foreclosure sale was "the successor in interest of the judgment debtor." The commissioner issued the certificate of redemption upon the payment of the amount of the sale plus interest and this certificate was recorded August 14, 1957.

Prior to the time of redemption Thunderbird offered to pay plaintiff the amount of his mechanic's lien. This tender was refused. Thunderbird then attempted to effect a redemption as "successor in interest" of the judgment debtor by offering to pay plaintiff the amount paid to redeem from the first sale plus the amount of his judgment plus interest. These tenders were refused on the ground that Thunderbird was not a "successor in interest" of the judgment debtor since it did not have a deed executed *after* the sale. The marshal also refused to allow redemption on the authority of Lawler v. Gleason (1955), 130 Cal.App.2d 390 [279 P.2d 70], which had been called to his attention by Mr. Riskin.

Since the refusal of both Mr. Riskin and the marshal was based upon the fact that Thunderbird's deed was received in 1955, Thunderbird had obtained a quitclaim deed dated September 16, 1957, from the judgment debtors. On the basis of this new deed and other supporting documents, the marshal then allowed Thunderbird to effect a redemption from plaintiff upon payment of the sum of $7,157.79 (representing the amount paid by plaintiff on his redemption plus the amount of his mechanic's lien plus interest).

The trial court in effect concluded that the second deed received by Thunderbird was a nullity and gave it no interest in the land and as a result the redemption from plaintiff was improper. Title was quieted in plaintiff by virtue of plaintiff's certificate of sale on the mechanic's lien foreclosure.

The principal contentions made by defendants on this appeal are: (1) plaintiff had no right to redeem from the trust deed foreclosure sale at which Thunderbird was the purchaser; (2) Thunderbird, as successor in interest to the judgment debtors, had a clear right of redemption from plaintiff as the purchaser at the mechanic's lien foreclosure sale, and having deposited the full redemption price of $7,157.79 and having received the certificate of redemption, it was entitled to judgment in the trial court.

It is helpful to analyze the status of the title and the rights of the parties after the judicial foreclosure of the second deed of trust. This foreclosure sale was held June 10, 1957, ⊥548 and Thunderbird was the purchaser. At this date, Thunderbird was the successor in interest of the debtors because it held a deed from the McGinnises dated June 2, 1955, recorded February 8, 1957. Thunderbird stood in the shoes of the original debtors (trustors) and when it bid in and became the purchaser, it was exactly the same legal situation as though the property had been bid in and purchased by the debtors or owners.

[1] The instant case presents an unusual and rare situation where the record owner (and successor in interest to the debtor) purchases in at the foreclosure sale. However, as will be pointed out, there is no element of fraud involved because subsequent and junior liens are not wiped out by such sale. The ordinary rule is, of course, that the purchaser at the foreclosure or execution sale takes title as of the date the lien vested and all subsequent or junior liens are eliminated. (See Bateman v. Kellogg, 59 Cal.App. 464, 474 [211 P. 46].)

The rule is different where the judgment debtor is the purchaser at such foreclosure or execution sale. The legal result is that the lien levied upon or foreclosed is satisfied and discharged, the effect of the sale is terminated, and the property remains subject to subsequent and junior liens.

[2] The situation is analogous to that where a judgment debtor redeems property after an execution sale. The redemption wipes out the effect of the execution sale and the property is still subject to junior liens. The rule and the reasons therefor are clearly pointed out in Kaiser v. Mansfield, 160 Cal.App.2d 620, at page 628 [325 P.2d 865, at page 870], where the court said: *"A redemption by the judgment-debtor terminates the particular sale in which that redemption is made and restores the estate of the judgment-debtor.* Section 701 of the Code of Civil Procedure provides that redemption may be made by a creditor having a lien or by the judgment-debtor or his successor in interest. Section 703 specifically provides 'if the debtor redeem, the effect of the sale is terminated, and he is restored to his estate.' A redemption by the judgment-debtor's 'successor in interest' has the same effect. * * * These statutes were designed to protect the redemption rights of various parties, not to relieve the judgment-debtor from the payment of his just debts. When a redemption is made by a creditor the junior lien which is wiped out does not represent a debt which is owed by the redeeming creditors. There would be no justice, however, in permitting a judgment-debtor to redeem from a first execution sale and thereby cancel and ⊥549 wipe out his obligation on other execution liens covering debts which he also owes. We cannot construe these statutes as having that effect and as leading to such a result. The same rule would apply where the redemption from the first sale is made by the 'successor in interest' of the judgment-debtor who stands in his shoes, and

is entitled only to the same rights." (Italics added.)

[3] Thus, the legal title to the property here, following the foreclosure sale on July 10, 1957, stood in the name of Thunderbird subject, however, to certain liens, including the lien of the mechanic's lien judgment of foreclosure entered April 2, 1953.

The mechanic's lien judgment of foreclosure was not enforced until 1957; the foreclosure sale was held July 12, 1957, and plaintiff was the purchaser at such sale. By this sale, plaintiff acquired the interest of the judgment debtor in the property as it existed at the time the mechanic's lien became effective.

[4] The question presented is whether plaintiff could thereafter legally redeem from Thunderbird as the purchaser at the trust deed foreclosure sale. Ordinarily, a subsequent judgment lien creditor can redeem (Code Civ.Proc. § 701, subd. 2) from a sale on a prior lien because such sale wipes out his lien and he is given the right of protection; however, in the instant case, the subsequent judgment creditor still has his lien, it is not wiped out or eliminated and the rule of redemption is not applicable.

As applied here, plaintiff did not have to redeem from Thunderbird because his lien (and the acquisition of the rights of the judgment debtor by reason of the sale) was effective. Therefore such attempted redemption by plaintiff from the foreclosure sale on the second deed of trust may be disregarded as being ineffective and not necessary to protect plaintiff's rights as purchaser on the foreclosure sale under the mechanic's lien judgment.

Any equity in plaintiff created by the payment to redeem from the trust deed foreclosure sale is fully protected here because the full sum paid by plaintiff to redeem was later returned to plaintiff (and is now held by plaintiff's attorney) upon the later redemption made by Thunderbird from the mechanic's lien judgment foreclosure sale.

We now turn to the principal issue in the case, the legal effect of the mechanic's lien judgment foreclosure sale, ⌊550 at which plaintiff was the purchaser, and the redemption from such sale by Thunderbird.

As previously stated, this sale was held July 12, 1957; plaintiff was the purchaser thereat and plaintiff thereby acquired all the interest of the judgment debtors in the property at the time the mechanic's lien became effective.

Previous to the execution sale, Thunderbird had obtained a deed to the property from the owners and judgment debtors (the McGinnises); the deed was dated June 2, 1955, and recorded February 8, 1957.

[5] This clearly and without any doubt made Thunderbird the "successor in interest" of the judgment debtor (McGinnis) and under section 701, subdivision 1, Code of Civil Procedure, "Property sold subject to redemption * * * may be redeemed in the manner hereinafter provided [illegible] * * * 1. The judgment debtor, or his successor in interest, in the whole or any part of the property." Under the statute Thunderbird had the legal right to redeem. This *right of redemption* follows as a result of the establishment of the status of being a *successor in interest* to the judgment debtor and *the date of the deed* or other conveyance is immaterial. Certainly the statute giving the right of redemption to a successor in interest of the judgment debtor specifies no requirement of the date of such succession in interest. Logically, there is no reason why the succession in interest must follow the execution sale; a judgment debtor may have conveyed the property (and all his interest therein) long before the date of the execution sale (as in the instant case) and the grantee's status as successor in interest gives him *the right of redemption* in order to protect his interest as *owner of the property* in question. A successor in interest has been defined as follows: "A successor in interest of the judgment debtor is one who has acquired (or succeeded to) the interest of the judgment debtor in the property, sub-

ject, of course, to the effect of the judgment and sale; * * * A grantee of the mortgagor-defendant, claiming under an unrecorded deed made prior to foreclosure, would be a 'successor in interest,' as would a grantee of the 'judgment debtor' taking by deed after judgment or sale." (Ogden's California Real Property Law, § 17.57, pp. 662, 663.)

[6] To summarize, as shown by the statute, it is the *status* that is the important and determining factor, not the *date* of the deed or conveyance. [][1]

⊥551 ⊥[Any statements in Lawler v. Gleason, 130 Cal.App.2d 390, 279 P.2d 70, contrary to the rules announced in this decision are disapproved.][2]

[7] It is our conclusion that Thunderbird, holding the 1955 deed from the judgment debtors which was recorded February 8, 1957, was a successor in interest to the judgment debtors within the meaning of subdivision 1 of section 701 of the Code of Civil Procedure, and having such *status* it was entitled to redeem from plaintiff who purchased at the mechanic's lien judgment execution sale held on July 12, 1957. Having paid the full redemption price ($7,157.59) and having received the certificate of redemption from the marshal, defendant Thunderbird (and its grantees and their encumbrancers as the other defendants in this action) should have had judgment in the trial court.

Because of the decision made above on the effective and valid redemption made by Thunderbird it is unnecessary to pass upon the other points as to the equities of the parties, as raised on this appeal by Thunderbird.

It appears from the record that plaintiff acquired an assignment of the first deed of trust against the property and that the amount necessary to pay and discharge this encumbrance, the sum of $2,784.93, has been tendered to plaintiff by Thunderbird, and that this amount is now held by Mr. Riskin, as plaintiff's attorney. The trial court made no disposition or ruling as to this item. []

[The judgment is reversed, and the trial court is directed to order (1) that the sum last above mentioned, now held by plaintiff's attorney as trustee, be paid to plaintiff; (2) that plaintiff execute and deliver the proper and necessary papers to bring about a full reconveyance of the property from the first trust deed; and (3) that the sum of $7,157.59, now held by plaintiff's attorney as trustee, be paid to plaintiff, this amount being the full redemption price payable to plaintiff by Thunderbird. In all other respects the judgment should be for defendants on the quiet title and declaratory relief issues, defendants to recover their costs on appeal.]

GIBSON, C. J., and TRAYNOR, SCHAUER, PETERS, WHITE and TOBRINER, JJ., concur.

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[1] [] Brackets together in this manner are used to indicate deletions from the opinion of the District Court of Appeal.

[2] Brackets enclosing material (other than editor's added parallel citations) are used to denote insertions or additions by this court.

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58 Cal.2d 513, 375 P.2d 174

⊥513 ⊥**Theresa M. DOLSKE, Plaintiff and Appellant,**

v.

Mary E. GORMLEY, Defendant and Respondent.

L. A. 26198.

Supreme Court of California,
In Bank.
Oct. 9, 1962.

Action for injunctive relief to restrain defendant from alleged interference with a driveway easement, wherein defendant cross-complained for removal of certain encroachments. The Superior Court, San

Bernardino County, Archie D. Mitchell, J., entered judgment unsatisfactory to plaintiff and she appealed. The Supreme Court, White, J., held that failure to award damages, and ordering removal of a porch pillar, roof eaves, and other encroachments on the easement, was an abuse of discretion where encroachments were causing little or nominal damages to owner of servient land and cost of their removal would be proportionately great.

Judgment affirmed in part and in part reversed and cause remanded for further proceedings in accordance with opinion.

Opinion, 21 Cal.Rptr. 148, vacated.

1. Appeal and Error 🔑171(1)

A change in the theory of one's case can be made on appeal only where questions of law alone are presented.

2. Appeal and Error 🔑170(1)

Question of whether plaintiff by prescription obtained right to use an easement for maintenance and other purposes in addition to right of ingress and egress for vehicular traffic would not be determined on appeal where issue of prescriptive rights was not put in issue or presented at trial.

3. Easements 🔑44(1)

A "driveway," is a path leading from a garage or house to a street used especially by automobiles.

See publication Words and Phrases for other judicial constructions and definitions.

4. Easements 🔑42

Every incident of ownership not inconsistent with an easement and the enjoyment of the same is reserved to the grantor.

5. Easements 🔑51

Grant of a driveway easement, together with hereditaments and appurtenances, did not constitute a grant of right to use the driveway area for general maintenance of grantee's side of her property in view of fact right of maintenance access to grantee's house and lot could not be considered appurtenant to right to use adjoining land area as a driveway.

6. Easements 🔑58(3)

Owner of servient easement may construct a fence along easement right of way so long as the fence is not placed so as to be inconsistent with rights of dominant owner.

7. Easements 🔑61(9), 69

Evidence, in action for damages and injunctive relief in regard to interference with an easement, sustained finding that owner of servient land did not unreasonably restrict driveway easement by erection of a fence along the easement right of way.

8. Easements 🔑61(11)

Failure to award damages, and ordering of removal of a porch pillar, roof eaves, and other encroachments upon a driveway easement, was an abuse of discretion where encroachments were causing little or nominal damage to owner of servient land and cost of their removal would be proportionately great.

9. Evidence 🔑5(2)

Judicial notice would be taken of fact that removal of a porch pillar, gas pipes and meters, roof eaves and other structures would involve considerable expense as well as disfigurement of a house which might be characterized as irreparable injury.

10. Injunction 🔑50

A court, in determining whether a mandatory injunction should issue ordering removal of encroachment, must consider various factors including good faith of the party in constructing the encroachments, plaintiff's delay in seeking the mandatory injunction, and whether plaintiff will suffer irreparable injury from the encroachments.

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Fred H. Almy and J. H. Petry, San Bernardino, for plaintiff and appellant.

Swing & Swing and Everett H. Swing, San Bernardino, for defendant and respondent.

⊥ WHITE, Justice. ⊥515

This is an appeal by plaintiff and cross-defendant Theresa M. Dolske, from a judgment denying injunctive relief sought to restrain defendant and cross-complainant Mary E. Gormley's alleged interference with a driveway easement, and decreeing that plaintiff and cross-defendant must remove from defendant and cross-complainant's property certain encroachments thereon. Mrs. Dolske is the owner of ⊥516 the dominant tenement, and Mrs. Gormley the owner of the adjoining servient tenement.

With regard to the factual background surrounding this litigation the record reflects that in 1913 Mary H. Eadie was the owner of a parcel of land located in San Bernardino, which had a 75 foot frontage on the south side of Victoria Avenue, an east-west avenue, and a depth of 128 feet. In that year Mrs. Eadie granted to one of plaintiff's predecessors in title the westerly portion of her larger parcel, which granted parcel measured 25 by 128 feet. Also included in the above grant was "the right to use as a driveway in common with grantor" a strip of land 10 by 128 feet along the westerly side of Mrs. Eadie's remaining property. The grantee's lot thus had a 25 foot frontage on Victoria Avenue, and "the right to use as a driveway" a strip adjoining the eastern edge of the new lot.

Prior to 1949 a house was constructed on the new lot, the easterly wall of which was approximately three inches from the property line, and certain other structural features of which encroached upon the westerly edge of the grantor's property. Specifically, it appears that a pillar supporting a large front porch extended at its base approximately nine inches over the property line, the roof eaves along the length of the house extended over the line approximately 19 inches, and two gas meters and pipes next to the house extended approximately eight inches over the adjoining property. It also appears that a wooden curb was constructed along the common driveway approximately one and one-half feet from the eastern wall of the house, and about one foot from the grantor's westerly property line. The garage for the property subsequently acquired by Mrs. Dolske was constructed 40 feet behind the house, the eastern wall of which is 17 inches from the Gormley property line.

Plaintiff Dolske acquired the above described house, lot, and driveway easement in 1949. Her deed conveyed the 25 foot wide lot, "Also right to use as a driveway" the 10 by 128 foot strip adjoining her easterly property line, "TOGETHER with the tenements, hereditaments, and appurtenances whatsoever to the same belonging or in anywise appertaining." Defendant Gormley acquired the adjoining property in 1951 from heirs of Mary H. Eadie. In 1954 or 1955, Mrs. Dolske had constructed, in addition to the prior existing structures along the property line, a concrete curb in the easement way to replace the above-described wooden curbing. It further appears that certain flowers and shrubs have been planted ⊥517 between the house and the curb, on Mrs. Gormley's property and in the common driveway area.

The instant litigation appears to have been precipitated when Mrs. Gormley had constructed, in May 1959, a chain link fence along her westerly property line. The fence, approximately four and one-half feet high, was commenced at the sidewalk and extended to the rear of the Dolske house, with breaks therein to accommodate the porch pillar and the gas meters. A 40 foot wide opening was left for access to Mrs. Dolske's garage, and the fence was then continued alongside the Dolske garage to the rear or southerly property line. The fence extended somewhat above the lower portions of the windows on the east side of Mrs. Dolske's house. Since the fence is on the property line, there is only three inches clearance between the fence and the Dolske house, and 17 inches between the fence and Mrs. Dolske's garage, making it difficult to clean and paint between the fence and the buildings.

In her complaint Mrs. Dolske alleged her ownership of the property and her use of the driveway as the sole means of access from Victoria Avenue to her garage in the rear of her property. She alleged that defendants wrongfully "obstructed said driveway by constructing a chain link fence upon and across said premises, whereby the plaintiff was and still is, prevented from enjoying the use of said easement and driveway." Plaintiff prayed that Mrs. Gormley "be perpetually enjoined and restrained from continuing to obstruct said driveway throughout its entire width by said fence and from otherwise obstructing the same." Mrs. Dolske also sought damages.

In addition to answering, defendant Gormley cross-complained, alleging the wrongful construction and maintenance upon her property of the above detailed pillar, eaves, and other structures, and prayed that a mandatory injunction issue ordering the removal from cross-complainant's property of all alleged encroachments. Mrs. Gormley also sought damages of $1,000. In the pretrial conference order it was recited by Judge Findlay that: "It is admitted or stipulated by both parties hereto that the easement rights of the plaintiff as set forth in the complaint arise out of an easement of grant rather than a right by user."

Following a trial before the court wherein the evidence was in the main confined to that bearing upon the question of the extent of the granted right "to use as a driveway" the 10 foot wide strip of Mrs. Gorm-⊥518ley's property, and following a view of the premises by the court, judgment was rendered for defendant and cross-complainant. In addition to finding that the fence did not unreasonably interfere with Mrs. Dolske's enjoyment of the driveway easement, it was decreed that Mrs. Dolske must remove from Mrs. Gormley's property all encroachments, including the roof eaves and the porch pillar. It was further decreed that the driveway easement may be used by Mrs. Dolske or persons claiming under her only "for ingress and egress for vehicular traffic between Victoria Avenue and the said dominant tenement through the opening in the fence as the same presently exists along the common boundary line of said dominant and servient tenements." No damages were awarded to defendant and cross-complainant.

Various contentions are advanced by plaintiff and cross-defendant concerning prescriptive rights that allegedly ripened in plaintiff or her predecessors in title, giving her the right to use the easement to obtain access to her property for maintenance and other general purposes, in addition to the right of ingress and egress for vehicular traffic. Plaintiff also appears to contend that prescriptive rights ripened such as to enable her to maintain the encroachments now existing upon defendant's lot.

However, while the record contains occasional references to matter bearing upon possible prescriptive rights, the issue of prescriptive rights appears not to have been litigated herein. The case at bar would appear to involve only the question of whether the chain link fence as constructed by Mrs. Gormley along her westerly property line unreasonably interfered with the use "as a driveway" of the granted 10 by 128 foot wide easement way, and the question whether the Dolske encroachments must be removed.

[1, 2] In advancing contentions concerning any prescriptive rights that might have been acquired in addition to those conveyed by the 1913 grant (see Mendelson v. McCabe, 144 Cal. 230, 232, 77 P. 915; Redemeyer v. Carroll, 21 Cal.App.2d 217, 219–220, 68 P.2d 739; Anno. 110 A.L.R. 915), plaintiff is met by the rule that a change in the theory of one's case can be made on appeal only where questions of law alone are presented. (Estate of Hunter, 194 Cal.App.2d 859, 862–863, 15 Cal.Rptr. 556.) It is apparent that any question concerning prescriptive rights "contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented⊥519 at the trial [so that] the opposing party should not be required to defend against it on appeal." (Panopulos v. Maderis, 47 Cal.2d 337, 341, 303 P.2d 738, 741.)

Appellant Dolske also contends that when the deed to her property recited that she was granted the "right to use as a driveway" the easement strip "TOGETHER with the tenements, hereditaments, and appurtenances whatsoever to the same belonging or in anywise appertaining," she was granted the right to use the driveway area for pedestrian access to the east side of her house and lot, as well as the right to use the driveway area for general maintenance of that side of her property. But while the above contended-for rights might be considered as "tenements" in an original legal sense that a tenement is "everything that may be *holden*," including incorporeal property rights such as offices, franchises or easements (see Black's Law Dictionary, (4th ed. 1951) p. 1637), and easement rights also might be characterized as "hereditaments" (see Westlake v. Silva, 49 Cal.App.2d 476, 478, 121 P.2d 872), it would be necessary for the access and maintenance rights herein contended for to be "appurtenant" or "appertaining" to the right to use the easement strip "as a driveway" in order for the instant contention to prevail.

[3–5] "Driveway" is defined in Webster's New World Dictionary (1951) page 443, as "a path leading from a garage or house to the street, used especially by automobiles." While admittedly driveways are commonly used for multifarious additional purposes, including those general maintenance and access functions contended for by plaintiff, "The law is jealous of the claim of an easement * * * and likewise of the extent of the rights claimed under an instrument granting an easement. The rule is that every incident of ownership not inconsistent with the easement and the enjoyment of the same, is reserved to the grantor." (Dierssen v. McCormack, 28 Cal.App.2d 164, 170, 82 P.2d 212, 216; see City of Pasadena v. California-Michigan, etc., Co., 17 Cal.2d 576, 579, 110 P.2d 983, 133 A.L.R. 1186.) It is thus entirely appropriate herein that, in construing the grant "to use as a driveway" an area of adjoining land, a narrow construction be placed upon the term "driveway." When driveway rights are viewed as primarily for ingress and egress of vehicles, plaintiff's contention is untenable that the right of pedestrian and maintenance access to a house and lot is "appurtenant" or "appertaining" to the right to use an adjoining land area "as a driveway."

⊥ [6, 7] Furthermore, the owner of the servient estate may construct a fence along the easement right of way so long as the fence is not placed so as to be inconsistent with the rights of the dominant owner. (Brearton v. Fina, 3 Misc.2d 1, 8, 155 N.Y.S.2d 399; Baird v. Knutzen, 49 Wash.2d 308, 310–311, 301 P.2d 375; see McCoy v. Matich, 128 Cal.App.2d 50, 53, 274 P.2d 714.) The trial court's finding of no unreasonable restriction by the fence upon the easement rights herein appears to be supported by substantial evidence. Nor can it be instantly argued that such rights of pedestrian and maintenance access as are contended for herein (see Anno. 58 A.L.R. 1037) were included in the conveyance to Mrs. Dolske of her house and lot, since the sought after rights involve the use of property of another, which land use rights would appear to involve questions concerning prescriptive rights acquired by Mrs. Dolske's predecessors in title and granted to her, and, as hereinbefore indicated, issues concerning alleged prescriptive rights have not been litigated in this action. ⊥520

[8, 9] A further and meritorious contention is that in not awarding damages and ordering removal of the porch pillar, roof eaves, and other encroachments upon Mrs. Gormley's property, where said encroachments are causing little or nominal damage to that defendant and the cost of their removal would be proportionately great, the trial court abused its discretion. (See Baglione v. Leué, 160 Cal.App.2d 731, 734, 325 P.2d 471.) As stated above, the trial court did not award damages to defendant Gormley for the long continued presence upon her property of the encroachments. And while no direct evidence is contained in the record as to the probable expense and inconvenience to Mrs. Dolske of the removal of the encroachments, this court may take judicial notice (see Nebel v. Guyer, 99 Cal.App.2d 30, 34, 221 P.2d 337) of the fact that removal of the porch pillar, gas pipes

and meters, roof eaves and other structures as pictured in the exhibits which are part of the instant record would involve considerable expense as well as disfigurement of the Dolske house (see Baglione v. Leué, supra, 160 Cal.App.2d 731, 735, 325 P.2d 471), which might well be characterized as "irreparable injury" to cross-defendant Dolske. (See Fairrington v. Dyke Water Co., 50 Cal.2d 198, 200, 323 P.2d 1001; Scheble v. Nell, 200 A.C.A. 429, 432, 19 Cal.Rptr. 375.)

[10] Involved herein is the "relative hardship doctrine" (see Christensen v. Tucker, 114 Cal.App.2d 554, 559, 562–563, 250 P.2d 660; Anno. 28 A.L.R.2d 679, 699), wherein a court, ⌊521 in determining whether a mandatory injunction should issue ordering removal of encroachments, must consider various factors including the good faith of the party who constructed the encroachments (Blackfield v. Thomas Allec Corp., 128 Cal.App. 348, 349, 17 P.2d 165), and the proportionate hardships to the parties. (Wright v. Best, 19 Cal.2d 368, 386, 121 P. 2d 702.) Also relevant is a plaintiff's delay in seeking the mandatory injunction (see Rankin v. DeBare, 205 Cal. 639, 641, 271 P. 1050), and whether such a plaintiff will suffer irreparable injury from the encroachments. (Pahl v. Ribero, 193 Cal.App.2d 154, 163–164, 14 Cal.Rptr. 174.)

From the instant record it does not appear that the encroachments were constructed negligently or in willful disregard of the property rights of Mrs. Gormley or her predecessors in title, and it further appears that the cost of removal of said encroachments would be disproportionate to any damage caused to the Gormley property. Also, Mrs. Gormley acquired the property in 1951 and delayed eight years before seeking legal relief against the encroachments. Finally, it does not appear that Mrs. Gormley's property rights will be irreparably injured by the denial of an order to remove the existing encroachments. The structures extend over a driveway area, and it would appear manifest that damages will be an adequate remedy. By the denial of injunctive relief Mrs. Dolske obtains no rights in fee in the Gormley property, since upon the removal of the present Dolske house any "encroachment rights" terminate. (See Christensen v. Tucker, supra, 114 Cal.App. 2d 554, 563, 250 P.2d 660.)

For the foregoing reasons the judgment is affirmed only insofar as it decrees that the 1913 grant of the driveway easement to plaintiff and cross-defendant's predecessors in title conveyed a bare right to use the easement way for ingress and egress of vehicular traffic, and that the fence erected by Mrs. Gormley does not unreasonably impede such easement rights. In all other respects the judgment is reversed and the cause remanded to the court below for further proceedings not inconsistent with the views herein expressed. The parties will bear their respective costs on appeal.

GIBSON, C. J., and TRAYNOR, SCHAUER, McCOMB, PETERS and TOBRINER, JJ., concur.

208 Cal.App.2d 471

⊥471 **Frank H. PUCKETT, Petitioner and Appellant,**

v.

The CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, Respondent.

Civ. 20306.

District Court of Appeal, First District, Division 2, California.

Oct. 15, 1962.

Rehearing Denied Oct. 25, 1962.

Hearing Denied Dec. 12, 1962.

Action for a writ of mandate directing a municipal corporation to restore petitioner to a position as a patrolman in the police department of the municipality. The Superior Court, San Francisco County, C. Harold Caulfield, J., denied the writ and petitioner appealed. The District Court of Appeal, Agee, J., held that where evidence of petitioner's unfitness based on a lack of integrity became known to police chief, and such evidence was not made available or considered by the Civil Service Commission at time it placed petitioner on eligible list, police chief had discretion to act upon such evidence by terminating the appointment.

Judgment affirmed.

1. Municipal Corporations 🔑185(5), 198(3)

Police chief or fire chief of San Francisco, under the San Francisco Charter, cannot act arbitrarily or capriciously in terminating an appointment to their department during the probationary period, but they must act reasonably and upon substantial evidence.

2. Municipal Corporations 🔑185(5)

Police chief of San Francisco has a right to terminate appointment of an unfit probationer at any time during the probationary period if chief acts reasonably and bases his action on substantial evidence, even though the evidence concerns conduct of the probationer occurring before the appointment, if the evidence upon which the chief acts was not known to the Civil Service Commission before it declared the probationer to be eligible.

3. Municipal Corporations 🔑185(5)

Where evidence of a probationary policeman's unfitness based on a lack of integrity became known to police chief, and such evidence was not made available or considered by the Civil Service Commission at time it placed such policeman on eligible list, police chief had discretion to act upon such evidence by terminating the appointment.

◆

James C. Purcell, Michael Riordan, San Francisco, for appellant.

Thomas M. O'Connor, City Atty. of the City and County of San Francisco, Bernard J. Ward, Deputy City Atty., San Francisco, for respondent.

⊥472 AGEE, Justice.

Petitioner appeals from a judgment denying a writ of mandate to restore him to a position as a patrolman in the San Francisco Police Department.

Prior to July 1, 1959, his employment was that of a motorman and bus operator for the Municipal Railway of San Francisco. In 1958, he took a qualifying examination given by the Civil Service Commission of the City and County of San Francisco for the purpose of acquiring a position on the eligible list for membership in the uniformed force of the city's police department. On September 19, 1958, he was notified by the commission that he had attained a standing on the eligible list, with the designation of Q-2 Policeman.

On November 18, 1958, respondent Thomas J. Cahill, Chief of Police for respondent city, wrote a letter to the Personnel Director and Secretary of the Civil Service Commission advising him that on the previous day, November 17, 1958, petitioner was personally interviewed at the Police Academy; that, in response to a direct question, he flatly denied having ever received medical treatment or consulted a doctor regarding an injury to his right knee; that in fact petitioner was then receiving a ten per cent disability pension from the United States Government for an injury to his right knee sustained while in the military service; that, when confronted with the fact that on one occasion in 1956 and on another in 1957, his right knee was treated for traumatic bursitis by a Dr. H. B. Henderson, 2085 Sutter Street, San Francisco, petitioner stated that this injury was merely feigned by him in order to obtain time off from his employment by the Municipal Railway; that on each occasion, petitioner remained away from work for a period of five days; that on December 23, 1957, petitioner took five days off because of an alleged bad shoulder, which complaint petitioner stated was also feigned.

The letter states further that during his employment by the Municipal Railway, petitioner utilized 76½ days of 77 accumulated days of sick leave, most of which time petitioner stated was for his own use rather than because of any actual ailments or injuries.

The letter also states that during said employment petitioner had lost 16 days of employment due to suspension for infraction of rules and on 15 separate occasions had been cautioned or warned by his superiors; that, in 1953, petitioner had eight accidents for which he had been warned by his immediate superiors, and that during 1958, up to the date ⊥473 of the letter, he had been involved in nine accidents, adding that eight of these were listed as "unavoidable" but were still being investigated. (Between January 20, 1959, and June 23, 1959, petitioner had nine more accidents, but, of course, these occurred after the writing of the letter. Nevertheless, these accidents indicate a pattern.)

Chief Cahill concluded in his letter: "In view of the foregoing, it is my belief that this man, because of his very poor record, should be removed from the present list of eligibles. He is either physically unfit for police duty or is untruthful regarding his physical condition."

Petitioner's counsel describes Chief Cahill's conclusion as a "whimsical, capricious and arbitrary determination." The letter was admitted in evidence and included in the record by stipulation. There was and has been no denial of the facts set forth therein. We do not think counsel's description of Chief Cahill's determination has any support in the record.

However, on the day following the chief's letter, the commission's secretary replied by letter that the commission had no authority to remove the name of an eligible from a list unless there was proof that "the individual secured standing on the list by false statement, fraud or concealment of fact made by the individual or by another on his behalf." The letter states that it does not appear that any false statements were made to the commission during the civil service examination.

The commission stated that it relied upon an opinion (No. 417) of the San Francisco City Attorney, dated August 6, 1951, regarding an eligible on a Public Health Department list, whose work for this department as a non-civil service employee, during a six weeks' period in 1950, had been unsatisfactory. Petitioner relies upon this opinion as support for his position.

It would serve no useful purpose in discussing this opinion or whether the commission could or could not re-examine the petitioner to determine his fitness as a police officer and thereafter remove him from the eligible list if such action was warranted. The fact is that it did not do so, and its failure to act upon information coming to it after it had declared petitioner to be eligible is not an issue to be determined herein.

There is no doubt that the commission is the body authorized by the Charter of the City and County of San Francisco ⊥474 to determine the eligibility for appointment to any municipal employment, including the police department. Also, there is no doubt that the appointing officer, the chief of police in this instance, has the power to terminate the employment of a probationary employee at any time during the probationary period. (San Francisco Charter §§ 145, 148.)

Section 148 of the charter provides in part as follows: "Whenever a position controlled by the civil service provisions of this charter is to be filled, the appointing officer shall make a requisition to the civil service commission for a person to fill it. Thereupon, the commission shall certify to the appointing officer the name and address of the person standing highest on the list of eligibles for such position."

This procedure was followed and on June 23, 1959, the chief notified petitioner to appear on July 1, 1959. On that date petitioner was sworn in as a probationary member of the police department and his appointment was then immediately terminated by the chief. Petitioner was paid for that one day but was not permitted to perform any functions as a police officer.

Following this termination, petitioner immediately reported back to the Civil Service Commission and on the following day, July 2, 1959, he was reinstated to his former position with the Municipal Railway with full seniority rights. However, on March 21, 1960, almost nine months later, he filed this action in which he asks for restoration to his position as a police officer, unpaid salary for such period, and $5,000 attorney's fees.

Section 148 of the charter further provides: "At any time during the probationary period [one year in this case] the appointing officer may terminate the appointment upon giving written notice of such termination to the employees and to the civil service commission specifying the reasons for such termination. *Except in the case of uniformed members of the police and fire departments the civil service commission shall inquire into the circumstances.*" (Italics ours.)

We added the foregoing italics in order to emphasize the obvious, that the Civil Service Commission has no further function to perform when the termination is of an appointment to the police or fire department. Whereas, as to all other departments, it has the duty to inquire into the circumstances of any such termination.

It is conceded that the written notice of termination was given to petitioner and to the commission, as required by the ⌊475 above charter provision. This does not, of course, weaken or affect the petitioner's contention herein.

[1] The requirement that the appointing officer must specify the reasons for the termination does have significance, however. It supports our opinion that the police chief or the fire chief cannot act arbitrarily or capriciously but instead must act reasonably and upon substantial evidence.

It was stipulated that the issue herein could be submitted upon the record and there was no testimony adduced at the hearing. The record includes as exhibits the application form filled out by petitioner for the commission, the chief's letter of November 18, 1958, the commission's reply letter of November 19, 1958, a medical report of October 10, 1958, petitioner's record with the Municipal Railway, including his accident record, and the transcript of his sickness and disciplinary record. All of these matters were before the trial court by stipulation. No contention is made that they are not correct. All of the statements of fact herein, are of course, based upon the same record as that before the trial court.

The record shows that the chief of police was justified in concluding that petitioner lacked integrity and that he had demonstrated this many times in the course of his employment by the Municipal Railway. Also, he had been untruthful during his interview at the Police Academy.

The number of accidents he had had and the many infractions of the rules of the railway would also justifiably indicate a tendency toward recklessness or carelessness which would be incompatible with the duties of a police officer.

[2] This brings us to the crucial point. Does the right and duty of the police chief to terminate the appointment of an unfit probationer arise only when such probationer has demonstrated his unfitness by conduct occurring *after* he has been appointed? Or can the police chief do so *"at any time"* during the probationary peri-

od, as the charter expressly says he can, if he acts reasonably and bases his action on substantial evidence, even though that evidence concerns conduct of the probationer occurring *before* the appointment?

[3] We think that when such evidence of unfitness becomes known to the police chief and this evidence was not made available to or considered by the Civil Service Commission at the time it placed petitioner on the eligible list, the police⌊476 chief has the discretion to act upon such evidence by terminating the appointment.

On the other hand, if the evidence upon which the chief acted was also known to the Civil Service Commission before it declared petitioner to be eligible, he should not have such right. To hold otherwise would be contrary to the intent and purpose of the civil service system and would in effect give the appointing officer the authority to veto the decision of the commission that a particular applicant was capable and eligible to perform the duties of the position in question.

The petitioner herein was placed on the eligible list by the commission on September 19, 1958. As we have seen, the commission took the position that it had no authority thereafter to remove him therefrom or to refuse to certify him after he had reached the top of the list and the necessary requisition had been received from the police chief.

Without qualifying the holding which we have stated above, the question might well be asked: What about the nine months' period elapsing between September 19, 1958, and July 1, 1959, when petitioner was appointed and sworn in? On November 17, 1958, he had deliberately falsified at the Police Academy interview. We have already referred to his accident record during this period and his sick leave absences based on false complaints. The commission thought that its hands were tied because no fraud had been practiced upon it during its examination of petitioner. We believe that the police chief should not likewise be prevented from exercising a discretion to act.

General authority on the subject emphasizes the importance of maintaining this discretion in the appointing officer, based on the rationale that he is the person best qualified to determine whether the probationary employee is able to perform satisfactorily in the position (Broyles v. State Personnel Board (1941) 42 Cal.App.2d 303, 108 P.2d 714; Boutwell v. State Board of Equalization (1949) 94 Cal.App.2d 945, 212 P.2d 20.) But it must be noted that these cases involve factual situations in which the employee's actual performance on the job has come into question.

The result which we have reached in the instant case contains an obvious danger to any civil service system. The commission determines the eligibility of the employee and certifies him as an eligible employee to the appointing officer. If the appointing officer does not believe such employee to be ⌊477 eligible because of matters in existence at the time of the commission's certification, he is in effect overruling or circumventing the commission's determination of eligibility by simply terminating the appointment immediately after he makes it. Whereas, if the appointing officer could only terminate the appointment for a cause or causes arising after the appointment, this would not be contrary to the commission's prior determination of eligibility.

On the other hand, as we have pointed out before, the charter expressly treats the police and fire departments in a category different than that of all other city departments. There is no provision for a review by the commission of the circumstances involved in the termination of an appointment to the police or fire department. The reason is obvious. A police officer is in a position of trust. He also owes a duty not to act in a careless or reckless manner or in disregard of life or the safety of the public. The point need not be labored.

Here, the police chief had information which the commission did not have when it made its determination of eligibility. Rightly or wrongly, the commission believed that it did not have the authority to subsequently remove the name of an eligible from a list unless the standing on the list was secured by false statements made to the commission or by fraud practiced upon the commission or by concealment of fact from the commission. The commission did not find that this had occurred.

There is no doubt that if petitioner had followed his pattern of untruthfulness, recklessness, and disobedience of rules *after* he had commenced his employment as a police officer, the termination would be justified. We do not believe that the police chief, having the knowledge that he had, should be required to wait until petitioner had demonstrated his unfitness as a police officer before he could act as he did in order to protect the public.

In view of our conclusion, it is unnecessary to discuss the request for unpaid salary and attorney fees.

Judgment affirmed.

KAUFMAN, P. J., and SHOEMAKER, J., concur.

On Petition for Rehearing.

PER CURIAM.

The appellant's petition for rehearing is denied. In response to the claim therein that facts are incorrectly stated in our opinion, we invite attention to the stipulation of petitioner's counsel, at page 39, lines 9 to 24, inclusive, of the reporter's transcript and to the "Pre-Trial Conference Order," in which the issues in dispute are stated.

208 Cal.App.2d 489

489 **In the Matter of the ESTATE of Burton J. WYMAN, Deceased.**

Alan CRANSTON, Controller of the State of California, Petitioner and Respondent,
v.
Adele F. WYMAN, Objector and Appellant.
Civ. 20385.

District Court of Appeal, First District,
Division 3, California.
Oct. 15, 1962.

Proceeding on objection to report of inheritance tax appraiser who included as a taxable item for inheritance tax purposes an annuity to which surviving wife of deceased referee in bankruptcy for the United States District Court became entitled upon referee's death. The Superior Court, Alameda County, A. J. Woolsey, J., overruled the objection and the widow, as executrix and distributee, appealed. The District Court of Appeal, Devine, J., held that statute exempting from taxation the right of any person to a pension, retirement allowance, or return of contribution accruing under "any public retirement system" was not limited to public retirement systems for employees of the state government only but also served to exempt from taxation the rights of persons covered by retirement systems of the Federal Government.

Order overruling objections reversed.

1. Taxation 🔑872

Statute exempting from taxation the right of any person to a pension, retirement allowance, or return of contribution accruing under "any public retirement system" was not limited to public retirement systems for employees of state government but served also to exempt from taxation the rights of persons covered by retirement systems of the Federal Government. West's Ann.Rev. & Tax.Code, § 13880.

See publication Words and Phrases for other judicial constructions and definitions.

2. Statutes 🔑181(2)

Statutes must be interpreted in such manner as to render their operation reasonable and fair rather than absurd or unjust; this is true even if it is necessary to depart from literal meaning of word used. West's Ann.Code Civ.Proc. § 1858.

3. Constitutional Law 🔑70(1)

If a statute announces a general rule and makes no exception thereto, courts can make none.

4. Statutes 🔑212.1

It is presumed that Legislature knew previous law and decisions.

Glicksberg, Glicksberg & Goldberg, Lawrence Goldberg, San Francisco, for appellant.

Charles J. Barry, Chief Inheritance Tax Atty., Newell C. Barnett, Assoc. Inheritance Tax Atty., San Francisco, for respondent.

⊥490 ⊥DEVINE, Justice.

[1] A question of law only is presented in this case, the facts being undisputed. On May 2, 1960, Burton J. Wyman, referee in bankruptcy for the United States District Court for the Northern District of California, died, and upon his death his widow became entitled to a survivor's annuity from the United States Civil Service Commission, to continue until her death or remarriage. By written stipulation of the parties, it is agreed that the annuity is a benefit accruing to the widow under the provisions of the Civil Service Retirement Act, a public retirement system for employees of the Federal Government. The inheritance tax appraiser listed the annuity as taxable and valued it as $29,145.14. Objection was made to the report of the inheritance tax appraiser because of the inclusion of the annuity as a taxable ⊥491 ⊥item. The objection was overruled and the report was approved by the superior court, and the widow, as executrix and as distributee, appeals from the order.

In 1956, there was enacted section 13880 of the Revenue and Taxation Code, which reads as follows: "The right of any person to a pension, retirement allowance, return of contributions, the pension, retirement allowance, any optional benefit, or any other right accrued or accruing to any person under any public retirement system is exempt from the tax imposed by this part." Appellant's argument has the stark simplicity of a syllogism: any right accrued or accruing to any person under any public retirement system is exempt; but the right of appellant has accrued to her under a public retirement system; therefore the right is exempt. It is argued by respondent, the State Controller, that one of the terms of the major premise must be interpreted by the court otherwise than according to its literal meaning; that is, that the term "any public retirement system," as used in the statute, means "any public retirement system established by the State of California or by any of its agencies or political subdivisions."

This proposition at once appears to transgress the circumscription of the court's function of construction of statutes as contained in section 1858 of the Code of Civil Procedure, which reads: "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

[2] We recognize the rule contained in authorities cited by respondent (Warner v. Kenny, 27 Cal.2d 627, 629, 165 P.2d 889; Dempsey v. Market Street Ry. Co., 23 Cal.2d 110, 113, 142 P.2d 929; 45 Cal.Jur.2d, § 116, p. 625, § 130, p. 637), that statutes must be interpreted in such manner as to render their operation reasonable and fair rather than absurd or unjust, and that this is true even if it is necessary to depart from the literal meaning of the words used. We find nothing in the statute herein, however, which demands a construction other than that of literal meaning, in order to avoid absurdity or injustice, and we set forth our reasoning first, the positive side, in support of the literal meaning, and second, in considering the considerations put before us by respondent.

⊥[3] To begin with, we make reference ⊥492 to the proposition that if a statute announces a general rule and makes no exception thereto, the courts can make none. (Stockton Theatres, Inc. v. Palermo, 47 Cal.2d 469, 476, 304 P.2d 7.)

The dictionary definition of the word "any" as "all," was applied in the case of Emmolo v. Southern Pacific Co., 91 Cal.App.2d 87, 204 P.2d 427, to section 486 of the Civil Code (now section 7604 of the Public Utilities Code), so that the requirement of warning by a locomotive at "any" street, road or highway was held to apply to private as well as to public roads. In Powell v. Allan, 70 Cal.App. 663, 234 P. 339, where a statute required that "any bonds" (street improvement bonds) not sold within a specified period be turned into a certain fund, the court construed the word "any" to mean "all." Similar construction was given to penal statutes containing the word "any" in Doble v. Superior Court, 197 Cal. 556, 241 P. 852, and People v. Syed Shah, 91 Cal.App.2d 716, 721, 205 P.2d 1081.

Perhaps as persuasive as the above cases is one in which the Supreme Court came to its conclusion upon the meaning of a tax statute relating to public retirement funds, in part by reference to omission from the statute of the word "any," namely Estate of Simpson, 43 Cal.2d 594, 275 P.2d 467, 47 A.L.R.2d 991. Government Code section 31452, as it read at the time of the decision, exempted rights and moneys accruing under county employees' retirement plans from taxation. It was held that the exemption did not include inheritance tax, because this is not a tax on the property itself, but on the privilege of succeeding to the property. In the course of its reasoning (at pp. 599, 600, 275 P. 2d 467), the Court distinguished the New York statute, which was construed by the courts of that state as exempting public retirement benefits from inheritance taxation (In re Morrison's Estate, 130 Misc. 438, 224 N.Y.S. 346; In re Fischer's Estate, 132 Misc. 204, 229 N.Y.S. 826, affd. 23 App.Div. 887, 229 N.Y.S. 855), in that the New York statute exempted from *any* state or municipal tax. The Supreme Court pointed out that the word "any," used in the New York statute, was broad enough to comprehend, in its enlarged and plural sense, all state and municipal taxes, without limitation, citing the cases of Doble v. Superior Court; Powell v. Allan; People v. Syed Shah, supra; that the Legislature of California presumably knew the existing laws and decisions, and that presumably the Legislature omitted the word "any" deliberately.

493 [4] Following the 1954 decision in Estate of Simpson, the Legislature not only amended section 31452 of the Government Code in 1955, to express exemption of county employees' retirement rights and funds as embracing "any interitance tax," but also enacted, in 1956, section 13880 of the Revenue and Taxation Code, in which there is a studious use of the word "any," for the statute exempts from inheritance tax the right of *any* person to a pension, etc., *any* optional benefit, or *any* other right accruing to *any* person under *any* public retirement act. Since it is presumed that the Legislature knew the previous law and decisions, including the rule in Estate of Simpson (45 Cal.Jur.2d, § 101, p. 615), it appears that the repeated and careful use in the statute of the word "any" was intended to avoid limitation of the words modified by the word (therein used as an adjective) "any."

It cannot be gainsaid by the respondent that the annuity accrues under the provisions of a public retirement system, for this was agreed by the parties in the stipulation referred to above, but respondent contends that the exemption embraces only public retirement systems of the state and of its agencies and subdivisions; and we turn to a consideration of respondent's two arguments. The first is that the history of the legislation on the subject sustains respondent's interpretation. Following the decision in Estate of Simpson, the Legislature made several changes for the purpose of including exemptions from inheritance tax, namely, the amendment to section 31452 of the Government Code, referred to above, applying to the county employees' retirement law; the enactment of section 21200.5 of the Government Code, a new section, to extend the exemption to the state employees' retirement law; and the enactment of section 14278 of the Education Code, a new section (now section 13836 of the Education Code since recodification in 1959), to make the exemption applicable to payments under the state teachers' retirement law. It is argued by respondent that as a result of these actions by the Legislature, public pension exemptions from inheritance tax were established in widely separated California codes, but no such exemption was contained in the inheritance tax law itself, and that in order to remedy this situation, and to cover all public pensions specifically exempted from inheritance tax in other California codes, the Legislature enacted the statute which is the subject of this case, namely, section 13880 of the California Revenue and Taxation Code. Thus, 494 argues respondent, there was no intention of the Legislature to enlarge the application of the exemption. We do not accept this interpretation. In the first place, section 13880 contains no limitation in its reference to any public retirement system, and limitation could have been expressed very simply and succinctly. We note, besides, that the three specific statutes which were passed or amended in 1955 have not been repealed or amended since that time. This would give some evidence that the Legislature intended to go beyond the specifically described exemptions. Indeed, respondent concedes, by his counsel, that the exemption in section 13880 includes rights and funds accruing under retirement plans for employees of cities within the state, under the comprehensive reference to "any public retirement system," although exemption for city pensions is not specified in any state statute. The intention of the Legislature then was not merely to draw together theretofore existing exemptions.

The second argument of respondent is that the Legislature must be assumed to have had in mind a benefit to the State of California, not to the Federal Government or to the governments of other states and nations. The purpose, says respondent, could not have been to benefit the recipients of the pension plans because, had that been so, the statute would have included recipients of private as well as public plans, else the statute would be of doubtful constitutionality; but if the purpose is to benefit the public body paying the pension, it must surely have been the desire of the Legislature to make employment with such bodies more attractive in order to enable the public bodies to recruit and hold better employees. Competition being keen between the various governments for good employees, says respondent, the Legislature could have had in mind only a benefit to the State of California and its political subdivisions, for to hold otherwise would impute to the Legislature a desire to benefit the Federal Government and the various governments of other cities and foreign countries, at the expense of the government of California and its political subdivisions.

We put to one side, as unnecessary to the disposition of this argument, the point that the Legislature could not have intended a benefit to the recipients. We cannot then accept, however, the proposition that the State of California could not have been willing to extend the exemption for the benefit of the United States Government, the employer of decedent. We find the exemption in another part of the law, that dealing with execution and attachment. 495 Section 690.22 of the Code of Civil Procedure exempts from execution or attachment "[a]ll money received by any person, a resident of the State, as a pension, or retirement or disability or death or other benefit, *from the United States Government,* or from the State, or any county, city, or city and county, or other political subdivision of the State * * *." (Emphasis added.) Whether this exemption is intended to benefit the employee or the Federal Government is of no moment; the fact is that the Legislature, in the matter of execution and attachment, manifested its intention to make the exemption applicable to Federal pensions, despite whatever competition there may be between the two governments to obtain employees. We find nothing which would make it impossible for the Legislature to have created a like exemption as a matter of comity, although not necessarily of reciprocity, for the benefit of the government of the United States, at least, if not directly for that government's officers and employees.

If the Legislature, in using the comprehensive language contained in section 13880 of the Revenue and Taxation Code, has gone beyond what it intended to do, it can make whatever corrections it desires. For the court to attempt to accept the limitation proposed by respondent would require either conjecture as to the Legislature's intention, or judicial legislation.

The order overruling objections to the report of the inheritance tax appraiser and fixing the inheritance tax is reversed.

DRAPER, P. J., and SALSMAN, J., concur.

208 Cal.App.2d 458

⌊458 ⌊**Donald P. GIBSON, Plaintiff and Appellant,**

v.

STATE of California, Defendant and Respondent.

Civ. 20085.

District Court of Appeal, First District, Division 2, California.

Oct. 15, 1962.

Action for damages for the wrongful death of plaintiff's mother injured in a collision between a state-owned dump truck and an ambulance in which she was being transported. From an adverse judgment of the Superior Court, County of Monterey, Stanley Lawson, J., the plaintiff appealed. The District Court of Appeal, Kaufman, P. J., held that the prior Appellate Court's decision was the law of the case, that the state's negligence was properly submitted to the jury and that rulings on instructions and evidence were not prejudicial error.

Judgment affirmed. Appeal from an order denying motion for new trial dismissed.

1. Appeal and Error 🔑1097(1)

An appellate court's decision on the sufficiency of evidence becomes the law of the case binding on a subsequent appeal so long as the evidence on retrial is not substantially different in a material respect from that on the former trial.

2. Appeal and Error 🔑1097(1)

On the second appeal in the same case, the Appellate Court looks not only to the opinion of the court but also to the prior record to determine whether the law of the case should control in the determination of the second appeal.

3. Appeal and Error 🔑1097(1)

In action for death of plaintiff's mother in a collision between a state-owned dump truck and ambulance in which she was being transported, Appellate Court's decision on sufficiency of the evidence became the law of the case on subsequent appeal where the evidence on retrial was not substantially different in material respect from that on the former trial.

4. States 🔑112

Liability of the state for tort is to be determined under the ordinary rules of common law negligence.

5. Highways 🔑168

The right to public use of a highway while road work is being done is subordinate to the right of the public authorities to make improvements in the public interest.

6. Automobiles 🔑163(1)

The amount of care required of a person performing work in a public street or highway is less than that of an ordinary driver.

7. Negligence 🔑3

The determination of what duty of care is owed to a particular plaintiff must be made on the facts of the individual case.

8. Automobiles 🔑245(19, 50)

In action for death of plaintiff's mother injured in a collision between the state-owned dump truck on a road under construction and ambulance in which the mother was being transported, whether adequate warning notice was not given or whether acts of the state employees were the proximate cause of decedent's injuries were properly left to jury as was question whether slowing to 35 miles per hour by driver after passing signalman was due caution.

9. Trial ⇨267(1)

Where the court correctly instructed the jury on concurrent causation in negligence case, plaintiff was not entitled to have the jury instructed in any particular phraseology.

10. Appeal and Error ⇨1033(5)

Appellant was not entitled to complain that the court by modifying his proffered instructions to eliminate the name of one defendant that the trial court misled and confused the jury as to the concurrent negligence of all three defendants where the deletion of such name from the instructions could only benefit the appellant.

11. Appeal and Error ⇨181

Appellant who did not make the objection made on appeal during trial of the case could not complain on appeal.

12. Witnesses ⇨388(7)

Record established that there was a proper statutory foundation laid so that a free hand diagram drawn by one of the parties to an accident was admissible as a prior inconsistent statement. West's Ann. Code Civ.Proc. § 2052.

13. Appeal and Error ⇨110

An order denying a motion for new trial was not appealable.

◆

Stewart & Tuttle, W. K. Stewart, Robert W. Tuttle, Pacific Grove, Patricia Lane, Carmel, for appellant.

Hoge, Fenton, Jones & Appel, by Robert O. Angle, Monterey, for respondent.

⊥460 KAUFMAN, Presiding Justice.

This is an appeal by the plaintiff from a judgment in favor of the State of California rendered on a jury verdict in an action seeking damages for the wrongful death of the plaintiff's mother who was injured in a collision between a state-owned dump truck and the ambulance in which she was being transported. At the prior trial of the matter, the jury returned a verdict in favor of the plaintiff against the State, the ambulance driver, Alfred Sanchez, and his employer, Monterey Ambulance Company. The State alone appealed and this court reversed solely because of an error in the instructions predicated on Yarrow v. State of California, 53 Cal.2d 427, 2 Cal.Rptr. 137, 348 P.2d 687 (Gibson v. State of California, 184 Cal.App.2d 6, 7 Cal.Rptr. 315).

Appellant argues that the judgment in favor of the State must be reversed because: 1) the negligence of the State was established as a matter of law; 2) the evidence did not indicate that the State was free of contributory negligence; 3) there were certain prejudicial errors in the instructions on concurrent negligence; and 4) the trial court erred in its admission of certain evidence. We cannot agree.

The collision between the ambulance and the state-owned dump truck occurred on July 1, 1958, about 1:30 p. m. ⊥461 on State Route 117–A between Monterey and Salinas on a straight stretch of the two lane highway just east of a gradual curve known as the Toro curve. The dump truck was engaged in hauling loads of dirt from a berm along the south side of the highway to the north side of the highway, where it was used to widen the shoulder on the north side. At the time, one Lyons, a subforeman employed by the State, was controlling traffic. He testified that he was standing approximately 1350 feet east of a "Men and Equipment Working" sign erected at the west end of the project on a steel tripod 8 feet high with 3 red flags at its top; that the loading operation was some 250 feet east of his position; that he had a signal paddle in his right hand held up with the "Stop" side in plain view of the Salinas (east) bound traffic lane but that no vehicles were in sight at the time the truck driver pulled his loaded truck away from the loader and commenced his U-turn. The truck driver, Clarence Hummel, testified that when the loader had filled the dump bed, he looked west and Lyons signaled him to proceed with his turn and that at that time, he saw the "Slow" side of the raised signal paddle facing him.

After Lyons signaled to Hummel, the ambulance carrying the plaintiff's 77 year old mother, came into view. The uncontroverted testimony indicated that the ambulance was on a nonemergency run, taking the plaintiff's invalid mother from her home in Pacific Grove to the county hospital in Salinas. The driver of the ambulance, Sanchez, testified that he was driving about 45 miles an hour, and saw no sign at the west end of the construction; that he slowed to 35 miles per hour as he passed Lyons; that he moved into the Monterey (west) bound traffic lane in order to avoid Lyons; that Lyons had the paddle by his side and did not signal with it; that he saw about 5 pieces of equipment on the shoulder to his right and that just as he was passing the last of them, the dump truck pulled out, turned without any signal, and hit the ambulance's right side, swinging it around onto the shoulder where it hit some slippery material and was thrown into a roll. There were no skid marks. The dump truck was stopped at the point of impact and the ambulance, after rolling over one and one-half times, rested on its top about 96 feet from the point of impact on the shoulder of the west bound traffic lane. The decedent, thrown from the ambulance, subsequently died from injuries received.

The first two contentions on appeal are, in effect, that the evidence is not sufficient to support the verdict in ⊥462 favor of the State. In the prior appeal, we said at page 10: "* * * there is substantial evidence that would support a finding that under the circumstances of the particular work in progress the state and its employees had exercised due care * * *" The sole reason for the reversal was certain errors in the instructions on negligence per se, due to the Supreme Court's recent ruling in Yarrow v. State of California, 53 Cal.2d 427, 2 Cal.Rptr. 137, 348 P.2d 687, that the liability of the State was to be determined by reference to the ordinary rules of common law negligence requiring only reasonable care under all the circumstances (Gibson v. State of California, supra, 184 Cal.App.2d at p. 9, 7 Cal.Rptr. 315).

[1–3] It is well established that an appellate court's decision on the sufficiency of the evidence becomes the law of the case, binding on a subsequent appeal, so long as the evidence on retrial is not substantially different in a material respect from that on the former trial (Murphy v. Atchison, T. & S. F. Ry. Co., 162 Cal.App.2d 818, 822, 329 P.2d 75). On the second appeal, we look not only to the opinion of the court but also to the prior record for the purposes of determining whether the law of the case should control in the determination of the second appeal (Estate of Baird, 193 Cal. 225, 223 P. 974). In the instant case, the only new evidence presented at the second trial was the testimony of Lawrence Perkins, the ambulance assistant, who was riding in the rear with the decedent at the time of the accident. His testimony, however, was merely cumulative to that of Sanchez. Although appellant's first two contentions are based on Hummel's testimony, we note that this was virtually identical to his testimony at the prior trial (Gibson v. State of California, supra). Thus, we are compelled to hold that the law of the case applies.

[4] Even assuming arguendo as appellant contends, that the rule of the law of the case should not apply, we can only conclude on the basis of the record that there is ample evidence to sustain the verdict. As indicated above, the liability of the State is to be determined under the ordinary rules of common law negligence.

[5, 6] Appellant, however, argues that Hummel was negligent as a matter of law. This argument ignores the fact that Hummel was not an ordinary driver on the road, but actively engaged in maintenance work on the highway. The right to public use of a highway while road work is being done is subordinate to the right of the public authorities to make improvements in the

463 public interest (Jones v. Hedges, 123 Cal. App. 742, 12 P.2d 111). Thus, the amount of care required of a person performing work in a public street or highway is less than that of an ordinary driver (Scott v. City & County of San Francisco, 91 Cal. App.2d 887, 206 P.2d 45). The reasons for this rule are well articulated in State, etc., Ins. Fund v. Scamell, 73 Cal.App. 285 at 290–291, 238 P. 780 at 782: "There can be and there is no duty imposed on a workman to be constantly on the lookout for motor vehicles; on the contrary, it is the duty of drivers of vehicles to observe the street laborers and to avoid contact with them. It is not negligence as a matter of law for a workman to keep his mind on his work or to fail to look and listen for approaching vehicles. * * *

"One so employed may also assume that a driver will give a signal or warning so that an accident may be avoided. Regan v. Los Angeles Ice [& Cold] Storage Co., 46 Cal.App. 513, 189 P. 474.

"A man who is engaged in work upon the streets cannot, if he performs his duty, spend a large part, if not all, of his time looking for the approach of vehicles. In most streets, if he did so, he would accomplish little or nothing."

[7, 8] Appellant further argues that the State was negligent as a matter of law as it was contributory negligence not to place another flagman on the Salinas side of the loading area. The determination of what duty of care is owed to a particular plaintiff must be made on the facts of the individual case (Yarrow v. State of California, supra). Reasonable care here required the giving of a warning by the work crew, and the evidence indicates the presence of Lyons and the sign. The conflict in the evidence between the testimony of Lyons that he had his signal paddle up with the "Stop" side in plain view of the Salinas bound traffic and Sanchez' testimony that Lyons was standing with his arms at his side, was properly left to the jury. Under the evidentiary features of this case, manifestly, it cannot be held as a matter of law that adequate warning notice was not given or that the acts of the State employees were the proximate cause of the decedent's injuries. From the testimony of Lyons, the jury could reasonably have concluded that adequate warning was given which should have caused the ambulance driver to exercise caution. Whether slowing to 35 miles per hour after passing the signalman was due caution was also a factual matter for the jury. Furthermore, the State's waiver of sovereign immunity applies only to negligence in the operation of a motor vehicle (Veh.Code § 17001; Muskopf v. Corning 464
Hospital Dist., 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457, suspended by Stats.1961, ch. 1404, p. 3209).

[9, 10] Appellant next contends that the court gave erroneous instructions on concurrent negligence which misled the jury. Appellant concedes that the instructions given were correct but argues that by modifying his proffered instructions to eliminate the name of Sanchez, the trial court misled and confused the jury as to the concurrent negligence of Hummel, Lyons and Sanchez. There is no merit in this contention. As the court correctly instructed the jury on concurrent causation, appellant is not entitled to have the jury instructed in any particular phraseology (Lemere v. Safeway Stores, Inc., 102 Cal.App.2d 712, 726–727, 228 P.2d 296). Furthermore, the record reveals that at appellant's request, the instructions referred to "two or more persons", and that the jury was properly instructed as to the responsibility of the State for the operation of motor vehicles by its employees and that there could be more than one proximate cause, making several people liable, regardless of the degree of contribution. The jury knew that the only question was whether any conduct on the part of Hummel and Lyons with respect to the operation of the dump truck was negligent and whether such conduct proximately caused or contributed to the collision. Thus, the deletion of Sanchez' name from the instructions could only benefit the appellant.

The final argument on appeal is that the trial court erroneously admitted into evidence a free hand diagram drawn by Sanchez immediately prior to the trial on a blackboard in the courtroom. The diagram was drawn at the request of appellant's counsel, who referred to it in his opening statement. When the respondent's counsel attempted to use the diagram in his opening statement, appellant's counsel objected. The trial court then remarked that since the drawing was probably not entirely accurate, a scale map should be obtained. Both counsel obtained the scale map which was admitted into evidence as plaintiff's Exhibit 1. During his testimony, Sanchez illustrated his testimony by reference to this exhibit. On cross-examination, he was shown his prior free hand diagram and was asked a number of questions about it in relation to the marks he had made on the scale map. Appellant then objected to the use of the drawing on the ground it was misleading and inaccurate. After permitting appellant's counsel to question his witness on voir dire, the ⊥465 court admitted the drawing into evidence for the limited purpose of impeachment.

[11, 12] Appellant argues that the court abused its discretion in admitting the drawing as no proper foundation had been laid. However, the appellant apparently did not make this objection during the trial and cannot now complain (Miller v. Anson-Smith Construction Co., 185 Cal.App.2d 161, 167, 8 Cal.Rptr. 131). Furthermore, the record supports the conclusion that there was proper foundation in accordance with section 2052 of the Code of Civil Procedure that the diagram was a prior inconsistent statement (Pierce v. J. C. Penney Co., 167 Cal.App.2d 3, 8, 334 P.2d 117).

[13] No prejudicial error appearing in the record before us, the judgment must be and is hereby affirmed. The order denying the motion for a new trial being not appealable, the appeal therefrom is hereby dismissed.

SHOEMAKER and AGEE, JJ., concur.

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208 Cal.App.2d 638

⊥638 **Linda Christian WEST, by and through her Guardian ad litem, Teddy B. West, Plaintiff and Appellant,**

v.

Charles A. REIGAL, Defendant and Respondent.

Civ. 20002.

District Court of Appeal, First District, Division 2, California.

Oct. 18, 1962.

Rehearing Denied Nov. 5, 1962.

Hearing Denied Dec. 12, 1962.

Personal injury action. After the jury returned a verdict for the defendant, the Superior Court, County of Santa Clara, John D. Foley, J., denied the plaintiff a new trial, and the plaintiff appealed. The District Court of Appeal, Agee, J., held that there was no showing that trial court abused its discretion in concluding there had not been a sufficient showing of prejudice to plaintiff from alleged prejudice of jury foreman, absent any showing that he attempted to dominate other jurors or in any way influence them in improper manner.

Judgment affirmed; purported appeal from order denying new trial dismissed.

1. Appeal and Error 🔑933(1)

In support of trial court's ruling denying plaintiff's new trial motion predicated on alleged misconduct of jury foreman, District Court of Appeal assumed that trial court resolved any conflicts in affidavits in favor of defendant.

2. New Trial 🔑157

Trial court had right and duty to weigh and consider conflicting affidavits presented on new trial motion predicated upon alleged misconduct of jury foreman.

3. New Trial 🔑56

There was no showing that trial court abused its discretion in concluding there had not been a sufficient showing of prejudice to unsuccessful plaintiff in injury action from alleged prejudice of jury foreman, absent any showing that he attempted to dominate other jurors or in any way influence them in improper manner.

4. New Trial ⇨140(3)

Even if jury foreman was prejudiced against plaintiff, plaintiff, seeking new trial therefor, had burden to affirmatively show that prejudice resulted to him.

5. Appeal and Error ⇨714(4)

Reviewing court could not consider letter from appellant's counsel as part of record.

6. Appeal and Error ⇨891

Showing that movant for new trial on grounds of asserted jury misconduct had no knowledge of misconduct either prior or during trial must be made before trial court within time prescribed by law, and appellate court cannot consider claim in first instance. West's Ann.Code Civ.Proc. § 659a.

7. Appeal and Error ⇨110

Order denying new trial was not appealable.

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Johnson, Thorne, Speed & Bamford, San Jose, for appellant.

Campbell, Custer, Warburton & Britton, San Jose, George A. Strong, Santa Clara, of counsel, for respondent.

⌊640 ⌊AGEE, Justice.

This is a personal injury action. Plaintiff appeals from the judgment entered herein following a jury verdict for defendant. The sole question before us is whether the trial court should have granted plaintiff's motion for a new trial, based upon the alleged misconduct of the foreman of the jury in answering questions put to him upon his voir dire examination.

Plaintiff's motion was supported by the affidavits of one of her attorneys, Mr. Clopton, and her father, Mr. West.

Mr. Clopton related that he approached the foreman, Mr. Stoneman, after the verdict had been rendered, and asked him for an explanation of the verdict and what was the deciding factor in his mind; that Mr. Stoneman replied: "'The defendant wasn't negligent, but if you want to know my true personal feelings on the matter I'll tell you,'"; that affiant requested a statement of such feelings and Stoneman replied: "'I think you people are a bunch of ambulance chasers and attorneys such as you should be hung for even bringing cases such as this into Court. You waste the time of a bunch of people on the jury listening to these practiced witnesses in a performance you stage'"; that affiant then had his associate, Mr. Thorne, come over to talk with Mr. Stoneman and the latter stated to Mr. Thorne: "'It is about time action was taken against a bunch of shysters like you and this was my chance.'"

Mr. West averred that he heard Mr. Stoneman say to Mr. Clopton and Mr. Thorne: "'It is about time somebody took some action against a bunch of shysters like you and this was my chance'"; that he (Stoneman) further stated that he had been prejudiced against the plaintiff's case even before the trial commenced because he felt that the courts were being used by ambulance chasers in accident cases and that they (the ambulance chasers) should be stopped.

Defendant filed three affidavits in opposition, by Mr. Stoneman (the foreman), Mr. Busch (a juror) and Mr. Britton (defendant's attorney).

Mr. Stoneman averred that Mr. Clopton approached him after the trial and wanted to know the basis of the jury's verdict; that affiant told him that he believed that defendant was not negligent and that this was the basis of his decision; that he further told Mr. Clopton that he thought that plaintiff's case was poorly prepared and poorly presented; that he did not say to Mr. Thorne that, "'It is about time action was taken against a bunch of chiselers like you and this was my ⌊641 chance.'" He further averred: "That affiant was not prejudiced against plaintiff's case at the outset of the trial nor during the conduct of the trial. * * * That affiant does not have a prejudice against any persons who make claims for injuries nor was he prejudiced against plaintiff nor plaintiff's attorneys in the above entitled action. That he definitely did believe, based entirely upon the evidence presented and the law as instructed by the Court that defendant was entitled to a verdict. That he did not state that he had been prejudiced against the plaintiff's case even before the trial commenced because he felt that the courts were being used by ambulance chasers in these accident cases and that they should be stopped." No specific denial was made as to whether affiant made any reference to "ambulance chasers" or wasting the time of the jury.

Mr. Busch averred that after the jury retired to deliberate upon a verdict, Mr. Stoneman was selected as foreman at the suggestion of other jurors; that at no time did Mr. Stoneman make any comments in the jury room regarding plaintiff's attorney; that his comments were based entirely upon the evidence which had been admitted and the instructions on the law as given by the court; that, as foreman, Mr. Stoneman gave all of the jurors the opportunity to express their respective opinions and only called for a vote after all of the other jurors had stated that they were ready to vote; that the vote was ten to two in favor of the defendant; that none of the jurors made any statement indicating prejudice against plaintiff or her attorneys or plaintiffs in general.

Mr. Britton averred that after the verdict had been returned, he went outside the courtroom into the hallway and observed Mr. Clopton talking to Mr. Stoneman; that Mr. Clopton was requesting information as to the basis of the jury's verdict; that Mr. Stoneman stated that the defendant was not negligent and that he had had some experience with corporation law and lawyers and that he thought plaintiff's case was poorly prepared and poorly presented; that Mr. Clopton angrily replied that they had talked to all of the witnesses and had brought them into court; that affiant then left the courthouse; that during the time he was present, he did not hear any reference to "ambulance chasers" or to wasting the time of the jury. Obviously, he did not and could not state whether any such reference was made before he arrived or after he left.

The record shows that on the voir dire examination ⊥642 of Mr. Stoneman, he stated, in response to questions, that he felt that he could be a fair juror; that he had no prejudice against plaintiffs as a class; that they had a right to come into court and have their cases determined by a jury; that he would decide the case entirely on the basis of the evidence and the law. These and other questions asked of Mr. Stoneman were sufficient to bring out his alleged bias and prejudice if, as claimed by plaintiff, his answers thereto had not been untruthful.

[1] In support of the trial court's ruling, we must assume that any conflicts in the affidavits were resolved by it in favor of the defendant. Stoneman's own affidavit avers that he was not prejudiced against plaintiff's case either at the outset of the trial or during the conduct of the trial and that he had never said anything to this effect; that he believed that the defendant was not negligent and that this was the basis of his decision. The affidavit of the juror Busch shows that Stoneman conducted the deliberations of the jury in a fair and impartial manner and that at no time during such deliberations were any derogatory statements made by anyone concerning the plaintiff's attorneys; that whatever comments the foreman made during the deliberations were based entirely upon the evidence and the instructions on the law; that the vote of the jury was ten to two in favor of the defendant. There is no contradiction of juror Busch's account of what transpired during the jury's deliberations. The affidavit of attorney Britton is, of

course, only to the effect that he did not hear any of the complained of remarks allegedly made by Stoneman.

[2, 3] The trial court had the right and duty to weigh and consider the conflicting affidavits. On the record presented to it, there is no showing that the trial court abused its discretion in concluding that there had not been a sufficient showing of prejudice.

In People v. Thomas, 108 Cal.App.2d 832, 837, 239 P.2d 914, 918, the court said: "The trial court passed upon the matter and by its denial of the motion for a new trial, determined that the alleged misconduct of the juror was not prejudicial. There is no showing of abuse of discretion. Under such circumstances, the trial court's decision will not be disturbed on appeal." (See also: Dunford v. General Water Heater Corp., 150 Cal.App.2d 260, 266, 309 P.2d 958; DeWit v. Glazier, 149 Cal.App.2d 75, 81–83, 307 P.2d 1031; Spadoni v. Maggenti, 121 Cal.App. 147, 156, 8 P.2d 874.)

⌊643 [4] As stated above, the jury voted ten to two in favor of defendant and the affidavit of Mr. Busch, which is uncontradicted, shows that the deliberations of the jury were confined to the evidence and the law as given to it in the court's instructions. There is no showing that Mr. Stoneman attempted to dominate the other jurors or in any way influence them in an improper manner. Assuming that Mr. Stoneman was prejudiced against plaintiff, as claimed, it still remains the burden of plaintiff to affirmatively show that prejudice resulted therefrom.

In Irvin v. Padelford, 127 Cal.App.2d 135, 139–140, 273 P.2d 539, 542–543 the court said: "There was another reason the trial court properly denied the motion for a new trial. There was no showing of prejudice resulting to defendant Padelford from Mrs. McManus' answer on her *voir dire* examination. This is a prerequisite to the granting of a new trial predicated upon the alleged misconduct of a juror. [Citation.]

"In the present case it appears that the jury was polled after the verdict in favor of plaintiff and the poll showed ten 'yes' and two 'no' votes. It is therefore evident that since only nine 'yes' votes were necessary to secure a verdict for plaintiff, even though Mrs. McManus had voted the other way the verdict would still have been for plaintiff. Hence no prejudice resulted from any irregularity arising out of her *voir dire* examination."

In LaGue v. Delgaard, 138 Cal.App.2d 346, 348, 291 P.2d 960, 962, it was said: "In the instant case, no prejudice has been shown. The burden of showing such prejudice rests upon the appellant. As mentioned in the respondents' brief, the juror's statements were not made during the course of the trial; the verdict rendered was 10 to 2 in favor of the defendant, and such verdict is amply supported by substantial evidence. Regardless of Juror Fitch's alleged misconduct, there is nothing to indicate that the rights of the plaintiff to a fair trial were in any manner prejudiced. There is therefore no reason to disturb the trial court's finding in this respect."

The trial court, in a memorandum opinion, stated: "There is nothing in the record to indicate that any of the other nine jurors voting in favor of the defense verdict considered in their deliberations or in their voting on a verdict anything but the evidence and the applicable law."

The trial court also pointed out that "a party moving for a new trial on the grounds of irregularity in the jury's proceedings must show affirmatively that neither he nor his ⌊644 counsel know [sic] of the facts constituting the claimed misconduct before rendition of the verdict." (Citing Crespo v. Cook, 168 Cal.App.2d 360, 336 P.2d 31; Dunford v. General Water Heater Corp., 150 Cal.App.2d 260, 309 P.2d 958; Forman v. Alexander's Markets, 138 Cal.App.2d 671, 292 P.2d 257.)

Plaintiff's counsel has attempted to remedy this defect by sending to this court a letter "in support of Appellant's Opening Brief." He states therein, "under penalty of perjury," that he was first advised of Mr. Stoneman's alleged prejudice after the return of the verdict. The letter was written some eight months after the time to file affidavits with the trial court had elapsed. (Code Civ.Proc. § 659a.)

[5, 6] Plaintiff's counsel apparently realizes that we cannot consider this letter as a part of the record but states that it is "to qualify for an affirmative showing * * * that attorney for the appellant had no knowledge of the misconduct either prior or during the trial." Crespo v. Cook, supra, directly holds that such a showing must be made before the trial court within the time prescribed by law and that an appellate court cannot accept the offered proofs under such circumstances.

[7] For the foregoing reasons, the judgment is affirmed. The purported appeal from the order denying a new trial is dismissed, it not being an appealable order.

KAUFMAN, P. J., and SHOEMAKER, J., concur.

208 Cal.App.2d 505

505 **In re ESTATE of Margaret E. LOCKNANE, Deceased.**

Frances H. WAINWRIGHT, Contestant and Appellant,

v.

Madelyn ENTRIKEN, Executrix, etc., Respondent.

Civ. 6867.

District Court of Appeal, Fourth District, California.

Oct. 15, 1962.

Rehearing Denied Nov. 8, 1962.

Hearing Denied Dec. 12, 1962.

Will contest in which the Superior Court of Orange County, Franklin G. West, J., entered a judgment which denied a petition to revoke the probate of the will. The District Court of Appeal, Brown, J., held that the admission of the will to probate established, prima facie, that it was valid, and the evidence supported the findings that the 79-year-old testatrix who was in feeble health had testamentary capacity to execute the will which left the major portion to a daughter who had been appointed as guardian of her person, and that the will was not procured by the daughter's undue influence.

Affirmed.

1. Appeal and Error 🔑714(1)

District Court of Appeal is bound by record and cannot consider exhibits or testimony which were not offered in trial court. Cal. Rules of Court, rules 5, 23(b).

2. Appeal and Error 🔑989

When judgment is attacked as being unsupported by substantial evidence, only question before reviewing court is whether there is substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trial court.

3. Wills 🔑427

Admission of will to probate established, prima facie, for all purposes of contest, that it was duly executed in manner required by law by testator who was competent and free from undue influence, etc., and burden was on contestants to establish its invalidity.

4. Wills 🔑21, 52(1)

Testamentary capacity is always presumed to exist until contrary is established and ultimate question is what was testator's actual mental state at time of testamentary act and not what it may have been.

5. Wills 🔑386

Trier of fact is sole judge of credibility and weight of evidence in will contest the same as in any other case.

6. Wills 🔑45, 47, 50

Although testatrix was 79 years of age and in feeble health at time of execution of will, such facts were not sufficient to establish testamentary incapacity unless it was shown by preponderance of evidence that condition of mind and body at time of execution of will was such that she was unable to understand the nature and situation of her property, to dispose of it intelligently, or to keep in mind the natural objects of her bounty.

7. Wills 🔑53(2)

Evidence of testatrix' mental status, appearance and conduct before and after execution of will is admissible as long as it has reasonable tendency to indicate mental condition at time of execution of will, which also includes permanent and progressing mental diseases.

8. Wills 🔑55(7), 166(2)

Findings that 79-year-old testatrix, who was in feeble health when she executed will leaving duplex property to her daughter who had been appointed as guardian of testatrix' person, was competent and that her will was not procured by undue influence were supported by sufficient evidence.

◆

Frances H. Wainwright, appellant, in pro. per.

Heinly & Heinly and John A. Tucker, Jr., Santa Ana, for respondent.

507 ⊥BROWN, Justice.*

This is an appeal from a judgment of the court sitting without a jury denying a petition to revoke the probate of the will of Margaret E. Locknane, deceased. The testatrix died at the age of 79 years on June 4, 1959, leaving an estate of an approximate value of $38,000 consisting of a duplex which was devised to respondent and the remainder of the estate which was divided equally among the testatrix' four children, respondent, appellant, another daughter, and a son. The other daughter and the son did not join or petition or participate in the action.

Appellant, who lives in Kansas, did not appear personally at the trial, but was represented by counsel. The will in question was executed on February 24, 1958, prior to which time, in September 1957, respondent was appointed guardian of the person of the testatrix and the First National Bank of Orange was named guardian of her estate. The will was admitted to probate on July 3, 1959.

⊥Appellant alleged in her petition that the 508 will was executed under undue influence of respondent and that the testatrix was of unsound mind. Thereafter, the court in its findings of fact and conclusions of law found that the testatrix had testamentary capacity, that she was not unduly influenced in the execution of her will, and that there was a confidential relationship between respondent and the testatrix.

For some time prior to September 1957 respondent lived in one unit of the duplex which was devised to her, and the testatrix lived in the other unit, and when the guardianship was established the testatrix moved in with respondent.

In November 1957 Dr. Mayes, D.O., was treating the testatrix and she was sent to a private rest home on his recommendation. The respondent and testatrix were dissatisfied with the treatment there and attempted to obtain the testatrix' release, without success either from Dr. Mayes or the attorney for the guardian bank. Respondent then contacted attorney Samuel Hurwitz, who obtained the testatrix' release. Dr. Mayes was discharged and Dr. Rumph, M.D., was retained. In January 1958 the testatrix asked respondent to make an appointment with Mr. Hurwitz to discuss a new will, stating she would like to have the lawyer who helped get her out of the rest home make the new will. Respondent made an appointment with the attorney's secretary and on January 20, 1958, the testatrix and respondent visited the attorney's office. During this interview the attorney had his secretary make verbatim notes on the conversation. Under the belief that the testatrix had given the attorney the impression that she wanted the property divided equally among the four children, as was covered in a previous executed will years ago, the testatrix advised the respondent on the way home from the attorney's office that she was merely describing her property and not stating the way she wanted it to go. On January 22, 1958, respondent wrote to the attorney explaining the error and enclosed a statement written by the testatrix in her own handwriting, reading as follows: "I want Madelyn to have my duplex and furniture at my death."

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* Assigned by the Chairman of the Judicial Council.

On February 10, 1958, the attorney wrote that he would prepare the will and on February 13th he mailed the will to the testatrix advising that it be witnessed by a doctor, suggesting Dr. Musfelt, M.D., a psychiatrist.

On February 24th the testatrix and respondent went to see Dr. Musfelt who examined the testatrix for forty or fifty minutes; then she proceeded to execute the will, Dr. Musfelt and 509 a secretary witnessing the same. The will was mailed back to the attorney's office and he retained it in his custody until it was offered for probate.

[1] Appellant's attorney filed her opening brief, replied to by respondent. Meanwhile, appellant discharged her attorney and filed her closing brief in propria persona in which she has made a personal appeal to this court, giving testimony which was not offered to the trial court and which this court cannot consider, as well as some argument with reference to the testimony of various adverse witnesses, together with 17 exhibits consisting of various letters which cannot be considered in this case as they were not introduced in evidence in the court below. Failure of the appellant to testify in person or by deposition does not permit appellant to attempt to offer various exhibits or testimony before the appellate court. We are bound by the record. (Datta v. Staab, 173 Cal.App.2d 613, 343 P.2d 977; Firemen's Ins. Co. of Newark v. Indermill, 182 Cal.App.2d 339, 6 Cal.Rptr. 469.) Rule 5 of the California Rules of Court states what the record shall consist of, and application to produce evidence must be made under rule 23(b) of those Rules. No such application has been made. The appellant appeals from the judgment claiming (1) that there was a presumption that the physical and mental deterioration of the decedent prior to the execution of the will continued to the time of making of the will and that the presumption was not overcome; (2) there was a confidential relationship between the decedent and respondent which raised the presumption of undue influence which presumption was not overcome; and (3) that there was a variance in the terms of the will and the expressed intentions of the testatrix.

[2] As stated in Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, the general rule is that when a judgment is attacked as being unsupported by substantial evidence, the only question before a reviewing court is whether there is substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court. (See also Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.)

[3] The admission to probate of the will executed February 24, 1958, here in question "* * * established *prima facie* for all the purposes of the contest, that it was duly executed in the manner required by law by a testator who was compe 510 tent, free from undue influence, etc. The burden of proof was on the contestants to establish its invalidity." (Estate of Baird, 176 Cal. 381, 384, 168 P. 561, 562; Estate of Jamison, 41 Cal.2d 1, 256 P.2d 984.)

[4, 5] Where the contestant establishes a prima facie case of the absence of testamentary capacity, the proponent of the will has the burden of meeting it. "Testamentary capacity is always presumed to exist until the contrary is established, and the ultimate question is what was *actually* the testator's mental state at the time of the testamentary act, and not what it *may* have been." (Estate of Russell, 80 Cal.App.2d 711, 715, 182 P.2d 318, 321.)

In Estate of Bourquin, 161 Cal.App.2d 289, 297, 326 P.2d 604, 608, it was held:

> "It is not within our province to here decide whether the testatrix was competent to execute the will dated June 13,

> 1956. That question is one of fact for the trial judge."

In Estate of Teel, 25 Cal.2d 520, at page 526, 154 P.2d 384, at page 387, the court said:

> "The trier of fact is the sole judge of the credibility and weight of the evidence in a will contest the same as in any other case."

[6] While in the present case the testatrix was 79 years of age and in feeble health, these facts are not sufficient to establish testamentary incapacity unless it be shown by a preponderance of the evidence that a condition of mind and body at the time of the execution of the will was such that she was unable to understand the nature and situation of her property and the disposing of it intelligently or was unable to keep in mind the natural objects of her bounty. (Estate of Russell, supra, 80 Cal.App.2d 711, 182 P.2d 318.)

The testatrix weighed only 80 pounds, had suffered a small stroke, and there is testimony that when she got out of the rest home for the first time she walked the floor in an agitated state and even threatened suicide at the sanitarium.

It was stated in Estate of Perkins, 195 Cal. 699, at pages 703–704, 235 P. 45, at page 47, that:

> "Every mental departure from the normal will not destroy a testamentary disposition, otherwise valid, of the testatrix's estate. It is not the rule of law that no person who is insane may make a valid will. The real rule is that the will of a person, who by reason of insanity is incapable of making valid testamentary disposition of his estate, shall not be upheld. [citations] * * * Mental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity ⊥511 of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion. Even in the latter class of cases, it is not sufficient merely to establish that a testator was the victim of some hallucination or delusion. The evidence must establish that the will itself was the creature or product of such hallucination or delusion; that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument."

Mental departures from the normal are also discussed in the Estate of Wright, 7 Cal.2d 348, 356, 60 P.2d 434; Estate of Smith, 200 Cal. 152, 158, 252 P. 325; and Estate of Nolan, 25 Cal.App.2d 738, 741, 78 P.2d 456.

It is stated in Estate of Gagliasso, 150 Cal. App.2d 65, 70, 309 P.2d 513, 516 that, "The incompetency to make a will must be shown to exist at the very time of the will's execution."

[7] Evidence of the testatrix' mental status, appearance and conduct before and after the execution of the will is admissible as long as it has a reasonable tendency to indicate the mental condition at the time of the execution of the will, which also includes permanent and progressing mental disease. (Estate of Calway, 196 Cal.App.2d 268, 273, 274, 16 Cal.Rptr. 462; Estate of Hartley, 137 Cal.App. 630, 633, 31 P.2d 240.)

According to the testimony of attorney Hurwitz, called by appellant, he questioned the testatrix in his office and had his secretary make a stenographic verbatim record of what was said. Several days later in her own handwriting the testatrix made a written request to have her will provide that the duplex was to be devised to respondent.

Dr. Musfelt, appellant's witness, testified about the condition of the testatrix and about her age and said that there were certain instances where she was forgetful. He stated as to undue influence that, "I didn't think she had been at that time." He testified that she was most specific about the duplex and that, "It was mainly what she was making the will for, to provide a home for her daughter"; that there could have been a personality change, a memory defect but that "she was not psychotic" and that she was of sound mind at the time she executed the will sufficient to make the will. He examined her for 40 or 50 minutes and followed certain standards in determining the soundness of mind, which in this case included asking the testatrix if she knew this was a will and that she was signing it, what she 512 was disposing of and whether or not she wished to so dispose of it.

Appellant called several other witnesses who testified with respect to the condition of the testatrix before and after the execution of the will. Dr. Mayes testified that he had not seen her since December 3, 1957; that he was giving her tranquilizers at that time and that he had no opinion as to the soundness of her mind at the time the will was executed. Blanche Runbeck testified that she had not seen the testatrix since Christmas 1957 and that the testatrix was forgetful. Pleasant Tarvin testified that she had not seen the testatrix since August 1957 and as to the question of unsoundness of mind said, "That is quite an assertion to make; I wouldn't say that," but she thought the testatrix was becoming senile. Hattie Estes testified to the question of unsound mind, "I would say so," but would not say that the testatrix was insane on the day she last saw her. Emma Arnold would not say that the testatrix was insane and in fact, had no opinion as to her mental condition in February or March 1958. Martell Thompson, an attorney, testified that in his opinion the testatrix was of unsound mind in September 1957.

The respondent called, in addition to herself, two other witnesses, one, a licensed vocational nurse who had cared for the testatrix from January 1958 to her death two or three times a week, who stated that after the testatrix was released from the rest home she was peppy, gained weight, had pride in her appearance, was alert and had mentioned to the witness that she was grateful to respondent and hoped that she would be able to do something for her. This nurse was of the opinion that the testatrix was perfectly sane but did go down-hill after a July 1958 illness but that she was of sound mind. The other witness was a former daughter-in-law of respondent who testified that she had known the testatrix since 1952, that she saw her after her release from the sanitarium which was in December 1958, that the testatrix at that time stated that she was going to give the duplex to respondent, saying, "I am glad she likes it because it is going to be hers someday * * *. I want Madelyn taken care of." She testified that the testatrix had a firm but stubborn mind and that the testatrix was not capable of being influenced.

The respondent testified as to the financial positions of her brother and sisters, which testimony was uncontradicted in the trial except that appellant has made an attempt in her closing brief to bring before us matters outside the record regarding the financial condition of these relatives. With respect to the 513 will, the respondent testified that it was at the testatrix' suggestion that they go to Mr. Hurwitz; that the testatrix told respondent that no one was interested in doing anything for her but respondent and she wanted respondent to have her home (the duplex), that she was going to change her will and that she would like to have the lawyer who helped her get out of the rest home prepare a new will. Respondent testified that she called attorney Hurwitz or his secretary for the will appointment at the request of the testatrix; that she took testatrix to the attorney's office; that after the consultation as they walked home the testatrix said that she thought the attorney was trying to figure out how the balance of the property was to be left, excluding the duplex, and that she had misunderstood him; that the testatrix thereafter wrote a note in her own handwriting to the attorney to make the will so that the respondent would get the duplex. Thereafter, at the suggestion of attorney Hurwitz in connection with the witnessing of the will, and at the request of the testatrix, the respondent called Dr. Musfelt and an appointment was made. The respondent testified that on the discharge from the sanitarium the testatrix said she wanted respondent to have the duplex; that the respondent had never asked the testatrix to give the duplex to her. It was respondent's opinion that the testatrix knew what she was doing on the day the will was signed. She denied retaining attorney Hurwitz to prepare the will, but did admit retaining him for advice in connection with the guardianship matter previously. Respondent also denied using any influence to have the will of February 24, 1958, signed.

The court found that there was a confidential relationship existing between the testatrix and the respondent, but also found that the respondent did not exert any undue influence upon the testatrix at the time of the execution of the will. (See Estate of Pellegrini, 138 Cal.App.2d 143, 291 P.2d 558; Estate of Bliss, 199 A.C.A. 658, 18 Cal.Rptr. 821).

The Estate of Lingenfelter, 38 Cal.2d 571, 585, 241 P.2d 990, 999 outlines the factors involving undue influence as follows:

> "The indicia of undue influence have been stated as follows: '(1) The provisions of the will were unnatural. * * * (2) The dispositions of the will were at variance with the intentions of the decedent, expressed both before and after its execution. (3) The relations existing between the chief beneficiaries and the decedent afforded to the former an opportunity to control
> 514 the testamentary act. (4) The decedent's mental and physical condition was such as to permit a subversion of his freedom of will. And (5) the chief beneficiaries under the will were active in procuring the instrument to be executed.' Estate of Yale, 214 Cal. 115, 122, 4 P.2d 153. These, coupled with a confidential relationship between at least one of the chief beneficiaries and the testator, altogether were held 'sufficient to shift the burden to the proponents of the will to establish an absence of undue influence and coercion and to require the issues to be determined by the jury.' In re Estate of Yale, supra, 214 Cal. at page 123, 4 P.2d at page 156."

"Confidential relationships" are defined in Estate of Cover, 188 Cal. 133, 143, 204 P. 583. (See also Herbert v. Lankershim, 9 Cal.2d 409, 483–484, 71 P.2d 220, where the court approves of an instruction regarding a confidential relationship.)

In Estate of Llewellyn, 83 Cal.App.2d 534, at page 564, 189 P.2d 822, at page 839, 191 P.2d 419 the court said:

> "And the evidence must indicate more than general influence. The influence necessary to invalidate a testamentary document must be a pressure which overpowered the mind and borne down the volition of the testator at the very time the will was made. * * *"

The court, in Estate of Hull, 63 Cal.App.2d 135, 143–144, 146 P.2d 242, stated:

> "The burden was on the contestants to show undue influence, and in meeting that obligation it is not sufficient for them merely to show circumstances consistent with the exercise of undue influence, but before a duly and solemnly executed will can be invalidated, circumstances must be shown that are inconsistent with freedom of action on the part of testatrix."

[8] We think that there was not sufficient evidence to show on behalf of the contestant that even though the respondent was in a confidential relationship with the testatrix that she, as a matter of law, influenced the testatrix into leaving respondent the duplex. The evidence shows substantially that while the confidential relationship did exist, there was no coercion, no destroying of the free agency on the part of the testatrix, and no pressure brought to bear on the testamentary action. "Proof of opportunity to influence the making of the will, even coupled with an interest or mo-

tive to do so, is insufficient." (Estate of Robbins, 172 Cal.App.2d 549, 554, 342 P.2d 933; Estate of Trabucco, 192 Cal.App.2d 643, 645, 13 Cal.Rptr. 468.)

⊥515 ⊥ The Estate of Gleason, 164 Cal. 756, 130 P. 872, held that there must be a pressure which overpowered the mind and bore down the volition of the testatrix at the very time the will was made, if a will is set aside on the ground of undue influence. (See also Estate of Arnold, 16 Cal.2d 573, 577, 107 P.2d 25.)

In the memorandum opinion of the judge in the lower court, which we can use only for the purpose of determining what was in the mind of the court, he said that he believed the testatrix had recognition of the natural objects of her bounty; that the respondent was unmarried and unprovided for otherwise as compared with the other children; that at various times the testatrix had declared to others that the respondent should and would have the duplex; and that respondent had overcome the presumption of undue influence.

The testimony of Dr. Musfelt as to undue influence as set out hereinabove is not sufficient to support appellant's position as against the finding that there was no undue influence exercised. The devise to the respondent was not necessarily unnatural, nor is it unusual for a parent to provide for a child who has no other source of income and who is devoting all of her time, care and attention to the aged parent while the other children of the parent have gone their separate ways. In this case the respondent testified that she had received nothing for services nor did she plan on filing any claim against the estate for services. The trust officer of the guardian bank testified that respondent was receiving $110 per month from the guardianship account which was for the support of the testatrix.

We think the trial court was justified in finding from the evidence that the provisions of the will were not unnatural and that the disposition was not at variance with the intentions of the testatrix and believe that the testatrix' mental and physical condition was not subverted and that the chief beneficiary was not active in procuring the instrument to be executed.

The judgment is affirmed.

GRIFFIN, P. J., and COUGHLIN, J., concur.

208 Cal.App.2d 422

⊥ **The PEOPLE of the State of California, Plaintiff and Respondent,** ⊥422

v.

Earl L. LEWIS, Defendant and Appellant.

Cr. 8283.

District Court of Appeal, Second District, Division 4, California.

Oct. 11, 1962.

Defendant was convicted in the Superior Court, Los Angeles County, Adolph Alexander, J., of selling and furnishing a narcotic, and he appealed. The District Court of Appeal, Jefferson, J., held that defendant was not denied right to a speedy trial although sale which was basis of prosecution took place in August and defendant was not arrested until December, where grand jury indicted defendant within three-year period of limitations and matter proceeded to trial within 60-day period after secret indictment was returned.

Judgment affirmed.

1. Criminal Law 🔑1036(2)

Defendant could not properly for first time on appeal claim there was error in permitting a witness to answer certain questions on re-direct examination where such testimony was received during trial without objection by defendant.

2. Criminal Law 🔑369(15)

Evidence concerning an attempt by defendant to carry out a sale of narcotics, other than sale on which prosecution was based, was admissible where question of identity of defendant was raised on cross-examination, and evidence as to other transaction tended to establish identity of defendant.

3. Criminal Law 🔑741(2)

Evidence, in prosecution for unlawful sale of narcotics, presented question for trier of fact as to identity of defendant. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law 🔑576(1)

Defendant was not denied right to speedy trial although sale which was basis of prosecution took place in August and defendant was not arrested until December, where grand jury indicted defendant within three-year period of limitations and matter proceeded to trial within 60-day period after secret indictment was returned. West's Ann.Pen.Code, § 800.

◆

Gerald J. Levie, Los Angeles, for defendant and appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Gilbert F. Nelson, Deputy Atty. Gen., for plaintiff and respondent.

⌊423 JEFFERSON, Justice.

The Los Angeles County Grand Jury returned a secret indictment on November 29, 1961, in which defendant was charged with a violation of section 11500 of the Health and Safety Code, selling and furnishing a narcotic, heroin. The indictment was amended to show defendant's true name. Defendant pleaded not guilty. Trial was by the court, jury having been duly waived by defendant and all counsel. Defendant was found guilty as charged. Motion for new trial was denied. Probation was denied and defendant was sentenced to state prison for the term prescribed by law. Defendant filed his notice of appeal in pro. per. Thereafter, he made a motion in this court to have counsel appointed to represent him on this appeal. This court granted the motion and counsel was appointed to represent defendant on appeal.

Jerry Chavous testified he was assigned to the narcotics division of the City of Los Angeles as an undercover agent. On August 4, 1961, he was in the company of an informant by the name of Ollie May; he saw defendant at the corner of 5th and Sanford Streets, Los Angeles. The informant left him and walked over to the corner to talk to defendant. After the conversation, informant returned to the narcotics officer and defendant left the corner and walked down the street. Later, defendant and informant entered the Morris Hotel. A few moments later defendant came into the hotel and walked to the rear of the lobby near some phone booths. The informant and the narcotics officer walked to the back of the lobby where defendant was standing. The narcotics officer was about ten paces away while informant and defendant engaged in conversation. The informant returned to the officer and instructed him to give defendant some money. The officer handed defendant $15. Defendant handed a package in a cellophane wrapper to the informant who handed it to the officer.

It was stipulated that this package contained five capsules of heroin.

Defendant was not arrested until December 11, but the officer testified he had observed defendant on several occasions between August 4 (date of the buy) and December 11 (date of the arrest). The officer was asked at the trial, "Now, by looking at this defendant, is there any question in your mind ⌊424 at all that this is the same defendant—the same person you saw on August 4? He answered: "No, sir, there is no doubt." Further, on re-direct examination the officer testified he had seen defendant almost every day after August 4 during the four-month period while working in that area.

[1] On cross-examination the officer stated he saw defendant at another local hotel subsequent to August 4 and had a conversation with him. The People made a re-

quest, which the court granted, to go into this conversation on re-direct examination. This testimony was received without objection by defendant. He cannot now properly for the first time on appeal claim that there was error made in permitting the witness to answer these questions (People v. Simeone, 26 Cal.2d 795, 806, 161 P.2d 369).

The officer testified he met defendant in company of one Albertina Morris who is a known user of narcotics and who asked the officer if he was looking for some "stuff" (narcotics, heroin). The officer told her he was sick and needed a "fix." He took the woman and defendant in his car. The officer overheard a conversation between the woman and defendant as to where they might go to find someone who might have some "stuff." The woman directed the officer where to drive. Defendant asked the officer how much money he could contribute for some "stuff" and the officer said he wanted his "stuff" to be separate. The officer gave defendant $6. Defendant left the car and after a few moments had elapsed he returned and said he couldn't obtain the "stuff."

Defendant took the stand in his own defense and admitted he knew the officer. He thought he had seen him around August or September at the Morris Hotel. He further admitted he knew informant Ollie May, who participated in the transaction of August 4, but denied he had any transaction in narcotics on August 4; he denied he received any money from the officer on that date. He admitted that Ollie May, the informant, might have approached him concerning the narcotics, but he could not recall such an incident. He stated he did not know she was a user of narcotics.

[2] Defendant contends the admission of evidence concerning another transaction was prejudicial. This contention is without merit. Defendant's counsel raised the question of the identity of defendant on cross-examination. "It is established by a long line of authorities that evidence of other offenses may be admitted where they are so similar to and connected with the crime charged as to prove a common plan 425 or scheme, *or if the other offenses tend to establish the identity of the person charged with the commission of the crime being tried.*" (People v. Grey, 180 Cal.App.2d 683, 689, 4 Cal.Rptr. 561, 565.) (Emphasis ours.)

[3] The question of identity was a question of fact to be determined by the trial court. As stated in People v. Powell, 187 Cal.App.2d 709, 712, 10 Cal.Rptr. 116, 119, "It was for the trial judge to pass upon the credibility of the witnesses and to resolve any conflicts in the testimony. [Citations.] * * * The judge was not required, under the circumstances, to believe the appellant. [Citations.]" Here, there was direct evidence to substantiate the trial court in its finding that defendant was the seller of the heroin.

[4] Defendant further contends he was not afforded a speedy trial. With this contention we disagree. A secret indictment was returned November 29, 1961. The matter proceeded to trial January 15, 1962, well within the sixty-day period. It is true that the sale took place August 4, 1961. In effect defendant complains in his brief that the alleged sale took place on August 4, 1961, and that he was not arrested until December 11, 1961. His argument is not sound. "The grand jury indicted appellant within the three-year period of limitations and the delay was without legal significance. (Pen.Code, § 800; People v. Bradford, 130 Cal.App.2d 606, 608, 279 P.2d 561.)" (People v. McDaniel, 169 Cal.App.2d 536, 539, 337 P.2d 537.) Other contentions of defendant do not merit discussion.

Judgment of conviction affirmed.

BURKE, P. J., and FORD,* J., concur.

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* Assigned by Chairman of the Judicial Council.

208 Cal.App.2d 367

⊥367 ⊥**CAHILL BROTHERS, INC., Plaintiff and Respondent,**

v.

CLEMENTINA COMPANY, a corporation, Defendant and Appellant.

Civ. 19850.

District Court of Appeal, First District, Division 1, California.

Oct. 11, 1962.

Rehearing Denied Nov. 2, 1962.

Hearing Denied Dec. 5, 1962.

Action by construction company against demolition company for implied contractual indemnity with respect to recovery against them by a pedestrian who was injured when he fell into excavation. From a judgment for the plaintiff by the Superior Court, County of San Francisco, Charles S. Peery, J., defendant appealed. The District Court of Appeal, Molinari, J., held that plaintiff which engaged defendant headed by plaintiff's general superintendent who ordered employees furnished demolition company by plaintiff to erect barricades, partook consciously and actively in wrong to pedestrian who fell into excavation so as to be precluded from contractual implied indemnity from demolition company.

Reversed.

1. Indemnity 🔑1

Right to implied indemnity exists and may arise as result of contract or equitable considerations.

2. Indemnity 🔑13

Where right of implied indemnity rests upon contractual relationship between person seeking and one resisting indemnity, it is not necessary or appropriate to apply theories of primary and secondary liability.

3. Indemnity 🔑1

Right of implied indemnity in contractual cases is based on breach of contract by person against whom indemnity is sought, while, in area of noncontractual indemnity, right rests on fault of another which has been imputed to or constructively fastened upon him who seeks indemnity.

4. Master and Servant 🔑5

The most important factor in determining whether one is employee or independent contractor is right to control manner and means of accomplishing the result desired, and, in this regard, right to discharge employee at will, without cause, is strong evidence of employer's control. West's Ann. Labor Code, § 3353.

5. Contracts 🔑29, 323(1)

Existence of oral contract between construction company and demolition company headed by construction company's general superintendent, and whether such contract, if found to exist, was breached by demolition company in failing to provide adequate safeguards for pedestrians, one of whom fell into excavation site, were questions for jury in indemnity suit between companies.

6. Indemnity 🔑13(2)

Negligence of construction company which engaged demolition company, in failing to provide adequate safeguards to protect pedestrians from falling into excavation would not ipso facto preclude recovery of indemnity from demolition company for liability to injured pedestrian because duties owing from construction company to injured pedestrian were not identical with those owed from construction company to demolition company.

7. Indemnity 🔑13(2)

In absence of express agreement for such indemnification, the indemnitee may not recover from indemnitor where he has been actively or affirmatively negligent.

8. Indemnity 🔑13(2)

Construction company which engaged demolition company headed by construction company's general superintendent who ordered employees furnished demolition company by construction company to erect barricades, partook consciously and actively in wrong to pedestrian who fell into excavation so as to be precluded from contractual implied indemnity from demolition company.

9. Evidence 🔑265(8)
Witnesses 🔑379(7)

Superseded pleading is not evidentiary admission which may be used as affirmative evidence, but it may be used as a prior inconsistent statement for impeachment of party as witness.

10. Evidence 🔑208(2)
Witnesses 🔑379(7)

Pleading in prior or pending action may be offered either as evidentiary admission against pleader in subsequent proceeding or for purposes of impeachment.

11. Evidence 🔑208(6)
Witnesses 🔑379(7)

Abandoned pleading in same case against defendant dismissed as party is to be treated as superseded pleading which may not be used as evidentiary admission, though it may be used as prior inconsistent statement for impeachment purposes.

12. Witnesses 🔑388(7)

Dismissed pleading cannot be offered without foundation being laid by questioning witness to be impeached therewith. West's Ann.Code Civ.Proc. § 2052.

13. Evidence 🔑596(1)

Defendant denying allegation of complaint that it was independent contractor was only required to produce evidence sufficient to offset effect of plaintiff's showing; it was not required to offset the showing by preponderance of evidence.

14. Pleading 🔑132

Allegation in answer that, contrary to contention in complaint that defendant was independent contractor, it was joint venturer, amounted to no more than denial of allegation that it was independent contractor and did not constitute the setting up of "new matter".

See publication Words and Phrases for other judicial constructions and definitions.

15. Pleading 🔑114

An averment in answer contrary to what is alleged in complaint is equivalent to denial.

16. Joint Adventures 🔑7

All members of a joint venture are jointly liable for injuries resulting from negligent conduct of one of the parties thereto because negligence of one joint venturer as employee acting in connection with joint venturers is imputed to other joint venturers.

17. Joint Adventures 🔑7

Each joint venturer owes same duty to injured party as others, as distinguished from disproportionate duties owed to such parties by persons seeking and resisting contractual indemnity.

18. Joint Adventures 🔑7

Each member of joint venture is agent of others in venture's business transactions.

19. Joint Adventures 🔑4(1)

Relationship between members of joint venture is that of mutual agency, akin to limited partnership, and, as between themselves, their rights are governed by same principles as apply to partnerships. West's Ann.Civ.Code, § 2338; West's Ann. Corp.Code, §§ 15009, 15013.

20. Appeal and Error 🔑1064(1)
Indemnity 🔑15(8)

Court committed prejudicial error, in suit for implied contractual indemnity wherein plaintiff alleged that defendant was independent contractor, in charging that defendant had the burden of proving its allegation in answer that it was not independent contractor but joint venturer.

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Carroll, Davis, Burdick & McDonough, San Francisco, for appellant.

Daniel J. O'Brien, Jr., Daniel J. O'Brien, III, Edward Molkenbuhr, Jr., San Francisco, for respondent.

⊥ MOLINARI, Justice. ⊥371

This is an appeal from a judgment for $17,609.73, plus interest and costs, on a jury verdict for plaintiff and respondent, Cahill Brothers, Inc., a corporation, hereinafter referred to as Cahill, against defendant and appellant, Clementina Company, a corporation, hereinafter referred to as Clementina.

The Facts

J. Peter Cahill, hereinafter referred to as Peter, owned certain buildings at Kearny and Sacramento Streets in San Francisco, California, which he desired to have demolished so that he could construct a new building on the site. He entered into a contract with Cahill, which was headed by his father, John R. Cahill, hereinafter referred to as John, for such demolition and construction work upon a cost plus three per cent fee basis.

Cahill had in its employ for over 40 years one Edwin A. Larkin, hereinafter referred to as Larkin. For many years prior to the accident which is the subject of this action, Larkin had acted as general superintendent for Cahill with whom he enjoyed a position of trust and confidence. Because of this relationship Cahill had from time to time permitted Larkin ⊥372 to engage in other business activities continuing all the while his said employment with Cahill. Among these was the formation in 1941, with two other persons, of a partnership known as Clementina Company for the purpose of renting construction equipment. In 1946 Clementina was incorporated; and at the time of the accident in October 1956 which brought about this litigation, there were 19 stockholders besides Larkin, who was then the owner of 46 per cent of its stock. Neither Cahill, nor any of its employees, other than Larkin, owned any interest or stock in Clementina.

In 1950 Clementina commenced doing demolition work for other contractors including Cahill. Its contracts with Cahill were always oral, on an informal basis and without the submission of bids. Clementina had only two permanent employees: Larkin, who was its managing officer, and an office girl. It was Clementina's practice to hire such employees as it needed for a particular demolition job, and on numerous occasions it would "borrow" employees from Cahill. At first, whenever employees of Cahill were "borrowed" they were paid directly by Clementina, but in later years they were paid by Cahill under its payroll, because Cahill's employees enjoyed a union contract with Cahill which contained welfare provisions, while Clementina had no such union contract. In these instances it was the practice of Cahill to charge such wages back to Clementina " 'in the final adjustment' " for the particular demolition job done for Cahill. The evidence discloses that in demolition jobs done for Cahill, Clementina did so usually on a cost plus 10 per cent basis, subject to final adjustment, with offsets to the credit of Cahill for wages to employees under the aforesaid arrangement and for the sums realized from salvaged materials. Clementina owned certain land on which it maintained its office and area for its materials and equipment. A portion of this area was rented to Cahill for a small separate office building.

On or about September 15, 1956, Cahill orally contracted with Clementina to do the demolition work on Peter's property. Under this contract Clementina was to completely wreck the existing buildings, sell the salvage, and render an accounting as to the amount recovered for salvage. Cahill, on the other hand, was to pay the demolition cost "plus a fee to be determined." The required demolition permits were taken out by Cahill in its name. The first work done on the job was by Cahill's men and consisted of the removal of furniture and plumbing from the buildings about to be demolished. There⊥373after the demolition work commenced. From the inception of the job for Peter at said site, Larkin was acting as general superintendent for Cahill on a salary basis. He was acting, as testified by him, "in a dual capacity"—as general superintendent for Cahill and as "the responsible and managing officer of Clementina." Larkin testified further: that Clementina was doing the demolition work "as a subcontractor" ; that "[e]verything in connection with the job was within my control, and I am Clementina Company and also Cahill Brothers" ; that it "is up to my judgment as to what work I would put on the Cahill work and what part I would do on my own"; and that he was looking out for Cahill Brothers' interests in doing the demolition job and was attempting to "hold the cost down" as well as he could.

In the course of the subject demolition job and in his capacity as such superintendent for Cahill, Larkin ordered several of Cahill's employees to engage in the demolition work which work was a "part of his job." Among these employees were two carpenters, Robert J. Dobson and Kenneth Wellman. While performing demolition work each was acting in the capacity of a foreman. Both testified that in the demolition work they took orders from Larkin and that during such work they considered themselves employees of Clementina, although their payroll checks on this job were issued by Cahill. Each testified that they had worked under such an arrangement previously, shifting from Cahill's employment to that of Clementina, during the demolition work, upon the completion of which they went back to Cahill's employ. They also testified that prior to the establishment of the aforesaid union welfare plan their checks were issued by Clementina, Wellman testifying that this was the first demolition job in which he received his payroll check from Cahill.

Larkin testified that Dobson and Wellman were ordered on this demolition job by him in his capacity as their superior at Cahill; that Wellman was directed by him "to keep the job well barricaded"; that barricades were erected by Dobson and Wellman, the lumber for the same being furnished by Cahill pursuant to his order as superintendent for Cahill; that the barricades were put up for purposes of protecting the public from falling into any openings or getting into any of the stores which were still occupied by some of the tenants in the buildings about to be demolished; that he instructed Wellman and Dobson "to keep the place protected," and that in doing so they were protecting "Cahill's interests": and that the 374 barricading was done for and on behalf of Cahill, although in another instance he stated that barricading was the type of work he "was supposed to do; * * *." There was a conflict as to whether there were both Cahill and Clementina signs affixed to the barricades. Larkin testified further that one of the reasons Clementina was engaged to do the demolition work instead of an outside demolition firm was the presence of tenants who were still in occupancy on the sidewalk level of the building; that "[a]n outside man wouldn't try to protect tenants"; and that the barricade was constructed in the manner in which it was (without a canopy) so as not to block the doorways of the tenants.

Despite such barricade, on Sunday, October 7, 1956, while demolition work was in progress, one William Hull, a pedestrian, was injured when he fell into an excavation on said job site. Hull brought suit against both Cahill and Clementina alleging that his injuries were due to their negligence in failing to provide adequate safeguards for pedestrians. After a trial Hull was awarded a judgment for $30,000, plus costs against both Cahill and Clementina. Said judgment was satisfied by the payment of the sum of $15,576.66 by Cahill and a like sum by Clementina, said sum representing one-half of the judgment, costs and accrued interest. Cahill thereupon filed this present action against Clementina for indemnification, seeking recovery of said sum of $15,576.66, plus the sum of $2,033.07 expenses incurred in defending the Hull action, or a total of $17,609.73. The latter sum was awarded to Cahill by a jury in the instant action.

Before proceeding to the questions and contentions presented on this appeal, it should be noted that the evidence further disclosed that the total cost of the said demolition work amounted to $25,276.38, and that the labor charge for the carpenters "borrowed" by Clementina from Cahill amounted to $2,838.92. The aggregate of these sums, i. e., $28,115.30, less a credit of $558.07 for lumber salvage, or a net of

$27,557.23, was billed to Peter by Cahill. Peter was also charged with the sum of $2,723.62 as Clementina's fee. This sum of $2,723.62 represented the amount accounted to Cahill by Clementina as the amount received by the latter for salvage, and because the said sum approximated the 10 per cent fee which it was agreed Clementina should receive, the respective credits were allowed by agreement between Cahill and Clementina to offset each other without the necessity of exchanging payments.

375 ⊥ As established by the pre-trial conference order, Cahill contends that Clementina was its subcontractor, and as such solely responsible for the demolition work, while Clementina, on the other hand, asserts that the two corporations were joint venturers in such work. The essence of Cahill's cause of action, as advanced in the court below, was that Clementina, as such a subcontractor, was solely at fault with respect to Hull's injuries and therefore was obligated to indemnify Cahill for the latter's portion of the satisfied judgment and its expenses incurred in defend-⊥ing the Hull action. Clementina's defense, in substance, was there predicated upon its claim that Clementina and Cahill were joint venturers, who, as joint tort-feasors equally liable to Hull, were jointly at fault in contributing to Hull's injuries so as to preclude any right of indemnity.

Questions Presented

Two questions are presented on this appeal:

(1) Did the evidence in this case warrant the submission of the issue of indemnity to the jury?

(2) Did the trial court err prejudicially in its instruction to the jury to the effect that the defendant, Clementina, had the burden of proving that it was not an independent contractor but was instead engaged in a joint venture with Cahill?

The Right to Indemnity

The gist of appellant's contention on appeal is that the uncontroverted evidence establishes as a matter of law that Cahill is not entitled to indemnity. Three arguments are advanced in support of the assertion, to wit: (1) That indemnity is improper when respondent's own fault contributed to the injury; (2) that respondent had knowledge of, acquiesced to, and participated in the negligent acts; and (3) that the admissions in respondent's verified complaint are binding on respondent and preclude indemnity as a matter of law. With respect to the last point, it is claimed that the verified admission in Cahill's amended complaint in its cause of action against Larkin (dismissed with prejudice prior to trial), to the effect that Larkin was operating on behalf of both respondent and appellant is binding as a matter of law.

[1, 2] The right to implied indemnity, while relatively recent in the law of California, is now well established. (See Peters v. City & County of San Francisco, 41 Cal.2d 419, 260 P.2d 55; City & County of San Francisco v. Ho Sing, 51 Cal.2d 127, 330 P.2d 802; San Francisco Unified Sch. Dist. v. California Bldg., etc., Co., 162 Cal. ⊥376 App.2d 434, 328 P.2d 785; De La Forest v. Yandle, 171 Cal.App.2d 59, 340 P.2d 52; Alisal Sanitary Dist. v. Kennedy, 180 Cal.App.2d 69, 4 Cal.Rptr. 379; Montgomery Ward & Co. v. KPIX Westinghouse Broadcasting Co., 198 Cal.App.2d 759, 18 Cal.Rptr. 341; American Can Co. v. City & County of San Francisco, 202 A.C.A. 580, 21 Cal.Rptr. 33; Pierce v. Diamond and Gardner Corp., 205 A.C.A. 299, 23 Cal.Rptr. 115.) The distilled essence of these cases is that where each of two persons is made responsible by law to an injured party the one to whom the right of indemnity inures is entitled to shift the entire liability for the loss to the other party. Accordingly, a right of implied indemnification may arise as a result of contract or equitable considerations. (Peters v. City & County of San Francisco, supra, 41 Cal.2d 419, 431, 260 P.2d 55; City & County of San Francisco v. Ho Sing, supra, 51 Cal.2d 127, 130, 330 P.2d 802; Alisal Sanitary Dist. v. Kennedy, supra, 180 Cal.App.2d 69, 76, 4

Cal.Rptr. 379; Pierce v. Diamond and Gardner Corp., supra, 205 A.C.A. 299, 303, 23 Cal.Rptr. 115; Ryan Co. v. Pan-Atlantic Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133; Weyerhaeuser S. S. Co. v. Nacirema Co., 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491.) It appears, at first blush, that the rationale of the cases which have considered the right of implied indemnity rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. (Alisal Sanitary Dist. v. Kennedy, supra, 180 Cal.App.2d 69, 75, 4 Cal.Rptr. 379; Pierce v. Diamond and Gardner Corp., supra, 205 A.C.A. 299, 303, 23 Cal.Rptr. 115; American Can Co. v. City & County of San Francisco, supra, 202 A.C.A. 580, 585, 21 Cal.Rptr. 33; Builders Supply Co. v. McCabe, 366 Pa. 322, 325–326, 77 A.2d 368, 24 A.L.R.2d 319.) A closer scrutiny discloses, however, that where the right of implied indemnity rests upon a *contractual* relationship between the person seeking and the one resisting indemnity it is not necessary or appropriate to apply the theories of primary or secondary liability. (Ryan Co. v. Pan-Atlantic Corp., supra, 350 U.S. 124, 133, 76 S.Ct. 232, 237, 100 L.Ed. 133; Weyerhaeuser S. S. Co. v. Nacirema Co., supra, 355 U.S. 563, 569, 78 S.Ct. 438, 442, 2 L.Ed.2d 491; San Francisco Unified Sch. Dist. v. California Bldg., etc., Co., supra, 162 Cal.App.2d 434, 447, 328 P.2d 785.)

In both Ryan and Weyerhaeuser it was held that a shipowner could claim indemnity against a stevedoring company whose employee had recovered a judgment against the shipowner for injuries sustained in the course of his employment connected with the unloading of a vessel. These cases held
377 that notwithstanding the absence of an express agreement of indemnity, the stevedoring company could be held liable for reimbursement to the shipowner for the amount of the judgment against the latter where the injuries to the longshoreman resulted from the unsafe stowage of cargo (in Ryan), and an unsafe winch shelter erected by the stevedoring company (in Weyerhaeuser). Liability was there predicated upon breach of the stevedoring contract, the rationale being that such contract necessarily implied an obligation to perform the stevedoring services contracted for with reasonable safety, and to discharge foreseeable damages resulting to the shipowner from the contractor's improper performance and not flowing from the shipowner's negligence. It was further held that the evidence bearing on these issues was for jury consideration under appropriate instructions.

The San Francisco Unified Sch. Dist. case relied upon the reasoning of Ryan and Weyerhaeuser, holding that a prima facie case for indemnity had been made by the school district plaintiff against the defendant maintenance company for damages which the district was compelled to pay to an employee of the maintenance company who had been injured while washing the windows of a high school. There the company contracted and agreed to wash the windows from the inside from stepladders but failed to furnish such ladders to its employees. The court held that the contract was breached, and that the damages flowing to the district from such breach were subject to indemnification under a warranty or agreement to indemnify necessarily implied in the contract. The Alisal case involved the sufficiency of a complaint for indemnity. There, too, the gist of the complaint was the breach of the defendant's contract with the plaintiff, the obligation allegedly breached being the performance of engineering work for the plaintiff in a skillful, expert and careful manner. In the De La Forest case the court relied on the San Francisco Unified Sch. Dist. case in holding that where the injury to a third party arises from a violation of a contractual duty owed by one tort-feasor to another, the latter may recover from the former. That case involved the sufficiency of a complaint wherein it was alleged in substance: that the plaintiff truck owner engaged the plaintiff repair shop owner to repair a worn trailer axle, the latter subletting the work to the defendants who held themselves as qualified, equipped, skilled and expert in their crafts; that the axle was reinstalled on the trailer and thereafter failed causing the trailer to strike an automobile and ⌊378 injuring its occupants; that the work of defendants was negligently done and the axle was unsafe for use; and that plaintiffs were sued by the injured parties and thereafter in good faith compromised said action. The court held that the complaint stated a cause of action for indemnity for the amount paid in settlement. Montgomery Ward likewise involved an action based upon the alleged breach of an implied agreement to indemnify. The court there relied upon Ryan, Weyerhaeuser, San Francisco Unified Sch. Dist., De La Forest and Alisal in holding that implicit in a written agreement between plaintiff and defendant for the origination by the latter of a telecast from the plaintiff's premises was the accompanying duty, on the part of the defendant, to perform the work in a safe manner, which duty, in turn, carried with it an implied agreement to discharge foreseeable damages resulting to one of its own employees from its negligent performance while said employee was performing such work on plaintiff's premises.

Ho Sing was the first California case to consider noncontractual implied indemnity. The court there concluded "that where an adjoining property owner for the exclusive benefit of his own property places in a public street or sidewalk some artificial structure and a city is compelled to pay compensation in damages to a member of the public injured thereby the city has a right to recover the amount so paid from the property owner by way of indemnity." (P. 138, 330 P.2d p. 808.) The court's ruling was predicated upon the equitable considerations of primary and secondary liability arising out of the special relationship existing between the city and the landowner in the situation where the latter negligently maintains a structure in the public sidewalk which inures only to his private benefit.

The American Can Co. case was the first to come to grips with the question of primary and secondary liability in rejecting a claim for implied indemnity in a situation where a vehicle owned by the plaintiff, who was seeking indemnity, had struck the defendant's improperly parked truck causing injuries to two of the latter's employees, who were on said truck and who thereafter recovered damages from the plaintiff. The court there adopted the rule of primary and secondary liability announced in Builders Supply Co. v. McCabe, supra, 366 Pa. 322, 325–326, 77 A.2d 368, and cited with approval by Alisal, as follows: "'"The right of *indemnity* rests upon a difference between the primary and secondary liability of ⌊379 two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his part, has been compelled by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in *degrees* of negligence or on any doctrine of *comparative* negligence,—a doctrine which, indeed, is not recognized by the common law; * * *. It depends on a difference in the *character* or *kind* of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person. * * * But the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible."'" (P. 585 of 202 A.C.A., p. 36 of 21 Cal. Rptr.)

The rule was reiterated in Haines, where the court held that there is no right of indemnity in favor of a defendant who was himself negligent and therefore primarily liable, notwithstanding that his codefendant may also have been negligent or may have been negligent to a greater degree. In that case one Turner had employed one Pierce to fell certain lumber. In doing so Pierce negligently cut a tree so as to damage a home owned by Haines. Haines sued both Turner and Pierce and recovered a judgment against both. A writ of execution caused Pierce to satisfy the judgment in full. He thereupon sought and was granted contribution against Turner, who claimed that the court erred in doing so because he was entitled to indemnity against Pierce. Based upon the trial court's finding that Turner had negligently failed to supervise Pierce in the cutting and felling of the timber, the reviewing court held that indemnity was precluded, and that a *sharing* of the loss by way of contribution as between the two tort-feasors was proper.

[3] It is apparent from the foregoing cases, therefore, that the right of implied indemnity in contractual cases is based upon a breach of contract by the person against whom indemnity is sought, while in
⊥380 the area of noncontractual indemnity the right rests upon the fault of another which has been imputed to or constructively fastened upon him who seeks indemnity.

[4, 5] An examination of the pleadings and the record in the instant case reveals that the case was tried upon the theory of contractual indemnity and that the trial court's instructions were so predicated. We are therefore not concerned with the incidents of primary and secondary liability, but rather with the question as to whether Clementina breached a contractual duty to Cahill. The evidence here was reasonably susceptible of the inference that Clementina was an independent subcontractor despite the wearing by Larkin of "two hats"; one in his capacity as general superintendent for Cahill, and the other as the responsible and managing officer of Clementina. "An independent contractor is one who renders service in the course of an independent employment or occupation, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." (Bates v. Industrial Acc. Com., 156 Cal.App.2d 713, 717, 320 P.2d 167, 170; Lab.Code, § 3353.) The most important factor, in determining whether one is an employee or an independent contractor, is the right to control the manner and means of accomplishing the result desired; and, in this regard, the right to discharge an employee at will, without cause, is strong evidence of the employer's control. (City of Los Angeles v. Vaughn, 55 Cal.2d 198, 201, 10 Cal.Rptr. 457, 358 P.2d 913.) Instructions requested by the respondent so defining an independent contractor and stressing the factor of such control were given by the trial court. Appellant does not, moreover, challenge the right of the trial court, under the state of the evidence, to submit to the jury the question whether or not Clementina was an independent contractor. The existence of an oral contract between Cahill and Clementina for the demolition work, and whether such contract, if found to exist, was breached by Clementina were likewise questions of fact for the jury. The propriety and sufficiency of the instructions on these issues are not under attack here.

[6] The serious question presented is whether as a matter of law Cahill's own conduct was sufficient to preclude recovery. In this respect appellant contends that indemnity does not lie because Cahill's own fault contributed to Hull's injury. In the literature of the law " 'fault' is synonymous with 'negligence.' " (Marston v. Pickwick Stages, Inc., 78 Cal.App. 526, 534, 248 P. 930, ⊥381
933; Gackstetter v. Market Street Ry. Co., 130 Cal.App. 316, 323, 20 P.2d 93.) It is not enough, however, that Cahill was at fault or that it was negligent in order to prevent the right of indemnity, because obviously the jury in the Hull case did find that Cahill was guilty of some act of negligence. Such a finding of negligence does not "*ipso facto* preclude recovery of indemnity" because the duties owing from Cahill to Hull were not identical with those from Cahill to

Clementina. (Weyerhaeuser S. S. Co. v. Nacirema Co., supra, 355 U.S. 563, 568, 78 S.Ct. 438, 441, 2 L.Ed.2d 491.) The inquiry is directed, therefore, not to whether *any* negligence on the part of the person seeking indemnity proximately contributed to the injury, as in the application of the contributory negligence rule in negligence cases, but rather to the *sufficiency* of such negligence. (San Francisco Unified Sch. Dist. v. California Bldg., etc., Co., supra, 162 Cal.App.2d 434, 447, 328 P.2d 785.) Whether such negligence or fault is sufficient to preclude recovery is usually a jury question. (Weyerhaeuser S. S. Co. v. Nacirema Co., supra, 355 U.S. 563, 568, 78 S.Ct. 438, 441, 2 L.Ed.2d 491; San Francisco Unified Sch. Dist. v. California Bldg., etc., Co., supra, 162 Cal.App.2d 434, 447, 328 P.2d 785; Alisal Sanitary Dist. v. Kennedy, supra, 180 Cal.App.2d 69, 79, 4 Cal.Rptr. 379; Pierce v. Diamond and Gardner Corp., supra, 205 A.C.A. 299, 303, 23 Cal.Rptr. 115.)

[7] In attempting to set a standard by which to guide the trier of fact in determining what conduct would preclude recovery for indemnity, the San Francisco Unified Sch. Dist. case reduced the factual determination to the ascertainment as to "whether the conduct * * * *helped* to bring about the damage" to the injured person. (P. 449, 328 P.2d, p. 794; emphasis added.) In the instant case, the trial court adopted this language when it instructed the jury that Cahill could not recover if its conduct "helped bring about the damage complained of by William Hull. * * *" Webster defines the verb "help" to mean "[t]o aid; assist." Among its synonyms are: strengthen, support, sustain, and further. To help implies cooperation or a combination of effort. (Webster's Dictionary of Synonyms.) The crux of the inquiry is participation in some manner by the person seeking indemnity in the conduct or omission which caused the injury beyond the mere failure to perform the duty imposed upon him by law. (San Francisco Unified Sch. Dist. v. California Bldg., etc., Co., supra, 162 Cal.App.2d 434, 445, 328 P.2d 785; Alisal Sanitary Dist. v. Kennedy, supra, 180 Cal.App.2d 69, 79, 4 Cal.Rptr. 379; Phoenix Bridge Co. v. Creem 102 ⌊382 App.Div. 354, 92 N.Y.S. 855.) The thrust of these cases is that if the person seeking indemnity personally participates in an affirmative act of negligence, or is physically connected with an act of omission by knowledge or acquiescence in it on his part, or fails to perform some duty in connection with the omission which he may have undertaken by virtue of his agreement, he is deprived of the right of indemnity. In other words, the person seeking indemnity cannot recover if his negligence is active or affirmative as distinguished from negligence which is passive. The courts of this state now recognize the distinction between active and passive negligence in holding that in the absence of express agreement for such indemnification the indemnitee may not recover from the indemnitor where he has been actively or affirmatively negligent. (Harvey Mach. Co. v. Hatzel & Buehler, Inc., 54 Cal.2d 445, 6 Cal.Rptr. 284, 353 P.2d 924; Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co., 202 A.C.A. 135, 20 Cal.Rptr. 820.)

[8] The evidence in this case unerringly points to participation on the part of Cahill which went beyond nonaction and the mere failure to perform the duty to Hull which the law imposed on Cahill, *i. e.*, the failure to act in fulfillment of the duty of care which devolved upon it as a general contractor. The actions and knowledge of Larkin in the course and scope of his employment for Cahill are imputed to the latter. The ubiquitous Larkin was present on this job as general superintendent for Cahill from its inception. He was not only physically connected, as such superintendent, with the barricade in question by virtue of his knowledge and acquiescence in the manner and method of its construction, but he was affirmatively active in its construction. As such superintendent he ordered Cahill's employees, Dobson and Wellman, to the demolition job and the erection of the barricade. He directed that the barricade be constructed with Cahill's lumber. In the

erection of the barricade he was acutely conscious of his obligation to protect Cahill's interests as well as those of Clementina, particularly the welfare of the tenants who were Cahill's responsibility. Under the state of the facts we are impelled to find that as a matter of law Cahill partook consciously and actively in the wrong to Hull. This is the only reasonable hypothesis that can be drawn from the evidence and the uncontradicted facts and the only conclusion which reasonable men could draw. Accordingly, the question as to whether Cahill actively participated in the affirmative act ⊥383 of negligence which caused the injury to Hull should not have been submitted to the jury. (Hicks v. Reis, 21 Cal.2d 654, 660, 134 P.2d 788; Di Muro v. Masterson Trusafe Steel Scaffold Co., 193 Cal.App.2d 784, 796–797, 14 Cal.Rptr. 551; Winningar v. Bales, 194 Cal.App.2d 273, 276, 14 Cal.Rptr. 908; and see 3 Witkin, Calif. Procedure, pp. 2251–2252.)

[9–12] In reaching this conclusion we have not required the aid of appellant's assertion that Cahill has admitted as a matter of law, in its dismissed cause of action for indemnity against Larkin, that the latter was acting as its employee in the erection of the barricade. The allegation was there made that Larkin as its general superintendent negligently supervised the construction of such barricade so as to make him liable to his employer under the doctrine of respondeat superior. The trial court permitted the reading of said dismissed cause of action to the jury by counsel for the appellant during his argument to the jury over respondent's objection. In this state a superseded pleading is not an evidentiary admission which may be used as affirmative evidence, but it may be used as a prior inconsistent statement to impeach a party as a witness. (Meyer v. State Board of Equalization, 42 Cal.2d 376, 385, 267 P.2d 257.) On the other hand, a pleading in a prior action or in others which are pending may be offered either as an evidentiary admission against the pleader in a subsequent proceeding or for the purpose of impeachment. (Meyer v. State Board of Equalization, supra, p. 385, 267 P.2d, p. 263.) While a dismissed cause of action against another party in the same action is not a superseded pleading in the strict sense, it would appear by analogy that it should be so treated and hence permitted only for impeachment purposes. In Gajanich v. Gregory, 116 Cal.App. 622, 3 P.2d 389, a dismissed cause of action against the sole defendant in the case was admitted for such purpose only. While no case has been cited or found in the instance of a cause of action dismissed against a defendant who is no longer a party in the case by virtue of the dismissal, we are of the opinion that under the familiar liberal rule permitting the pleading of inconsistent causes such an abandoned pleading in the same case should be treated in the same category as a superseded pleading. (See Williams v. Seiglitz, 186 Cal. 767, 773, 200 P. 635 (abandoned answer), and Gajanich v. Gregory, supra, 116 Cal.App. 622, 3 P.2d 389, cited by Meyer v. State Board of Equalization, supra, 42 Cal.2d 376, 385, 267 P.2d 257, in support of the rule that a superseded pleading may be offered for the purpose ⊥384 of impeachment only. And see also Witkin, Calif. Evidence, pp. 251–252.) The dismissed cause of action, then, could have been presented to the jury for impeachment purposes only providing that it was properly admitted. In view of the rule that such a dismissed pleading is considered as a prior inconsistent statement, it could not be offered without a foundation being laid by questioning the witness to be impeached. (Code Civ.Proc., § 2052; Witkin, Calif.Evidence, p. 704; Zanotto v. Marogna, 124 Cal.App.2d 329, 331, 268 P.2d 826.) The abandoned pleading was first alluded to at the time of argument. No foundation for its admissibility was laid; therefore, the trial court should have sustained the objection to it. The error was of no moment, however, because as we have pointed out above the issue of indemnity should not have been submitted to the jury in any event.

The Instructions As To Burden Of Proof

In its complaint Cahill alleged in essence that Clementina was its subcontractor and as such solely responsible for the demolition work. Clementina, in its answer, denied that it was a subcontractor and asserted that Cahill and Clementina were joint venturers in the performance of the demolition work. These were the respective contentions as recognized by the pre-trial order. The trial court gave a standard instruction to the jury that the respondent bore the burden of proving all the allegations in its complaint by a preponderance of the evidence. The propriety of this instruction is not questioned. The court further instructed the jury that the respondent bore the burden of proving that it entered into an oral contract with the appellant for the demolition of certain buildings and that the appellant entered into these contracts as an independent contractor and that the appellant breached the oral contract. The appellant does not challenge this instruction, but disputes a subsequent instruction which reads as follows: "You are further instructed that among the allegations contained in the answer of the defendant Clementina Company, that is, the answer to the plaintiff's complaint, is that Clementina Company was not an independent contractor but instead entered into a joint agreement with Cahill Brothers to demolish the buildings in question and thus was engaged in a joint venture at the time of the accident in question to William Hull, and hence was not an independent contractor as alleged in plaintiff's complaint. *The burden of proving these allegations by a preponderance of evidence* ⌊385 *is upon the defendant.*" (Emphasis added.) The court thus told the jury in one instruction that the plaintiff had the burden of proving that the defendant was an independent contractor, while in a subsequent instruction the court stated that the defendant bore the burden of proving it was *not* an independent contractor, but a joint venturer. There is an apparent inconsistency between these instructions.

[13] The respondent, in its complaint, presented the affirmative of the issue that appellant was an independent contractor. Appellant's answer that it was not an independent contractor was merely a denial of respondent's allegation. The burden of proof on this issue therefore devolved upon the respondent and remained upon it throughout the trial. All that was required of the appellant was to produce evidence sufficient to offset the effect of respondent plaintiff's showing; it was not required to offset it by a preponderance of the evidence. (Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; Eley v. Curzon, 121 Cal.App.2d 280, 263 P.2d 86.)

[14, 15] The questioned instruction also told the jury that the appellant had the burden of proving by a preponderance of the evidence that it was a joint venturer. Unless this allegation constitutes new matter it amounts to no more than a denial of the allegation in the complaint that the appellant was an independent contractor. The mere fact that an answer contains an affirmative allegation does not mean per se that it is setting up "new matter." An averment in the answer contrary of what is alleged in the complaint is equivalent to a denial. (Trozera v. McDonell, 131 Cal. App. 473, 475, 21 P.2d 706.) The basic consideration is whether the matters of defense are responsive to the essential allegations of the complaint, i. e., whether they are contradicting elements of plaintiff's cause of action or whether they tender a new issue, in which case the burden of proof is upon the defendant as to the allegation constituting such new matter. (Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 533.) The distinction is well stated by the leading case of Frisch v. Caler (1862) 21 Cal. 71, as follows: "Whether matter is new or not, must be determined by the matter itself, and not by the form in which it is pleaded—the test being whether it operates as a traverse or by way of confession and avoidance. A plea tendering no new issue, but controverting the original cause of action, is a mere traverse, and as

nothing new is involved in it, to call it new matter would be a misapplication of terms. 386 It is not essential to a traverse that it be expressed in negative words—the form of the plea depending upon the allegation it is intended to meet; a negative allegation requiring an affirmative plea, and *vice versa.* New matter involves of necessity a new issue, or the introduction of a new ingredient as the basis of one, and a new issue can only arise upon a plea of confession and avoidance." (P. 75.)

In the early case of Goddard v. Fulton (1863) 21 Cal. 430 the rule was stated thusly: "If the answer, either directly or by necessary implication, admits the truth of all the essential allegations of the complaint which show a cause of action, but sets forth facts from which it results that, notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought, those facts are new matter. But if those facts only show that some essential allegation of the complaint is not true, then such facts are not new matter, but only a traverse." (P. 436.) (Quoted by 2 Witkin, Calif.Procedure, p. 1524.)

By its answer the appellant not only denied respondent's affirmative allegation that it was an independent contractor, but it responded with an affirmative allegation of its own, i. e., that it was a joint venturer. If appellant showed that it is a joint venturer it showed that it was not an independent contractor, and therefore its affirmative allegation was but another traverse or denial of respondent's affirmative allegation. The appellant's answer contains no element of confession or avoidance, nor does it directly or by necessary implication admit the truth of respondent's allegation that Clementina was an independent contractor.

The trial court at respondent's request gave an instruction to the effect that if the jury found Clementina to be an independent contractor that then Clementina and Cahill could not at the same time be joint venturers. The court also instructed on the meaning and the elements of a joint venture. The relationship between the parties was the main feature of the case. The evidence here might have supported the finding of a joint venture in view of Larkin's close relationship with both Clementina and Cahill, his dual capacity, and the manner of their dealings. If the burden of proof were placed on the wrong party it could well have affected the outcome of the case.

Respondent seeks to soften the impact of any error in the questioned instruction by urging that the evidence discloses as a matter of law that there was not a joint venture because a sharing of the losses is a neces- 387 sary element of a joint venture. While this is disputed by appellant, who asserts that an agreement to divide profits implies an agreement to share losses (citing Martter v. Byers, 75 Cal.App.2d 375, 384, 171 P.2d 101, and Nels E. Nelson, Inc v. Tarman, 163 Cal.App.2d 714, 726, 329 P.2d 953), and while we are of the opinion that the existence of a joint venture would be a factual question for the jury, it does not follow, as respondent contends, that the failure by appellant to establish a joint venture necessarily establishes the existence of an independent contractor relationship. As we have seen the issue of a joint venture was interposed to refute the existence of a principal-independent contractor relationship. While the appellant may have not been able to show the existence of a joint venture by a preponderance of the evidence, it might have shown by evidence equating that of the respondent that it was a joint venture, or in its attempt to so prove, establish that the relationship was that of principal and agent, a relationship which the jury might well have found under the facts of the instant case.

[16–19] The respondent argues further that the existence of a joint venture would not, in any event, bar respondent's recovery because one joint venturer may recover from another for a breach of his duties to the joint venture. Respondent cites Elsbach v. Mulligan, 58 Cal.App.2d 354, 136 P.2d 651 as authority for this proposition. The Elsbach case did not involve an in-

demnity situation, but concerned itself with the right of one adventurer to recover damages against his coadventurer for a wrong inflicted by the latter in the carrying out of their joint undertaking. It did not involve a situation where the two adventurers wronged a third party. The respondent here predicated his entire case upon the theory that the appellant was an independent contractor, which relationship the appellant sought to negate by attempting to show a joint venture. The jury was not instructed (nor did either side so request) upon the rule which would permit an adventurer to recover from his coadventurer where both were found liable for a wrong to a third party. It should be noted that all members of a joint venture are jointly liable for injuries resulting from the negligent conduct of one of the parties thereto because the negligence of one joint venturer or his employee acting in connection with the joint venture is imputed to the other joint venturers. (Buckley v. Chadwick, 45 Cal.2d 183, 288 P.2d 12, 289 P.2d 242;
388 Leming v. Oilfields Trucking Co., 44 Cal.2d 343, 282 P.2d 23, 51 A.L.R.2d 107; Hupfeld v. Wadley, 89 Cal.App.2d 171, 200 P.2d 564.) In the case of joint venturers, however, each owes the same duty to the injured party as distinguished from the disproportionate duties owed to such party by the person seeking and the one resisting indemnity in the cases of contractual indemnity. Each member of a joint venture is the agent of the others in the venture's business transactions (Engineering, etc., Corp. v. Longridge Inv. Co., 153 Cal.App.2d 404, 314 P.2d 563); the relationship is that of mutual agency, akin to a limited partnership. (Leming v. Oilfields Trucking Co., supra, 44 Cal.2d 343, 282 P.2d 23, 51 A.L.R.2d 107; Campagna v. Market St. Ry. Co., 24 Cal.2d 304, 149 P.2d 281.) As between themselves their rights are governed by the same principles which apply to partnerships. (Zeibak v. Nasser, 12 Cal.2d 1, 82 P.2d 375; Price v. Slawter, 184 Cal.App.2d 715, 7 Cal.Rptr. 830.) The principle upon which the liability of a partnership for injuries to a third person rests is the same as that applicable to principal and agent and master and servant. (Madsen v. Cawthorne, 30 Cal.App.2d 124, 126, 85 P.2d 909; Civ.Code, § 2338; Corp.Code, §§ 15009, 15013.) A principal whose agent has committed a tort in the transaction of the business of the agency is jointly and severally liable to an injured party. Such liability is either predicated upon an act or omission of the agent which the principal directed or in which he participated; or it is imposed, where he did not so direct or participate, simply because of the responsibility cast upon him by law by reason of his relationship to his agent. In the former situation liability is fastened because of the principal's fault and, accordingly, he is not entitled to indemnification from the agent. In the latter situation, liability being imposed upon the principal not because of any fault on his part but solely because of his relation to the one personally at fault, he is entitled to indemnification from the erring agent. In this latter situation the liability of the principal is deemed secondary and that of the agent primary. (Bradley v. Rosenthal, 154 Cal. 420, 423, 97 P. 875; Reynolds v. Lerman, 138 Cal.App.2d 586, 595–596, 292 P.2d 559.) While, as we have discussed above, this case was tried upon the theory of contractual indemnity rather than upon the incidents of primary and secondary liability, it is apparent that had the appellant been able to establish a joint venture, it would only have been required to indemnify the respondent if the latter did not direct, or participate in, the act or omission on the part of appellant. We have al- 389
ready pointed out the nature and extent of the respondent's participation and its affirmative and active negligence.

[20] The importance of the relationship between Cahill and Clementina cannot be discounted. The contradictory instructions on the burden of proof with respect to this relationship cannot be harmonized. They render it impossible to determine which of the conflicting rules presented to them was followed by the jury. Accordingly, the

questioned instruction was not only erroneous but prejudicial.

The prejudicially erroneous instruction in and of itself would warrant a retrial of the case, but our conclusion that in any event no right of indemnity existed here as a matter of law requires a complete reversal of the case.

The judgment is reversed.

BRAY, P. J., and SULLIVAN, J., concur.

Hearing denied; WHITE, J., sitting pro tem.

208 Cal.App.2d 667

⌊667 ⌊**John H. FAHEY and Frank J. Siri, Petitioners, Plaintiffs and Respondents,**

v.

CITY COUNCIL OF the CITY OF SUNNYVALE, and J. Fred Kerr, Fred J. Logan, Mrs. Maureen McDaniel, Mark E. Russell, Robert To Sapp, James B. Scott and Walter L. Jones as Members of the City Council of the City of Sunnyvale, Respondents, Defendants and Appellants.

Joe V. VIVO, Adelaide Vivo, Horace L. King, Mary F. King, Marion Carlotta, Mary Carlotta, Frank J. Pace and Dorothy M. Pace, Petitioners, Plaintiffs and Respondents,

v.

CITY COUNCIL OF the CITY OF SUNNYVALE and J. Fred Kerr, Fred J. Logan, Mrs. Maureen McDaniel, Mark E. Russell, Robert To Sapp, James B. Scott and Walter L. Jones as Members of the City Council of the City of Sunnyvale, Respondents, Defendants and Appellants.

Civ. 19890.

District Court of Appeal, First District, Division 1, California.

Oct. 19, 1962.

Rehearing Denied Nov. 15, 1962.

Hearing Denied Dec. 12, 1962.

Proceeding by landowners for mandamus and certiorari requiring termination by city of proceeding of levying of assessments and ordering of work to establish industrial subdivision. The Superior Court, County of Santa Clara, Edwin J. Owens, J., entered judgment granting writs of mandate and certiorari and the city and other defendants appealed. The District Court of Appeal, Bray, P. J., held that landowners' proceedings against city challenging the levying of assessments and the ordering of work to establish industrial subdivision, first of which was commenced 36 days after assessment was levied, were not timely.

Reversed with directions to dismiss the petitions and complaints.

1. Municipal Corporations 🔑57

City may not act beyond its territorial limits without specific legislative authority, except in certain instances.

2. Constitutional Law 🔑48

Statutes should be given that construction which will sustain rather than defeat them, if language will permit.

3. Statutes 🔑51

Section of Municipal Improvement Act of 1913 referring to construction of works by city and the levy of assessments incorporates only those sections of Improvement Act of 1911 which deal with extraterritoriality and allow municipality to act beyond its territorial limits. West's Ann. Streets & High.Code, §§ 5115–5118, 10103.

4. Statutes 🔑230

Amended statute may be looked to in construing prior one, and where amendment is only for purpose of clarification it is merely restatement of prior law in clearer form, so that law before amendment is same as after it.

5. Municipal Corporations 🔑512(2)

Landowners' proceedings against city challenging levying of assessments and ordering of work to establish industrial subdivision, first of which was commenced 36 days after assessment was levied, were not timely. West's Ann.Streets & High. Code, §§ 10103, 10400.

6. Municipal Corporations 🔑454

City council's action on report and assessment for municipal improvement is levying of assessment within limitation statute of Municipal Improvement Act of 1913. West's Ann.Streets & High.Code, § 10400.

7. Municipal Corporations ⚷451

Levying of assessment is quasi-judicial act which cannot be done by ministerial officers such as clerk, tax collector, etc. West's Ann.Streets & High.Code, § 10312.

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Frank Gillio, City Atty., Sunnyvale, Wilson, Harzfeld, Jones & Morton, San Mateo, for appellants.

Burnett, Burnett & Somers, San Jose, for John H. Fahey and Fank J. Siri.

⊥669 ⊥BRAY, Presiding Justice.

In two proceedings consolidated for trial, defendants appeal from a judgment granting writs of mandate and certiorari, requiring the termination by the City Council of the city of Sunnyvale of proceedings for the levying of certain assessments and the ordering of certain work.

⊥670 ⊥QUESTION PRESENTED.

Are petitioners' actions barred by the statute of limitations? This question requires a determination: (a) Does section 10103, Streets and Highways Code, incorporate all sections of the Improvement Act of 1911, and (b) when is the assessment referred to in section 10400 "levied"?

RECORD.

The Nogales Industrial Assessment District embraces within its boundaries land situated within the limits of the city of Sunnyvale and lands lying outside said city limits and within unincorporated area of the County of Santa Clara. Petitioners all own land in the city with the exception of petitioners Joe V. Vivo and Adelaide Vivo, who own land within the district in the unincorporated area.

The proceedings in question were undertaken by the city for the purpose of acquiring easements for street purposes and improving these areas by clearing, grading and paving the same, the installation therein of sewers, water mains and appurtenances, storm drain facilities, curbs, gutters and sidewalks. These improvements were to establish an industrial subdivision in an area which theretofore was raw, undeveloped acreage. The cost of the acquisition and the improvements, with the exception of a contribution by the city of $27,794, was assessed against the land in the district.

Preliminary to forming the district, the city, by resolution, requested the Santa Clara County Board of Supervisors to grant its consent to the formation of the proposed district and to the proposed acquisition of land and construction of improvements. The board gave this consent by resolution. Thereafter the city council by resolution preliminarily determined to proceed with the formation of the district and the acquisition and improvements and fixed a time for hearing protests. Written protests against the entire project were filed by owners (including petitioners) of more than one-half of the property in said proposed district, by area, by assessed valuation and by front footage.

The city council, by vote of more than four-fifths of its members, adopted resolutions overruling all protests, determining that the public interest, convenience and necessity required the formation of the district and the proposed acquisition and improvements, and that division 4 of the Streets and Highways Code should not apply. The resolution further confirmed the proposed assessments and the engineers' report and ordered the proposed improvements.

⊥Thereafter petitioners by two separate actions sought writs of mandamus and certiorari to prevent any further proceedings by the city council. These actions were consolidated for trial. The court found that the assessments were void for certain reasons which need not be discussed, because, as we herein determine, petitioners' actions are barred by the statute of limitations, in spite of the court's determination that they were not so barred. ⊥671

Judgment ensued ordering the issuance of writs of mandamus and certiorari to terminate said proceedings.

The first question to be determined is what statute of limitations applies. It is petitioners' contention that the limitation to be applied is that contained in the 1911 Improvement Act, while defendants contend, and we think correctly, that it is the limitation contained in the Municipal Improvement Act of 1913.

To solve this question it is necessary to determine whether section 10103, Streets and Highways Code (part of the Municipal Improvement Act of 1913)[1] incorporates only those sections of the Improvement Act of 1911[2] which deal with extraterritoriality or incorporates all of the sections of the 1911 act including the provision therein concerning limitations of actions.

(a) DOES SECTION 10103 INCORPORATE ALL SECTIONS OF THE IMPROVEMENT ACT OF 1911?

The proceeding to establish the district, construct the work and levy the assessments was undertaken pursuant to the provisions of the Municipal Improvement Act of 1913. The only sections of the Improvement Act of 1911 followed by the council were 5115, 5116, 5117, and 5118, the council believing, and now contending, that section 10103 incorporated only those sections of the 1911 act which deal with extraterritoriality, that is, area of a district outside the city limits. Sections 5115–5118 are such sections. Section 10103 (of the 1913 act)[3] provided: *"Improvement Act of 1911 relating to construction and assessments incorporated by reference: Matters authorized thereby.* The provisions of the Improvement Act of 1911 providing for the construction of work and the ⊥672 levy of an assessment by a city within a county or by a county within a city, are incorporated in this division as if fully set out herein. Upon taking the proceedings provided in that act, a city may construct improvements and levy an assessment in a county or in another city, a county may construct improvements and levy an assessment within a city, and a public corporation may construct improvements outside of its boundaries either within a city or within a county. The consent required by that act shall be obtained before the recordation of the assessment."

The 1913 act and the 1911 act are generally coextensive, providing alternate methods of constructing imyprovements of a local nature and financing them by levying assessments. There are no restrictive provisions in the 1913 act which would preclude the establishment of a district to construct the improvements contemplated by the Nogales District and to levy assessments therefor. (§ 10102.) That district, however, included land in Santa Clara County. There are no independent provisions in the 1913 act which authorize this. Therefore, section 10103 was placed in that act providing that the provisions of the 1911 act "providing for the construction of work and the levy of an assessment *by a city within a county* or by a county within a city" (emphasis added) are incorporated in the 1913 act.

Sections 5115 through 5118 are the only sections in the 1911 act which deal with such situation. Section 5115 provides in effect that when in the opinion of the city "the proposed work is of such a character that it directly and peculiarly affects property in two or more cities, or in one or more cities and counties," and that the purposes sought to be accomplished by the work can best be accomplished by a single, comprehensive scheme of work, there is conferred on the city council "full power and authority to extend the work or the boundaries of the district to be assessed therefor beyond the territorial limits of the city."

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[1] Hereinafter referred to as the 1913 act. It is set forth in section 10000 et seq., Streets and Highways Code.

[2] This act will be referred to as the 1911 act. It is set forth in section 5000 et seq., Streets and Highways Code.

[3] All reference to code sections herein, except where otherwise noted, are to such sections as they existed in 1960, the time of the trial herein. Some of them have been amended since.

Section 5116 provides the nature of work which the city council may authorize, in the adjacent county area. Section 5117 provides in effect that if the consent of the governing body of the county is obtained the city may include within the boundaries of an assessment district lands lying within the county. Section 5118 provides in pertinent part that the consent, if obtained, "shall, of itself, constitute assent to the assumption of jurisdiction thereover for all purposes of the proceeding and authorize the legislative body initiating the ⌊673 proceeding to take each and every step required for or suitable for the consummation of the work extending outside the limits of the city, and the levying, collecting and enforcement of the assessments to cover the expenses thereof and the issuance and enforcement of bonds to represent unpaid assessments." It is conceded and the court found that the council followed sections 5115–5118.

[1] The court's interpretation of section 10103 precludes the use of the 1913 act to construct improvements and to levy assessments where extraterritoriality is involved, and the use of its provisions where work is being done "by a city within a county or by a county within a city * * *." As a city may not act beyond its territorial limits without specific legislative authority[4] such would be the result if section 10103 were not enacted. So if such is its meaning, why was it enacted? Such an interpretation leaves the section meaningless.

[2] "It is a cardinal rule in the construction of statutes that they should be given one which will sustain rather than defeat them, which will make them operative, if the language will permit, rather than render them without effect. * * *" (Glassell Dev. Co. v. Citizens' Nat. Bk. (1923), 191 Cal. 375, 384, 216 P. 1012, 1016, 28 A.L.R. 1427.)

[3] To give section 10103 meaning requires that it be construed to provide that only those provisions of the 1911 act incorporated in the 1913 act are those which deal with extraterritoriality. A study of the language of section 10103 supports this conclusion. The first sentence states: *"The provisions* of the Improvement Act of 1911 *providing for the construction of work and the levy of an assessment by a city within a county* or by a county within a city are incorporated * * *." (Emphasis added.) Thus, only the provisions of the 1911 act dealing with construction and assessment by a city within a county or by a county within a city are referred to. No reference is made to other provisions of the 1911 act. The second sentence again makes it clear that the section has a limited application: "Upon taking the proceedings provided in that act, a city may construct improvements and levy an assessment in a county or in another city * * *." What proceedings are referred to? Obviously, those proceedings which the 1911 act requires to be taken to give the city jurisdiction over the outside territory. In doing special assessment work *within* the city and levying assessments therefor a city has the ⌊674 choice of proceeding under either the 1911 or 1913 act. No good reason appears why the Legislature would intend to prevent the use of the 1913 act for extraterritorial work, which would be the situation under the court's interpretation of section 10103. The second sentence in that section gives the city jurisdiction to "construct improvements and levy an assessment in a county * * *" "[u]pon taking the proceedings provided in that act * * *." The latter phrase refers to the provisions of the act of 1911 which provide for the construction and assessment by a city within a county, not the general provisions of that act. Otherwise the Legislature would be considered to require that

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[4] Except in certain instances not applicable here.

while a city has the option of using one of two acts for the creation and operation of assessment districts within the city it is limited to one act where the district includes land without the city. Had the Legislature so intended there would have been no reason for adopting section 10103.

The last sentence of that section reads: "The consent required [that is, of the county] by that act [the 1911 act] shall be obtained *before the recordation of the assessment.*" (Emphasis added.) The 1913 act contemplates the recordation of the assessment prior to the commencement of construction (Sts. & Hy.Code §§ 10312–10401.) The 1911 act provides for the recordation *after the completion of the work.* The sentence above quoted would be meaningless in a proceeding under the 1911 act, since the consent need not be secured until after the work was completed. This would lead to a possible situation in which the work would be done, and the city would then apply to the county for consent to the formation of the district which had already been formed and to the work which had already been done. If the county failed to consent there would be no way of paying for the work done in the county area. The possibility of such a ridiculous situation resulting clearly shows that it was the intent of the Legislature that only those sections of the 1911 act applicable to a district including outside territory were intended to be incorporated in the 1913 act.

The proper interpretation of section 10103 is that it incorporates in the 1913 act only those provisions of the 1911 act which deal with extraterritoriality. That this is the interpretation of the section intended by the Legislature is shown by the recent amendment of the section. It was amended (Stats. 1961, ch. 1432, p. 3238) effective July 12, 1961, to read as follows (the deletions are in strike-out type and the new ⌊675 language is italicized): "The provisions of ~~the Improvement Act of 1911~~ *Chapter 2 (commencing with Section 5115) of Part 3 of Division 7 of this code* providing for the construction of work and the levy of an assessment by a city within a county or by a county within a city, are incorporated in this division as if fully set out herein. Upon *obtaining the consent required* ~~taking the proceedings provided~~ in that ~~act~~ *chapter,* a city may construct improvements and levy an assessment in a county or in another city, a county may construct improvements and levy an assessment within a city, and a public corporation may construct improvements *and levy an assessment* outside of its boundaries either within a city or within a county. ~~The consent required by that act shall be obtained before the recordation of the assessment.~~ *If no assessment is to be levied outside the boundaries of the city, county, or public corporation conducting the assessment proceedings, the proposed resolution of intention need not be submitted or approved and the consent required shall be obtained prior to the ordering of the improvement.*

"Sec. 2. This act is an urgency measure necessary for the immediate preservation of the public peace, health and safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

"It is necessary that the provision for exercise of extraterritorial jurisdiction be more clearly stated in the Municipal Improvement Act of 1913. Clarity of the law is essential to the conduct of bonding proceedings in order to obtain merchantable legal opinions supporting the legality of bonds and to avoid wasteful interpretative litigation. Many areas are in urgent need of improvements which can be most economically constructed and financed under said act as single projects, regardless of territorial boundaries, during the spring and summer of 1961, before the advent of winter rains. It is, therefore, imperative that this act take effect immediately."

It is to be noted that chapter 2 of part 3 of division 7 of the Streets and Highways Code is composed of sections 5115–5119, exactly what we have determined is all that is incorporated in the section before amendment. Section 2 of the amended section clearly shows that the amendment was intended only to clarify the prior law.

[4] An amended statute may be looked to in construing the prior one. (Koenig v. Johnson (1945), 71 Cal.App.2d 739, 753–755, 163 P.2d 746; see also People v. Puritan Ice Co.⌊676 (1944), 24 Cal.2d 645, 653, 151 P.2d 1; 2 Sutherland, Statutory Construction, 3d ed., § 5015.) And where an amendment is only for the purpose of clarification it is merely a restatement of the prior law in a clearer form, the law before the amendment being the same as after it. (W. R. Grace & Co. v. Cal. Emp. Com. (1944), 24 Cal.2d 720, 729–730, 151 P.2d 215; Koenig v. Johnson, supra, 71 Cal.App.2d at p. 755, 163 P.2d 746.)

[5] As the portions of the act of 1911 incorporated by section 10103 in the 1913 act do not include the limitation portions of the 1911 act, we must look to the 1913 act to determine what limitations of action appear therein, and then determine whether the actions are barred by such limitations.

(b) WHEN THE ASSESSMENT IS LEVIED.

Section 10400, Streets and Highways Code, the section of the 1913 act pertinent here, provided: "The validity of an assessment or supplementary assessment levied under this division shall not be contested in any action or proceeding unless the action or proceeding is commenced within 30 days after the assessment is *levied*." (Emphasis added.)

The "Resolution Determining Convenience and Necessity, Adopting Engineer's Report, Confirming Assessment and Ordering Work and Acquisitions" was adopted November 24, 1959. In that resolution the council found that the assessment of the costs and expenses of the proposed acquisition and improvements upon the several subdivisions of land in the district in proportion to the estimated benefits to be received by said subdivision, respectively, "be and the same is hereby, finally approved and confirmed as the assessment to pay the costs and expenses of said acquisitions and improvements."

The first action was filed December 30, 1959, 36 days after the assessment was levied by said resolution. The second action was filed January 11, 1960, 48 days thereafter. Petitioners contend that the assessment is not levied by the above mentioned resolution but only after the city clerk, following the adoption of the resolution, transmits to the city tax collector the diagram and assessment (§ 10401), and the tax collector records the assessment (§ 10402) in the office of the superintendent of streets and in the office of the county surveyor. This recording occurred December 1, 1959. Thus, say they, the first action was filed within 30 days thereafter. However, they do not discuss the situation as to the second action, which was not filed until 40 days after such recording. That action, ⌊677 even under petitioners' interpretation of when the assessment is "levied" (§ 10401), was too late and should have been dismissed.

[6, 7] When was the assessment levied? Section 10312 provided: "When upon the hearing the proposed assessment is confirmed as filed, as modified, or corrected, by resolution the legislative body shall order the proposed improvement to be made or acquired, and *declare its action upon the report and assessment*. The resolution shall be final as to all persons, and the *assessment thereby levied* upon the respective subdivisions of land in the assessment district." (Emphasis added.) Thus section 10312 shows that the action upon the report and assessment which the council is to "declare" is the levying of the assessment. The levying of an assessment is a quasi-judicial act. It cannot be done by the ministerial officers such as the clerk, tax collector, etc. It is done by the city council. As said in Smith v. Byer (1960), 179 Cal.App.2d 118, 121, 3 Cal.Rptr. 645, 647, with respect to real property taxes, "The word 'assessment' in the section refers to the act of the assessor. The word 'levied' refers to the act of the board of supervisors or city council. Allen v. McKay & Co., 120 Cal. 332, 52 P. 828." Although the assessment is not a tax (see

Creighton v. Manson (1865), 27 Cal. 613, 620), it, like a tax, can only be levied by a legislative body. Cases dealing with "levy" of writs of attachment cited by petitioners are not in point. The fact that the assessment does not become a lien until the date of recordation (§ 10402) does not affect the necessary conclusion from the provisions of section 10312 that when the council "declares" its action upon the report and assessment the assessment is "thereby levied." The resolution of November 24 was the type of resolution referred to in section 10312.

The word "levied" has a variety of meanings. For example, it may mean the apportionment of the amount to be raised, the fixing of the rate, the ordering of the tax or assessment, the extending in the tax roll of the sums to be charged, or the determintion of the total amount thereof. It may mean a provision for the collection of the cost of public improvements by a public officer in advance of the doing of the work by a summary sale rather than by foreclosure proceedings. (See Hayne v. San Francisco (1917), 174 Cal. 185, 196, 162 P. 625.) Its meaning must be determined by the context in which it is used.

Thus section 2151, Revenue and Taxation Code, provides, 678 concerning property taxation, "The board of supervisors shall fix the rates of county and district taxes and *shall levy* the State, county, and district taxes as provided by law." (Emphasis added.) Section 2152 provides, "The auditor shall *then*" (emphasis added) compute the sums to be paid upon the property listed. Thus, the tax is *levied* before the amount assessed against the particular piece of property is determined. Section 2153 provides "A tax of one-tenth of 1 per cent is *hereby levied* on the actual value of solvent credits and any interest therein." (Emphasis added.) In this instance the tax is *levied* before value and ownership of the property levied upon are determined. The *levy* of a tax and the imposition of a lien are two separate matters. They may be provided to take effect at the same time, but not necessarily so. There must be an express provision of law to make them effective at the same time. As pointed out in San Diego County v. Riverside (1899), 125 Cal. 495, 500, 58 P. 81, 83, concerning taxes, "the assessment does not create the lien. It is merely one of the steps for its enforcement."

Here the Legislature has stated that the assessment "thereby levied" by the resolution provided for in section 10312 shall be final. This is the context in which we must construe the meaning of "levied." If, as contended by petitioners, the assessment is not thereby levied, when and how could it become final?

In 14 McQuillin, Municipal Corporations, 3d ed., p. 260, "levy" is defined: "With reference to assessments for local improvements, it means to charge upon the property which must respond to the assessment a sum of money already ascertained." (See also People v. Mahoney (1939), 13 Cal.2d 729, 735–736, 91 P.2d 1029.)

Section 10204 requires that the report on which the resolution provided for in section 10312 is based shall contain among other matters "(d) A diagram showing the assessment district and the boundaries and dimensions of the subdivisions of land within the district as they existed at the time of the passage of the resolution of intention. Each subdivision shall be given a separate number upon the diagram. (e) A proposed assessment of the total amount of the cost and expenses of the proposed improvement upon the several subdivisions of land in the district * * *. The assessment shall refer to the subdivisions by their respective numbers as assigned pursuant to subdivision (d) of this section."

The report on which the resolution of November 24 was 679 based fully complied with section 10204. Thus, the property and the subdivisions thereof in the district were charged with the assessments thereby levied, meeting the definition of "levy" in McQuillin, supra.

There is nothing in the language of section 10312 which is uncertain or ambiguous. To adopt petitioners' interpretation of the section would require the complete disregard of the words "and the assessment thereby levied upon the respective subdivisions of land in the assessment district." Whatever the word "levied" may mean in other statutes, the Legislature has stated in this section that the assessment to be stated in the resolution is *levied* by the adoption of the resolution. Section 10400 requires any court contest of the validity of the proceeding to be commenced within 30 days thereafter. Neither proceeding was brought in time. Therefore, the trial court had no jurisdiction to proceed other than to dismiss the proceedings.

In view of our determination, it is unnecessary to consider any other of the contentions made on appeal.

The judgment is reversed and the trial court directed to dismiss the petitions and complaints.

SULLIVAN and MOLINARI, JJ., concur.

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208 Cal.App.2d 499

499 **Frank J. BRICK, Plaintiff and Respondent,**
v.
Richard M. KEIM et al., Defendants and Appellants.
Civ. 6843.

District Court of Appeal, Fourth District, California.
Oct. 15, 1962.
Hearing Denied Dec. 12, 1962.

Action by a landowner for a determination of existence of a public roadway easement along northerly border of defendants' property. The Superior Court, Riverside County, Hilton H. McCabe, J., entered judgment in favor of plaintiff and defendants appealed. The District Court of Appeal, Shepard, J., held that finding that road to the width of 18 feet was openly and continuously used for more than 10 years as a public road and that plaintiff and his predecessors in interest were afforded means of ingress and egress thereby to plaintiff's property was sufficient to support judgment declaring a public road or easement over the way in question.

Judgment affirmed.

1. Trial 🔑105(2)

Hearsay testimony received without objection stood as evidence to be considered in support of findings.

2. Appeal and Error 🔑989

Evidence could not be weighed on appeal from a judgment decreeing existence of a public easement across certain property.

3. Highways 🔑2

Statute providing that no public or private road shall become a county highway until accepted into the county road system by appropriate resolution does not interfere with common law rule that a right in the public to use of a road may arise by prescription or by dedication, except to protect the political subdivision from responsibility where it has not formally accepted the road as a county highway. West's Ann.Streets & High.Code, § 904.

4. Easements 🔑36(3)
Highways 🔑17

Finding that road over defendants' property to width of 18 feet was openly and continuously used for more than 10 years as a public road and that plaintiff and his predecessors in interest were afforded means of ingress and egress thereby to plaintiff's property was sufficient to support judgment declaring a public road or easement over the way in question.

Musick, Peeler & Garrett, by Bruce E. Clark, Los Angeles, for appellants.

James Hollowell, Palm Springs, for respondent.

SHEPARD, Justice. 500

This is an appeal by defendant from that portion of a judgment in favor of plaintiff, which decrees existence of a public easement along the northerly border of defendant's property.

PLEADING AND FINDINGS

Plaintiff's complaint in essence pleads plaintiff's residence and land ownership, defendant's land ownership; the physical existence for more than ten years over a described course across defendant's land of the road in question, the open and continuous use thereof by the public during all of that time; that they used it during all of that time as a public road; its use by plaintiff as a means of ingress and egress to plaintiff's land; obstruction of the road by defendant without right shortly before commencement of the action.

The trial court found that the allegations of the complaint are true; but made no detailed or specific findings of fact beyond that.

FACTS

The roadway easement in question runs east and west adjacent to and south of the north line of defendant's land; plaintiff's land lies adjacent to and north of defendant's land.

[1, 2] While there is considerable conflict in the testimony, it clearly is sufficient to support the conclusion that the road in ⊥501 question was used openly and continuously by all members of the public having occasion to do so from 1941 to 1957 without let or hindrance from anyone. Some of the testimony was hearsay, but was received without objection and this stands as evidence. (Merchant etc. Assn. v. Kellogg Express & Drain Co., 28 Cal.2d 594, 599 [4], 170 P.2d 923.) We cannot weigh the evidence on this appeal. (Brewer v. Simpson, 53 Cal.2d 567, 583 [1, 2], 2 Cal.Rptr. 609, 349 P.2d 289.)

FINDINGS

Defendant contends that the finding that the road to the width of 18 feet was openly and continuously used for more than 10 years last past as a public road and that plaintiff and his predecessors in interest were afforded means of ingress and egress thereby to plaintiff's property is insufficient to support the judgment declaring a public road or easement over the way in question.

In support of this contention he cites Bartholomew v. Staheli, 86 Cal.App.2d 844, 854 [6], 195 P.2d 824, 831, which analyzes a similar problem in connection with the meaning and application of that portion of Political Code Section 2621 enacted in 1883, which portion reads as follows:

> "'* * * No route of travel used by one or more persons over another's land, shall hereafter become a public road or by-way by use, or until so declared by the board of supervisors or by dedication by the owner of the land affected.'"

The court there said on the subject in question,

> "They claim the roadway became a public highway by user for a long period of time. We think not. The statute precludes the acquiring of a public road in that manner.
>
> * * * * * *
>
> "In the present case there is no evidence that the roadway was ever accepted or declared by the board of supervisors to be a public road. Nor is there evidence to show that it was used as such by the public generally prior to 1883."

However, the principles controlling dedication and acceptance by long continued public user and the inference that such user is not by license are set forth by a long line of authorities in California.

In Kripp v. Curtis, 71 Cal. 62, at page 66, 11 P. 879, at page 880, the Supreme Court says,

> "A prescription supposes a grant before the time of legal memory. It is founded on the immemorial use of the way by the claimant and his ancestors or grantors.
>
> ⊥502 "Immemorial use at common law was time out of mind. Time out of mind in contemplation of law in this state, is five years. * * * The use of the

> easement for five years unexplained will be presumed to be under a claim or assertion of right, and adverse, and not by leave of or favor of the owner. (Citation) Wherever there is a question as to the user for a sufficient length of time, and whether the circumstances are of such a character as to constitute a right by prescription, the facts are to be determined by a jury or by the court sitting as such."

In Schwerdtle v. County of Placer, 108 Cal. 589, at page 593, 41 P. 448, at page 449, it is said,

> "But where the claim of the public rests upon long-continued adverse use, that use establishes against the owner the conclusive presumption of consent, and so of dedication. It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license."

In Franz v. Mendonca, 131 Cal. 205, 63 P. 361, the Supreme Court, citing many authorities, arrives at the same conclusions. In Fleming v. Howard, 150 Cal. 28, at page 30, 87 P. 908, at page 909 it is said,

> "'Where an open and uninterrupted use of an easement for a sufficient length of time to create the presumption of a grant is shown, if the other party relies on the fact that these acts or any part of them were permissive, it is incumbent on such party, by sufficient proof, to rebut such presumption of a non-appearing grant; otherwise the presumption stands as sufficient proof, and establishes the right.' [Citation]"

The entire problem is thoroughly analyzed in the later cases of Arnold v. City of San Diego, 120 Cal.App.2d 353, 261 P.2d 33 and Union Transp. Co. v. Sacramento County, 42 Cal.2d 235, 267 P.2d 10, and the same principle is adhered to.

Defendant cites Lantz v. City of Los Angeles, 185 Cal. 262, 196 P. 481, and Union Transp. Co. v. Sacramento County, supra, to the effect that mere user is insufficient. However, we do not have "mere user." The situation in the case at bar is recognized in the Lantz case, where it is said at page 268[2], 196 P. at page 483,

> ⊥503 "* * * but it does not follow from this that the user of such strip of land by the public may not constitute some evidence of its dedication, which, taken with other evidence showing expressly or by implication an intent on the part of the owner of the land to dedicate the same to public uses, may amount to sufficient proof of such dedication thereof as would satisfy the provisions of the foregoing section of the Political Code."

and in the Union Transp. Co. case, where the court, at page 241, quotes with approval from the Schwerdtle case the same quotation we hace heretofore set forth.

It will be noted that the Supreme Court's attention in the Union Transp. Co. case was directed to the problem of County liability and its discussions therein contained were intended to solve that problem. The court did not disapprove the cases cited to the effect that public user may constitute acceptance of the road by the public. It carefully pointed out (42 Cal.2d page 243, 267 P.2d 10) that those cases did not involve contentions of responsibility for maintenance on the political subdivision involved.

In Hartley v. Vermillion, 141 Cal. 339, at pages 347 and 348, 74 P. 987, at page 991, the court analyzes the problem of statutory terminology regarding public and private roads and says,

> "'In accurate legal contemplation the term "private road" involves a contradiction. The term is unknown to the common law. It has its origin in American legislation. It cannot be regarded as having been employed as a substitute for the word "way," as used at common law. * * * For the purpose of distinguishing between such roads and those which subserve equally the interests of all, a name for the former was needed, for the legal term

> "highway" was alike applicable to both; hence the terms "public" and "private" roads. The latter is not to be understood as being synonymous with "ways" at common law, but as indicating a particular class of highways or public ways over which any one may pass without committing trespass.' [Sherman v. Buick, 32 Cal. 241.]
>
> "It is a matter of common knowledge that many roads and highways in this state—starting, perhaps, first as mere trails—became public highways without any formal or express dedication, but by long uninterrupted use and general acquiescence. When, as in this case, the public, or such portion of the public as had occasion to use the road, traveled over the same, with full knowledge of the landowners interested, without asking or receiving any permission and without objection from any one, for a period of time beyond that required by ⌊504 law to bar a right of action, a right in the public to the use of the road arises by prescription or implied dedication."

A further clarification of the intent involved in Streets and Highways Code, §§ 904 and 941 is found in the enactment in 1955 by our legislature of the second paragraph of said section 941 as follows,

> "No public or private road shall become a county highway until and unless the board of supervisors, by appropriate resolution, has caused said road to be accepted into the county road system; nor shall any county be held liable for failure to maintain any road unless and until it has been accepted into the county road system by resolution of the board of supervisors."

[3] It will be noted also that when Political Code section 2621 was transposed to Streets and Highways Code section 904 its wording was changed from "public road or by-way" to "county highway." Thus, it is clear that the sections as they now stand do not interfere with the common law rule, except to protect the political subdivision from responsibility where it has not formally accepted the road as a county highway.

[4] While the finding is certainly short of perfection, we think that in view of the pleadings, the issues and the evidence, it sufficiently meets the necessary requirements to support the judgment. Cases which have criticized such findings have been coupled with an absence of sufficient evidence to support the ultimate elements found even by the use of inferences above noted.

Other points made by the parties are sufficiently covered by the foregoing discussion.

The judgment is affirmed.

GRIFFIN, P. J., and COUGHLIN, J., concur.

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208 Cal.App.2d 585

⌊585 **Leon M. PITTENGER, Petitioner and Appellant,**

v.

COLLECTION AGENCY LICENSING BUREAU, Defendant and Respondent.

Civ. 26010.

District Court of Appeal, Second District, Division 4, California.

Oct. 16, 1962.

Action for a writ of mandate to compel registration of applicant as an employee of a collection agency. The Superior Court, Los Angeles County, Gordon L. Files, J., entered judgment denying the writ and an appeal was taken. The District Court of Appeal, Burke, P. J., held that denial of application for registration as an employee of a collection agency on ground applicant committed an act in violation of statute providing for revocation of license of any employee found guilty of misrepresentation was proper even though another statute not referred to was more descriptive of applicant's conduct which, if committed by a licensee, would be ground for suspension or revocation of a license, in view of fact act committed constituted misrepresentation justifying suspension or revocation of license under statute referred to.

Judgment affirmed.

1. Licenses 🔑22

Denial of an application for registration as an employee of a collection agency on ground applicant committed an act in violation of statute providing for revocation of license of any employee found guilty of misrepresentation was proper even though another statute not referred to was more descriptive of applicant's conduct which, if committed by a licensee, would be ground for suspension or revocation of a license, in view of fact that act committed constituted misrepresentation justifying suspension or revocation of license under statute referred to. West's Ann.Bus. & Prof.Code, §§ 6930(a, b), 6947 (j).

2. Licenses 🔑20, 38

"Wilfully," as used in statute providing for revocation or suspension of license of an employee of a collection agency when the licensee has wilfully violated any provisions implies only a willingness to commit the act, and therefore a license could be refused on a showing of willingness to commit an act in violation of the statute without a showing of wilful intent to violate the statute. West's Ann.Bus. & Prof.Code, § 6930.

See publication Words and Phrases for other judicial constructions and definitions.

3. Licenses 🔑20

No special intent is required under statute authorizing refusal to register employee of collection agency for an act constituting dishonesty or fraud. West's Ann.Bus. & Prof.Code, § 6894.7(b).

4. Licenses 🔑20

Act of an applicant for registration as an employee of a collection agency in deceiving a debtor's former employer into believing that applicant was a representative of the American Red Cross whereby he was able to obtain information as to debtor's address was an act constituting "dishonesty or fraud," within statute authorizing refusal to register such employee for an act constituting dishonesty or fraud. West's Ann.Bus. & Prof.Code, § 6894.7(b).

See publication Words and Phrases for other judicial constructions and definitions.

John S. Byrnes, Jr., Alhambra, for petitioner and appellant.

Stanley Mosk, Atty. Gen., and Lynn Henry Johnson, Deputy Atty. Gen., for defendant and respondent.

⊥BURKE, Presiding Justice. ⊥586

Petitioner filed an application with the Collection Agency Licensing Bureau for registration as an employee of a collection agency. After an administrative hearing, petitioner's application was denied under the Business and Professions Code, sections 6894.7(a) and (b), which specify grounds for refusal to register an employee; and 6930, which sets forth grounds for suspension or revocation of license. Petitioner sought a writ of mandate in the Superior Court alleging that the finding of fact made by the hearing officer and adopted by Collection Agency Licensing Bureau was supported only by slight evidence. The entire record of the administrative proceeding was before the trial court, and the matter was argued by counsel and submitted. The court made its own findings of fact and conclusions of law, and judgment was entered denying the petition for writ of mandate. This is an appeal from the judgment.

While employed by a collection agency, petitioner telephoned the personnel office of the Bendix Corporation. Petitioner stated to the personnel clerk that he was Mr. Anderson from the American Red Cross, and he was trying to reach one of their former employees whose brother was in town on an emergency leave. The personnel clerk advised "Mr. Anderson" that it was against company policy to give out either past or present employee addresses. She stated, however, that she would check with her supervisor in this case and call him back. "Mr. Anderson" furnished her with two telephone numbers.

The personnel clerk explained "Mr. Anderson's" request to the supervisor and suggested that since this was the Red Cross calling perhaps the rules should be waived. The supervisor replied, "Well, yes, I guess in that case it's all right; go ahead and give it to him." She returned the call, and the answering party stated, "The American Red Cross, Mr. Anderson." The personnel clerk was suspicious and inquired, "Mr. Anderson, where is your office located, the American Red 587 Cross office that your work for?" He gave an address, and after a quick check she found that it did not correspond with the American Red Cross address which was listed in the telephone directory. When confronted with this inconsistency, "Mr. Anderson" explained, "I am in a branch office." His response was so calm and smooth that the personnel clerk decided she was probably being an alarmist, and she proceeded to furnish the address of the former employee.

Petitioner admitted that he falsely represented himself to be "Mr. Anderson." He states, however, that he falsely represented that he was calling for Red Cross Shoes rather than the American Red Cross. Petitioner admitted that when the personnel clerk returned his call he was aware of her impression that he was from the American Red Cross. He did not attempt at any time to correct this misimpression. Petitioner also admitted that this act was committed in the course of his employment as an employee of a collection agency, and that the act was committed for the purpose of locating a debtor.

The two sections of the Business and Professions Code of which petitioner's act was found to be in violation, read:

Section 6894.7

> "After a hearing the director may refuse to register an employee * * * if the individual has:
>
> "(a) Committed any act which, if committed by a licensee, would be a ground for the suspension or revocation of a license under this chapter.
>
> "(b) Committed any act constituting dishonesty or fraud."

Section 6930

> "If it be found upon the hearing, * * * that the licensee or employee has wilfully violated any of the provisions of this chapter, [§§ 6850–6956] * * * or that he has been guilty of fraud or misrepresentation, * * * the director shall * * * render the decision which may:
>
> "(a) Order the revocation of the license or licenses * * * or order any accused employee disqualified from further employment in the collection agency business.
>
> "(b) Order the license or licenses suspended * * *."

[1] The primary contention on appeal is that the administrative tribunal and court erred in finding that petitioner committed 588 an act in violation of general provisions of the statute when the facts establish that petitioner's acts were in violation of a particular provision of the statute which is inconsistent with the general provisions.

Petitioner urges that section 6947(j) of the Business and Professions Code is the particular provision of the statute which his act violated. This section provides:

> "No licensee or employee shall:
>
> * * * * * *
>
> "(j) Use any name while engaged in the collection of claims, other than his true name, except under conditions prescribed by rules and regulations adopted by the director."

There is no merit whatever in this contention. Applicant's conduct plainly violated the provisions of section 6894.7 which is the section having a direct bearing upon the right of the director to refuse to register an employee. The fact that the director could have chosen section 6947(j) as being more descriptive of the conduct which, if committed by licensee, would be a ground for suspension or revocation of a license is of no import. The acts committed constituted misrepresentation which would also justify a licensee's license being suspended or revoked under section 6930.

[2] Petitioner also contends that his act did not constitute a wilful violation of the statute, nor did the administrative tribunal or the court make a finding that he wilfully violated any section of the code. Section 6930 provides for the revocation or suspension of a license when the licensee "has wilfully violated any of the provisions of this chapter." Under section 6894.7(a) this would also be grounds for refusal to register an employee.

In statutory offenses "wilfully" inplies only a willingness to commit the act, unless otherwise apparent from the context of the statute. Section 7 of the Penal Code provides that within the Penal Code "wilfully" does not require an intent to violate the law. This definition of the term "wilfully" has been adopted in reference to prohibitions and regulations in other codes created under the state's police power. (Bay Shore Co. v. Industrial Accident Commission, 36 Cal.App. 547, 551, 172 P. 1128.) Absent any contrary legislative intent we hold that the same interpretation is proper here.

[3, 4] The refusal to register petitioner was also under section 6894.7(b) on ⊥589 grounds that he committed an "act constituting dishonesty or fraud." No special intent is required under this subsection. The terms "dishonesty or fraud" as used in this statute are not designed to serve as standards of precise measurement of conduct. Clearly the terms extend beyond acts which are criminal to embrace misrepresentation and deception committed with an intent to gain an advantage over another. (Wayne v. Bureau of Private Investigators & Adjustors, 201 A.C.A. 480, 489–490, 20 Rptr. 194.)

The conclusion is inescapable that petitioner's act of deceiving a debtor's former employer into believing he was a representative of the American Red Cross whereby he was able to obtain information otherwise unavailable to him was an act constituting dishonesty or fraud within the meaning of section 6894.7(b) of the Business and Professions Code.

The judgment is affirmed.

JEFFERSON and FORD,* JJ., concur.

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208 Cal.App.2d 572

⊥572 **The PEOPLE of the State of California, Plaintiff and Respondent,**
v.
Frank Perez ORTIZ, Defendant and Appellant.
Cr. 7857.

District Court of Appeal, Second District, Division 2, California.
Oct. 16, 1962.

The defendant was convicted of possession of heroin. The Superior Court of Los Angeles County, John F. Aiso, J., rendered a judgment and order, and the defendant appealed. The District Court of Appeal, Fox, P. J., held that evidence sustained the finding that police officers, who did not have a search warrant or warrant for arrest, had probable cause to enter and search house, seize heroin found there, and arrest defendant.

Judgment and order affirmed.

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* Assigned by Chairman of the Judicial Council.

1. Arrest 🔑63(4)

Police officer may make arrest without warrant when he has probable cause for believing person arrested has committed felony. West's Ann.Pen.Code, § 836.

2. Arrest 🔑63(4)

"Probable cause", which will justify arrest by police officer without warrant, is shown if man of ordinary caution or prudence would be led to believe and conscientiously entertain strong suspicion of guilt of accused. West's Ann.Pen.Code, § 836.

See publication Words and Phrases for other judicial constructions and definitions.

3. Arrest 🔑63(4)
Searches and Seizures 🔑3(1)

Evidence sustained finding that there was probable cause for officers, who did not have search warrant or warrant for arrest, to enter and search house, seize heroin found there, and arrest defendant. West's Ann.Pen.Code, § 836; West's Ann.Health & Safety Code, § 11500.

4. Criminal Law 🔑260(11)

Weight to be accorded facts and circumstances which arresting officers, who did not have search warrant or warrant for arrest, observed and acted on in entering and searching house, seizing heroin, and arresting defendant was essentially for trial court's determination in exercise of sound discretion in determining whether there was probable cause for believing that defendant had committed felony. West's Ann.Pen.Code, § 836.

5. Arrest 🔑63(4)
Searches and Seizures 🔑3(1)

In determining whether there was evidence sufficient to justify entry, search, and seizure of heroin and arrest by officers, who did not have warrants for search or for arrest, experience of officers was required to be considered, and officers were entitled to take into account past criminal record of defendant and his association with known narcotic users, and furtive conduct of defendant. West's Ann.Pen.Code, § 836.

6. Witnesses 🔑216

It was not necessary for arresting officer, before testifying in prosecution for possession of heroin, to reveal identity of informer who supplied information that defendant was dealing in narcotics, where informer merely pointed finger of suspicion at defendant and there followed an arrest based solely on observations by law enforcement officers who were led to believe that public offense was being committed in their presence. West's Ann.Health & Safety Code, § 11500.

7. Witnesses 🔑373

Testimony of defense witness that police officers attempted to make a deal with him was not admissible in prosecution for possession of heroin for purpose of impeaching testimony of officers and for showing bias and prejudice on their part, where no proper foundation was laid for admission of such evidence by cross-examination of officers with respect to alleged deal.

8. Criminal Law 🔑59(5)

One who is present and is aware of acts of perpetrator of crime and who either by acts of encouragement or warning or by gestures aids or encourages commission of crime is "aider" and "abettor" and may be charged as principal. West's Ann.Pen.Code, § 31.

See publication Words and Phrases for other judicial constructions and definitions.

9. Poisons 🔑9

Evidence sustained conviction of defendant for possession of heroin on theory that he was aiding and abetting his wife in possession of heroin. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen. Code, § 31.

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Cary G. Branch, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Otto J. Hetzel, Deputy Atty. Gen., for respondent.

575 ⊥FOX, Presiding Justice.

Appellant and his wife Lupe were charged in an indictment with possession of a narcotic (heroin) in violation of section 11500, Health and Safety Code. It was also charged that appellant had suffered three prior felony convictions, two of which were for burglary; the third involved narcotics.

Both appellant and his wife were found guilty as charged.[1] The court also determined that the alleged prior convictions were true. Appellant's motion for a new trial was denied. He was sentenced to the state prison. He has appealed from the judgment and order denying his motion for a new trial.

In the summer of 1960, Officer Salagi of the Los Angeles Police Department, Narcotics Division, received information that appellant and another person were selling narcotics; that appellant resided at 961 South Duncan Street in Los Angeles. Thereafter the officer made an investigation. He determined that appellant had previously been convicted of a narcotics charge. He observed a 1958 Thunderbird parked in front of the above address, which was registered to appellant.

On October 17 the officer observed a truck in the driveway at the Duncan Street address with some furniture on it. Appellant was on the truck and someone was bringing furniture out of the house to him. The officer followed the truck to 1113 North Stone Street, where the furniture was unloaded and taken into the house. The officer thereupon "staked out" this location. For a period of approximately ten days appellant's car was seen parked in front of the Stone Street address early in the morning and at various other times throughout this period. During this surveillance period cars were seen parked in the immediate vicinity of the Stone Street residence, which were registered to persons who had a narcotics record. Upon an occasion only a couple of days before appellant's arrest, the officer identified Robert Ramirez, who was going through the motions of cutting the hedge with a pair of clippers. He would go into the house for a while and come out again but it appeared to the officer that he always came ⊥576 to the same location and cut the hedge at the same place all the time. While Ramirez was thus engaged, he would look back and forth, up and down the street. The officer later ascertained that Ramirez was a narcotic addict.

On the day before appellant's arrest, one Arthur Pepper, a narcotics user, was seen to enter the Stone Street residence. Appellant was not present at that time. Pepper remained there until appellant returned some 25 minutes later in a small truck that had some furniture on it. Appellant parked the truck at the curb. He and Pepper removed the furniture from the truck. Later they went into the house. After remaining there a while, Pepper left. He was intercepted by the officers some blocks away. When the officers identified themselves, Pepper immediately put his hand in his pocket and attempted to bring it up to his mouth. At that point the officers grabbed him and after a struggle they obtained two contraceptives which contained a white powder that proved to be heroin. When questioned by the officers as to where he got it, he stated, "Well, I can't tell you that." Officer Salagi said, "Well, we know where you got it. We were watching you. You got it from Frank [appellant], didn't you?" Pepper replied, "I can't tell you that." The officer then said, "Well, we have been watching you" and asked him why it took so long for him to score. Pepper replied, "I had to wait for the man to come home." The officer then inquired, "Well, was the man Frank Ortiz?" Pepper stated, "I can't tell you that. You guys know what happened." Pepper was thereupon arrested.

After arresting Pepper, the officers went back to the Stone Street location at approximately 3:00 p. m. Appellant had left with the small truck. They kept the place under observation until four o'clock in the morning. At about 8:00 p. m. that evening, appellant pulled his T-bird up to the house with another person in it. He stayed only approximately five minutes and then left. He did not again return that night while the officers had the place under surveillance. The officers returned at approximately 8:50 the next morning. Neither the truck nor the T-bird was there. However, appellant returned to the home at approximately eleven o'clock that morning. He parked across the street from the residence, and went into the house.

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[1] Mrs. Ortiz's conviction is not involved in this appeal.

A few minutes later Sergeant Sanchez with two other officers approached the front of the residence while Officer Salagi went to the rear door. Sergeant Sanchez observed appellant, who was walking out of the front door. He took ⊥577 two or three steps outside the door which was wide open behind him. As the Sergeant approached, appellant ran back to the door, "straddled" the entrance and placed a hand on each door jamb. He was facing the Sergeant and his body was "blocking the entranceway." Appellant "put his head back over his shoulders" and "in a shouting manner" stated in Spanish, "Look out, here they come." At this point the Sergeant shoved appellant aside, entering the front room. He hesitated a moment and heard a door slam in the rear portion of the house. He immediately went in the direction from which this sound came.

Officer Salagi, who was at the rear of the house, also heard this same noise from within and concluded, based on his previous experience in investigating narcotic cases, that it came from the bathroom, the location of which had been previously ascertained. Salagi immediately entered from the rear and went directly to the bathroom, reaching there just ahead of Sergeant Sanchez. Salagi found the bathroom door closed. When he turned the knob on the door and pushed it open, he found appellant's wife sitting on the commode. Instead of sitting straight on the commode like a person normally would, she was sitting at an angle of about 30 to 45 degrees. Officer Salagi ordered her to get up. She refused; whereupon the officer grabbed her left arm and pulled her off of the commode. At this point she flushed the toilet. As the water filled up and started to swirl, the officer observed a plastic bag in the water and reached in and grabbed it. It was found to contain 20 grams of heroin. The officers then searched the bathroom and found a capsule that also contained heroin.

The officers arrested both appellant and his wife. They did not have either a search warrant or a warrant for their arrest.

In a conversation with Sergeant Sanchez appellant stated that he did not live at the Stone Street address; that he and Lupe had been having some marital difficulties; that he had attempted a reconciliation with her but that he had rented a motel room on Whittier Boulevard just east of Atlantic approximately a week earlier; that he had stored some of his clothing there; and that he had been commuting between there and the house on Stone Street. The officers searched the motel and found two or three suitcases with appellant's clothing in them and a couple of coats hung in the closet. Appellant claimed that he did not know anything about the narcotics found in the toilet bowl. Appellant was asked if he knew a person by the name of Arthur Pepper. He stated that he ⊥578 recalled vaguely a person by that name. He was asked when he last saw Pepper and stated, "Well, it's been some time." The officer then asked him, "Isn't it a matter of fact, that you saw him yesterday, on the 26th at about 3:00 p. m.?" Appellant replied, "No, I don't recall." The officer then stated that he had observed Pepper with appellant at the Stone Street residence, that he had seen Pepper help appellant unload the furniture that appellant had brought to that place. Appellant made no comment relative to this matter. The officer then informed appellant that Pepper was under arrest for possession of narcotics and that he had been seen talking to appellant shortly before his arrest. Appellant then remarked, "Yes, I do recall now that I did talk to him yesterday but only for a short time."

At the trial appellant denied he lived at the Stone Street house with his wife, claiming to be living at the motel on Whittier Boulevard and having all his belongings there due to the fact that he was having marital difficulties with his wife. Appellant explained his frequent presence at the Stone Street address by saying that he often went to see his daughter and that he had been engaged for some days in moving his wife's things into that home. He denied knowing either Lazano or Martin, each of whom had previously suffered a narcotics conviction and who had visited the Stone Street address. He also denied knowing Ramirez who had been seen pretending to trim the hedge. He admitted having known Pepper since around 1959. Pepper denied that he had purchased from appellant the narcotics found in his possession by the officers although he gave the appearance of recently having had a "fix". He admitted this was true and that he had it in the basement of the Stone Street house; that it had been given to him by one Cardova who lived in the basement and who had the necessary equipment therefor. He claimed appellant was unaware of this. Appellant's wife also gave testimony seeking to absolve him from any connection with the narcotics that the officers found.

In seeking a reversal, appellant first argues that the evidence was illegally obtained on the theory that there was not sufficient showing to establish probable cause justifying the officers in entering and searching the Stone Street house, seizing the narcotics there found and arresting appellant.

[1-5] A police officer may make an arrest without a warrant when he has probable cause for believing the person arrested has committed a felony. (Penal Code § 836; People ⌊579 v. Smith, 50 Cal.2d 149, 151, 323 P.2d 435.) "Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused." (Bompensiero v. Superior Court, 44 Cal.2d 178, 183, 281 P.2d 250, 254.) Applying this test, the trial judge justifiably came to the conclusion that (excluding the information furnished by informants which will be discussed later) the officers had probable cause to enter the premises, make the search and arrest appellant and his wife. In this connection it should be noted that the weight to be accorded the facts and circumstances which the arresting officers had observed and acted upon in making the arrests was essentially for the trial court's determination in the exercise of a sound discretion. (Lorenzen v. Superior Court, 150 Cal.App.2d 506, 510, 310 P.2d 180.) Also, in determining whether there was evidence sufficient to justify the entry, search and seizure of the contraband and the arrests, the experience of the officers must be considered. (People v. Whyte, 199 A.C.A. 670, 674, 18 Cal.Rptr. 889.) This includes the common knowledge of police officers that a much-used method of getting rid of contraband is to flush it down a toilet. (People v. Crowley, 193 Cal.App.2d 310, 314–315, 14 Cal.Rptr. 112.) The officers were entitled to take into account the past criminal record of appellant and his association with known narcotics users and "the fact that a person was found to be in possession of a narcotic shortly after he left the premises of the suspected person." (People v. Perez, 189 Cal.App.2d 526, 533, 11 Cal.Rptr. 456, 460.) Furtive conduct on the part of a suspect may also be taken into account by the officers in determining their course of action.

Here we have (1) men with prior narcotics records visiting the Stone Street house; (2) a user in possession of narcotics and showing evidence of having had a "fix" after having had a conversation with appellant at these premises and immediately after he had left there; (3) appellant's previous criminal record including a narcotics conviction; (4) appellant's attempt to block the doorway and thus prevent the officers from entering; (5) his exclamation, apparently directed to those in the house, "Look out, here they come"; and (6) the sound of a door slamming, which indicated to the officers who were experienced narcotics investigators, the likelihood that someone was attempting to dispose of contraband by flushing it down the toilet. The combination of these cir⊥580cumstances, viewed in the light of experienced police officers in making such investigations, amply support the trial court's determination that probable cause was established and justified the actions of the officers. The entry, search and seizure, and arrests were therefore legal and the evidence thus obtained was properly admitted.

[6] Appellant argues that the court should have granted his motion to strike the arresting officer's testimony because the officer refused to reveal the identity of the person who supplied the information to the effect that appellant was dealing in narcotics. The law is established that it is not necessary to reveal the identity of an informer who merely points the finger of suspicion at a defendant where an arrest thereafter follows which is based solely upon observations by law enforcement officers which reasonably led them to believe a public offense was being committed in their presence. (Scher v. United States, 305 U.S. 251, 254, 59 S.Ct. 174, 83 L.Ed. 151; People v. Williams, 51 Cal.2d 355, 359, 333 P.2d 19; People v. Alcala, 169 Cal.App.2d 468, 471, 337 P.2d 558; People v. Alesi, 169 Cal.App.2d 758, 761, 337 P.2d 838.) In the case at bench the acts of appellant that were observed by the officers constituted the basis for the officers' entrance, seizure of the evidence and arrest of appellant. The only function of the informant was to point the finger of suspicion at appellant which motivated the officers to "stake out" the residence on Stone Street. The court properly denied appellant's motion to strike the arresting officer's testimony.

[7] Appellant complains because the court refused to allow Pepper to give testimony to the effect that the officers tried to make a deal with him by which he would get a 90-day sentence provided he would testify that he bought the narcotics that were found on his person when he was arrested from appellant. This testimony was first offered on the question of probable cause. Voir dire examination, however, revealed that the asserted conversation regarding this matter took place at the time of Pepper's preliminary hearing. This, of course, was long after the search of the Stone Street house and the arrest of appellant. Obviously such testimony could have no relevancy whatever on whether or not the officers had probable cause for the search, seizure and arrest of appellant. Appellant's counsel [2] later sought to introduce this evidence on the theory of impeaching the testimony of the officers⊥581and showing bias and prejudice on their part. Counsel, however, failed to lay a proper foundation for the admission of this evidence. Neither Officer Salagi nor Sergeant Sanchez was cross-examined with respect to the statements made by Pepper at the time of his arrest or as to statements which would have indicated that they were attempting to make a deal with him. The failure of counsel to lay such a foundation made the court's rejection of the offer of Pepper's testimony entirely proper. Apposite here is the statement of the court in People v. Sweeney, 55 Cal.2d 27, at page 37, 9 Cal.Rptr. 793, at page 798, 357 P.2d 1049, at page 1054: "Rather here there was not even a purported compliance with the established rule providing for impeachment of a witness 'by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them.' (Code Civ.Proc. § 2052.) 'The methods prescribed in the code for the impeachment of a witness are exclusive.' [Citation.] The same reasons of fairness apply in an attempt to show bias or hostility from declarations of a witness as apply in

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[2] Appellant's counsel on appeal was appointed by this court and did not represent him at the trial.

contradictory or inconsistent statements; he must be given a full opportunity for explanation with his attention directed to the particulars set forth by section 2052. [Citations.]"

[8] Finally appellant argues that the evidence is insufficient to sustain the judgment of conviction. In this connection it should be pointed out that appellant was convicted on the theory of aiding and abetting his wife in her unlawful possession of heroin. One who is present and is aware of the acts of the perpetrator of the crime and either by acts of encouragement or warning or by gestures aids or encourages the commission of the crime is an aider and abettor and may be charged as a principal. (People v. Carlson, 177 Cal.App.2d 201, 205, 2 Cal.Rptr. 117; section 31, Penal Code.)

[9] Here appellant frequented at various times of the day and night the residence of his wife at the Stone Street address. His personal belongings were often kept there although he also had a motel room elsewhere at which he had some of his clothing. It seems that he supplied the equipment for the Stone Street residence, supervised its maintenance and paid the bills. Appellant's association with other narcotic users, their frequenting the Stone Street residence and his prior narcotics conviction were circumstances to be considered ⌊582 on the subject of appellant's knowledge that his wife possessed heroin. Finally, his efforts to block the entrance to the living room and his warning, "Look out, here they come", apparently addressed to those inside the house, justify the inference that appellant knew that his wife was in possession of narcotics at the time the officers entered and that he sought to prevent her being apprehended in possession of the contraband. The evidence amply supports the implied finding that appellant was guilty of aiding and abetting his wife. He was therefore properly charged and convicted as a principal.

The judgment and order are affirmed.

ASHBURN and HERNDON, JJ., concur.

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208 Cal.App.2d 543

⌊543 **Leon TABORY, Petitioner and Appellant,**
v.
STATE PERSONNEL BOARD of the State of California, Respondent.
Civ. 20590.

District Court of Appeal, First District, Division 3, California.
Oct. 16, 1962.
Rehearing Denied Nov. 15, 1962.
Hearing Denied Dec. 12, 1962.

Mandamus proceeding. The Superior Court, Marin County, Thomas F. Keating, J., denied the relief sought, and an appeal was taken. The District Court of Appeal, Salsman, J., held that evidence sustained finding that psychologist in department of corrections had willfully disobeyed department rule against contacting ex-prisoners.

Affirmed.

1. Officers 🔑11

The substantial evidence rule is the rule by which court is bound in reviewing decision of personnel board. West's Ann.Code Civ.Proc. § 1094.5.

2. Officers 🔑72(1)

Evidence sustained finding that psychologist in department of corrections had willfully disobeyed department rule against contacting ex-prisoners. West's Ann.Gov. Code, § 19572(e, *o*).

3. Administrative Law and Procedure 🔑486

Administrative findings need not be stated with formality and precision required of findings in judicial proceedings.

4. Officers 🔑72(1)

Notice of punitive action which alleged that employee's acts were done without just cause and excuse, was personnel board's pleading, and board's findings, which adopted in part language of pleading, were sufficient, notwithstanding contention that they were fatally defective for failure to include in so many words finding that employee's acts were done willfully and with intent to do unlawful act. West's Ann.Gov.Code, § 19582(e).

Freitas, Allen, McCarthy & Bettini, San Rafael, for appellant.

Stanley Mosk, Atty. Gen., of the State of California, John M. Morrison, Deputy Atty. Gen., Sacramento, for respondent, State Personnel Board of the State of California.

SALSMAN, Justice.

The appellant appeals from the denial of his petition for a writ of mandate, by which he sought to compel the State Personnel Board (hereinafter referred to as the Board) to reinstate him in his position as a psychologist with the Department of Corrections (hereinafter referred to as the Department).

⌊544 ⌊The charges against the appellant were based on Government Code section 19572, (e) and (*o*). That section provides in part: "Each of the following constitutes cause for discipline of an employee, or person whose name appears on any employment list: * * * (e) Insubordination * * * (*o*) Wilful disobedience." The claim was that appellant had made contact with an ex-prisoner, in violation of a rule of the Department. The rule provided in part: "No employee shall in any way deliberately contact or correspond with an ex-prisoner * * unless his assigned duties require it or he has permission of his division or institution head * * *"

Appellant was employed as a psychologist to help formulate a plan for a program of intensive case work treatment of prison inmates. The program was to have two parts, the first, called "in prison" treatment, was formulated and put into effect. The second part related to a program of "follow-through" treatment, and was directed towards help for former inmates who had left prison and were on parole.

In October, 1959, prior to the events here in question, appellant had requested and received permission to contact a parolee, but later decided not to make the contact. At the same time appellant asked for blanket authority to contact parolees in the future. Appellant's superior denied this request, and in a letter to appellant explained that present policy of the Department was to discourage such contacts, and "[t]herefore, either with respect to personal contact or correspondence, individual requests will need to be made."

It is admitted that appellant made two visits to the home of a parolee, one in June and the other in July, 1960; that no request was made, and no permission given to make such contact with the parolee.

In July, 1960 appellant was transferred from duty at San Quentin to duty at the California Medical Facility at Vacaville, and given a new assignment. He did not again contact the parolee.

In November, 1960 appellant was questioned by an investigator for the Department. These charges followed, and appellant was dismissed. A hearing was then granted before a hearing officer of the Board; the hearing officer recommended that appellant be reinstated; oral argument was granted by the Board pursuant to Government Code section 19582(c) and, after argument, the Board made findings and sustained the Department in its dismissal of appellant.

⌊545 ⌊[1] This appeal challenges the sufficiency of the evidence to support the findings and decision of the Board and the trial court. Code of Civil Procedure section 1094.5(c) provides: "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence ***in the light of the whole record.***" (Emphasis added.) Appellant contends that the use by the Legislature of the phrase "in the light of the whole record" requires the trial court to review the record, weigh the evidence, test the credibility of the witnesses, and determine the merits of the petition from such a review. It is the established law of this State, however, that the substantial evidence rule is the rule by which a court is bound in reviewing a decision of the Board. (Boren v. State Personnel Board, 37 Cal.2d 634, 234 P.2d 981; Genser v. State Personnel Board, 112 Cal.App.2d 77, 82, 245 P.2d 1090; Nelson v. Department of Corrections, 110 Cal.App.2d 331, 242 P.2d 906. In Martin v. Alcoholic Bev., etc., Appeals Bd., 52 Cal.2d 238, 246, 340 P.2d 1, 5, the Supreme Court explained the meaning of the term "substantial evidence in the light of the whole record" as used in Code of Civil Procedure section 1094.5: "The phrase 'substantial evidence in the light of the whole record' is not new in the law of this state. It has been embodied in section 1094.5 of the Code of Civil Procedure at all times since the enactment of that section in 1945. Stats. 1945, ch. 868, p. 1636. The quoted language, as used in section 1094.5, had been considered by this court prior to the adoption of the constitutional amendment in 1954 (Thompson v. City of Long Beach, 41 Cal.2d 235, 244, 259 P.2d 649), and more recently, the meaning of a similar phrase—'based upon the entire record'—was considered by this court. (Argonaut Ins. Exchange v. Industrial Acc. Com., 49 Cal.2d 706, 708, 321 P.2d 460.) The cited cases and others show that such phrases have been consistently construed as signifying no more than the adoption by the Legislature, for particular purposes, of the 'substantial evidence' rule as generally applied in judicial proceedings in this state rather than the 'scintilla' rule, which has been applied in judicial proceedings in some other jurisdictions. (See Walters ⌊546 v. Bank of America, 9 Cal.2d 46, 49, 69 P.2d 839, 110 A.L.R. 1259; 88 C.J.S. Trial § 208, p. 422."

Our duty here is to review the record before the trial court, which is the same record as that before the Board, and to determine if there is substantial evidence in the record to support the findings made by the court.

[2] We find substantial evidence in the record to support the determination of the Board and the court. It is undisputed that appellant made two contacts with a parolee at the latter's home; that arrangements for these visits were made while the parolee was a prison inmate; that appellant had knowledge of the rule and policy of the Department prohibiting employees from contacting ex-prisoners except by permission or unless the employee's assigned duties required the contact; that appellant had requested blanket permission to contact parolees and this had been denied; the supervisor of institutional research, under whose general direction the research program was carried on, testified that it was unnecessary for appellant to make personal contact with the parolee in order to carry out his assigned research task. The investigator for the Department testified to admissions made by the appellant, among them a statement by appellant that he contacted the parolee in order to continue treatment "in the field"; that he expected some action by the Department as a result; that in case of conflict between his "clinical judgment" and a rule of the Department, his "clinical judgment" would prevail. The appellant was charged with insubordination and wilful disobedience. Evidence sufficient to support either charge would warrant dismissal by the Board. The trial court found substantial evidence of wilful disobedience in the record. The brief recitation here of only a part of the evidence before the Board and the trial court amounts to substantial evidence, which if believed by the Board, as it apparently was, fully supports the ruling which it made.

[3, 4] Appellant also contends that the findings of the Board are fatally defective in that they do not conclude in so many words that appellant's acts were done "wilfully and intentionally" with the intent to do an unlawful act. Administrative findings, however, need not be stated with the formality and precision required in judicial proceedings. (Swars v. Council of City of Vallejo, 33 Cal.2d 867, 206 P.2d 355.) Here the Notice of Punitive Action was the Board's pleading. Government Code sec-

tion 19582(e) provides in part that findings ⌊547 in disciplinary matters in the ⌊State Civil Service may be stated "in the language of the pleadings or by reference thereto." The Board's notice, after stating facts, further alleged that "all of the said acts herein alleged were without just cause and excuse." The findings of the Board adopted in part the language of the Board's pleading, as permitted by the Government Code, and were in this case entirely sufficient. (Webster v. Board of Dental Examiners, 17 Cal. 2d 534, 110 P.2d 992; So. Cal. Jockey Club v. Cal. etc. Racing Bd., 36 Cal.2d 167, 223 P.2d 1.)

Judgment affirmed.

DRAPER, P. J., and DEVINE, J., concur.

208 Cal.App.2d 547

⌊547 ⌊**Eleanor MACKIE, Plaintiff and Respondent,**

v.

Malcolm MACKIE, Defendant and Appellant.

Civ. 25873.

District Court of Appeal, Second District, Division 1, California.

Oct. 16, 1962.

Proceeding on motion by husband to vacate a final decree of divorce on ground that wife's affidavit filed in the proceedings to obtain final decree had fraudulently failed to disclose that the parties had cohabited during the interlocutory period. The Superior Court, Los Angeles County, Roger Alton Pfaff, and Frank S. Balthis, JJ., denied the motion and the husband appealed. The District Court of Appeal, Lillie, J., held that mere assertion by husband that parties had cohabited following the interlocutory decree did not establish a reconciliation or show that wife had committed a fraud upon the court in view of the grievous physical cruelty committed by husband against wife and her continuous struggle to evict him and avoid contact with him.

Affirmed.

1. Divorce 🔑156

In order to justify denial of dissolution of marriage, conduct of party subsequent to entry of interlocutory judgment must have been such as to constitute a reconciliation, and court has duty, where grounds of divorce have been established by interlocutory decree, to enter the final decree unless there is clear and cogent proof of reconciliation, of resumption of connubial relations, or of some other legal ground for denying dissolution of marriage. Cal. Rules of Court, rule 233.

2. Divorce 🔑156

Mere cohabitation or living on the same premises following entry of interlocutory judgment of divorce is not sufficient to constitute ground for denial of final judgment and does not as a matter of law establish reconciliation of parties.

3. Divorce 🔑156

To establish reconciliation of parties following entry of interlocutory judgment of divorce there must be an intent on part of prevailing party to condone past conduct of the offending party and restore him to all marital rights.

4. Divorce 🔑156

In proceeding to obtain final decree of divorce, trial court must determine credibility of affiants, weigh their assertions and resolve any factual conflict created thereby.

5. Divorce 🔑184(6)

Question of whether divorced wife had committed a fraud upon the court in asserting in her affidavit filed in connection with proceeding to obtain final decree that parties had not been reconciled since the entry of the interlocutory decree was for lower court. Cal. Rules of Court, rule 233.

6. Divorce 🔑165(5½)

Mere assertion by husband on his motion to vacate a final decree of divorce that wife had committed a fraud upon the court when she stated in her affidavit on proceeding to obtain final decree that the parties had not cohabited since the granting of the interlocutory decree did not establish a reconciliation or preclude grant of final divorce decree in view of grievous physical cruelty husband had inflicted upon wife and her continuous struggle to evict and avoid contact with him. Cal. Rules of Court, rule 233.

Malcolm Mackie, Appellant in pro. per.

Edwards, Edwards & Ashton, Glendale, for respondent.

⊥549 ⊥LILLIE, Justice.

After twenty years of marriage, plaintiff wife, now 80 years old, sued defendant for divorce in 1959 alleging a course of grievous physical and mental cruelty. Upon charges and proof that defendant strangled her to unconsciousness in 1957 and repeatedly beat her, on four occasions resulting in blackened eyes (1958), that she lived with defendant in a state of terror and since 1958 has avoided him whenever possible, that several times defendant has been in jail, and that defendant has failed and refused to work and support her (Amended Complaint For Divorce, para. V)—an interlocutory decree of divorce was entered on October 8, 1959, awarding her a divorce and the family home. From this judgment defendant appealed; it was affirmed November 28, 1960. (Mackie v. Mackie, 186 Cal.App.2d 825, 9 Cal.Rptr. 173.) On February 9, 1961, plaintiff executed a proper affidavit and filed her application for final decree of divorce; final judgment was entered February 21, 1961. Thereafter, defendant moved to vacate the same upon the ground that plaintiff committed a fraud on the court, in that her affidavit had failed to disclose that the parties "lived together as husband and wife and cohabited" during the interlocutory period. Defendant appeals from the order denying the motion. Appellant's sole contention is that inasmuch as "the parties lived together after the entry of the Interlocutory Decree" (A.O.B., p. 6), the lower court erred in refusing to vacate the final judgment.

Assuming all matters set up in defendant's affidavit supporting his motion to vacate to be true, he has failed to make out a case of fraud which would justify vacation of the final judgment; indeed, had the motion based thereon been granted, the showing would have been insufficient to thereafter support a denial of entry of the final decree.

[1–3] Under the law of this state, whatever their conduct ⊥550 with each other subsequent to entry of the interlocutory judgment, to justify denial of a dissolution of the marriage it, at least, must have been such as to constitute a reconciliation of the parties (Olson v. Superior Court, 175 Cal. 250, 165 P. 706, 1 A.L.R. 1589; Nacht v. Nacht, 167 Cal.App.2d 254, 334 P.2d 275); and it is the duty of the court, where grounds for divorce have been esablished by an interlocutory decree which has been unassailed until application for final decree, to enter the latter "unless there is clear and cogent proof of reconciliation and resumption of connubial relations, or of some other legal ground for denying dissolution of the marriage." (Keller v. Keller, 122 Cal.App. 712, 715, 10 P.2d 541; Dean v. Dean, 77 Cal.App.2d 98, 174 P.2d 705.) Mere cohabitation or living on the same premises is not sufficient to constitute a ground for denial of a final judgment. Living in the same house, or engaging in acts of sexual intercourse, or cohabiting together as husband and wife during the interlocutory period does not as a matter of law establish a reconciliation of the parties; in addition, there must be an intent on the part of the prevailing party to condone past conduct of the offending party and to restore him to all marital rights. (Estate of Abila, 32 Cal.2d 559, 197 P.2d 10; Dean v. Dean, 77 Cal. App.2d 98, 174 P.2d 705; Walsh v. Walsh, 108 Cal.App.2d 575, 239 P.2d 472; Nemer v. Nemer, 117 Cal.App.2d 35, 254 P.2d 661; Peterson v. Peterson, 135 Cal.App.2d 812, 288 P.2d 171; Garibaldi v. Garibaldi, 153

Cal.App.2d 170, 314 P.2d 89.) "A reconciliation occurs when the circumstances show that the parties intended to reunite as husband and wife (In re Estate of Abila, 32 Cal.2d 559, 197 P.2d 10; Nemer v. Nemer, 117 Cal.App.2d 35, 254 P.2d 661), and when there has been an unconditional forgiveness by the prevailing party. Angell v. Angell, 84 Cal.App.2d 339, 191 P.2d 54." (Nacht v. Nacht, 167 Cal.App.2d 254, 261, 334 P.2d 275.) Accordingly, Rule 233, California Rules of Court, requires the applicant for final judgment of divorce at the time of the motion therefor, to submit to the court "an affidavit to the effect that, among other things (a) the parties have not been reconciled, and (b) that they have not lived or cohabited together since the granting of the interlocutory decree." This plaintiff did; her affidavit asserted "2. That since the granting of said interlocutory judgment, (a) said parties have not become reconciled; (b) said parties have not lived or cohabited together; * * *"

⊥551 ⊥ Significantly, in defendant's notice of motion to vacate, points and authorities and supporting affidavit, he alleged neither the ultimate fact of reconciliation nor facts even suggesting one; made no claim whatsoever that a reconciliation had taken place; nor did he assert that plaintiff voluntarily or willingly lived with him in her home or cohabited with him, or did either with intent to condone his past conduct and restore him to marital rights. And in appellant's brief before this court there is a complete absence of any claim of reconciliation or even a use of the term "reconciliation." Defendant not only failed, in the lower court, to sustain his burden of showing that a reconciliation took place, but in his appellate brief completely ignores the necessity for such a showing. Defendant's only claim is found in his declaration, not under oath, that "the parties have lived together as husband and wife and cohabited during said period in their home" (Notice of Motion to Vacate), and his statement under oath that at all times he resided at plaintiff's address and they "were not 'seperated' [*sic*] or apart but in fact were living togather [*sic*] normally as husband and wife in the home as formally [*sic*] for the past 20 years." (Affidavit in Support of Motion.) Mere living on the same premises or living together as husband and wife in the home, without further conduct showing a reconciliation, is not sufficient to constitute a ground for denying dissolution of a marriage; thus on their face, defendant's Notice of Motion to Vacate and his accompanying affidavit are insufficient to support the charge of extrinsic fraud alleged therein.

Ignoring the rules on appeal, appellant asks us to review the facts and determine, contrary to the lower court's implied finding, that the "parties have lived together so as to nullify the judgment of divorce" (A.O.B., p. 7); he does not contend that the evidence is insufficient to support the finding of the court below but improperly argues that the evidence would support a finding that "the parties had lived together." (A.O.B. p. 7.) However, were we empowered to reevaluate the evidence and find that "the parties had lived together" during the interlocutory period, such a finding still would not justify a holding contrary to that of the lower court; as authority therefor, we refer to the principles hereinabove set forth. But considering the sufficiency of the evidence, a review of the record convinces us that the implied findings of the court below are amply supported.

[4–6] Like oral testimony, it is the province of the trial⊥judge, in considering affidavits, to determine the credibility of ⊥552 the affiants, weigh their assertions and resolve any factual conflict created thereby. Whether defendant's showing on his motion to vacate, by way of his affidavit and the "records, papers and files" in the action, was sufficient to establish the falsity of plaintiff's affidavit in support of her application for final judgment and thus a fraud on the court, was a question of fact for the lower court. (Garibaldi v. Garibaldi, 153

Cal.App.2d 170, 314 P.2d 89.) Moreover, even had it found defendant's affidavit, on ⊥553 its face, to be sufficient to constitute a ground for vacating the final decree and proceeded to a determination whether a reconciliation did in fact occur, such a factual determination is binding on the appellate court (Nemer v. Nemer, 117 Cal.App.2d 35, 254 P.2d 661; Ruggles v. Bailey, 15 Cal.App.2d 555, 59 P.2d 837; Slusher v. Slusher, 85 Cal.App.2d 626, 193 P.2d 778; Small v. Small, 123 Cal.App.2d 870, 268 P.2d 63; Nacht v. Nacht, 167 Cal.App.2d 254, 334 P.2d 275); and it is obvious from the holding of the court below that it disbelieved defendant, rejecting his assertions under oath as not being credible, and denied his motion for his failure to sustain the burden of proving that a reconciliation took place.

In their briefs both parties allude to considerable facts which are not disclosed by the record, including those contained in an affidavit filed by plaintiff in opposition to defendant's motion. Plaintiff, in her brief, refers at length to her counter affidavit and its contents (R.R.B., p. 2, p. 6); defendant in his opening brief concedes that such an affidavit was filed by plaintiff and before the lower court, in his reference to the hearing on the motion and plaintiff's affidavit—that she "introduced nothing to controvert" defendant's affidavit and her "affidavit is evasive and insecure on its face." (A.O.B., p. 14.) While plaintiff's counter affidavit was not included in the record before us, we do not doubt one was filed controverting defendant's assertions that the parties cohabited subsequent to the entry of the interlocutory decree; and defendant has not replied denying that one was filed or that it did not contain allegations opposed to his claim. However, defendant based his motion, as well, on all records, papers and files in the action, which, we may assume, the lower court had before it when deciding the matter; and from reference to it in her brief, the allegations of plaintiff's affidavit appear to be little different than those made under oath in her Amended Complaint for Divorce under which she was granted a decree—that "defendant has beaten plaintiff several times during their married life; that defendant has blackened plaintiff's eyes four times from such beatings, the last of which occurred in August, 1958, that since this date plaintiff has lived in a state of terror and has avoided defendant whenever possible * * * that in 1957 defendant strangled plaintiff rendering her unconscious * * *" (Para. V.)

Plaintiff's outright unwillingness to have defendant in her home at any time, which could hardly show cohabitation let alone reconciliation, is reflected not only in the record before us and the prior opinion of this court (186 Cal.App.2d 825), but in defendant's own brief. They reveal plaintiff's continuous unsuccessful struggle to evict defendant from her home and avoid contact with him—the obtaining of an order to show cause and restraining order for his removal from the premises and her efforts to evict him, including his arrest and contempt proceedings for his failure to comply with the court's order. Defendant's own brief, as well, concedes this struggle and plaintiff's efforts to keep him out of her home, including his arrest for a violation of the court's order for his removal from the premises (A.O.B., pp. 4, 5), and her desire to evict him for reasons of her health and safety (A.O.B., p. 9).

The record shows a bitterly contested divorce case with numerous appearances and court proceedings, a recent and repeated course of physical violence that placed plaintiff in a state of fear and terror, a constant and continuous struggle to remove defendant from her home, an elderly woman, obviously without strength to forcibly evict defendant (approximately 10 years younger) and her permanent intention to avoid any contact with defendant. This showing is hardly compatible with any alleged fact of defendant's stay on the premises with plaintiff's consent, cohabitation, or cohabitation on a voluntary basis, let alone reconciliation with the necessary intent to for-give defendant's past conduct and restore him to full marital rights.

For the foregoing reasons the order is affirmed.

WOOD, P. J., and FOURT, J., concur.

208 Cal.App.2d 482

⌊482 ⌊**The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Richard H. BAGLEY, Defendant and Appellant.

Cr. 4080.

District Court of Appeal, First District, Division 2, California.

Oct. 15, 1962.

Rehearing Denied Nov. 13, 1962.

Hearing Denied Dec. 5, 1962.

Defendant was convicted of attempted escape and from an order denying his motion for a new trial in the Superior Court, County of Monterey, Anthony Brazil, J., the defendant appealed. The District Court of Appeal, Shoemaker, J., held that the evidence sustained convictions, and that the rulings at trial were not prejudicial to the defendant, and that the defendant was not deprived of a fair trial because prosecutor was allegedly guilty of misconduct.

Judgment and order denying motion for new trial affirmed.

1. Criminal Law ⇨1130(4)

Where notice of appeal was filed by a defendant but he failed to file an opening brief after notice duly given in accordance with the rule, his appeal was dismissed. Cal.Rules of Court, rule 17(a).

2. Criminal Law ⇨260(11)

On appeal, the court is bound by the findings of the trial court if there is substantial evidence contradicted or uncontradicted to support the conclusion arrived at.

3. Escape ⇨10

Evidence supported conviction for attempted escape. West's Ann.Pen.Code, § 4530.

4. Criminal Law ⇨232

Defendant who voluntarily chose not to be represented by counsel at the preliminary examination but wherein court-appointed counsel was available to him at all subsequent stages in the proceedings failed to show any error or prejudice resulting from the absence of counsel at the preliminary hearing.

5. Criminal Law ⇨1166½(1)

Record failed to establish that defendant was prejudiced by defense counsel's failure to introduce in evidence the document which would have substantiated his testimony but would have discredited the testimony of his co-defendant consisting of a prison record known as a "chronological evaluation" of the defendant, where the defendant's entire chronological evaluation was subsequently read into the evidence at request of the prosecution.

6. Criminal Law ⇨742(1)

The intelligence or mental condition of a particular witness at least to the extent that it affects his powers of perception, memory or narration may properly be considered by the jury.

7. Witnesses ⇨337(5)

A witness may be impeached by proof that he has suffered a prior felony conviction, and the rule applies to a defendant who testifies in his own behalf in a criminal trial, despite the fact that such evidence may tend to prejudice him in the eyes of the jury. West's Ann.Code Civ.Proc. § 2051.

8. Criminal Law ⇨1172(1)

Instruction containing a reference to the degree of intelligence as evidenced by a witness was not prejudicial to the defendant.

9. Criminal Law ⇨1171(1)

Prosecutor was not guilty of prejudicial misconduct because on two separate occasions he referred to an incident in the prison recreation yard as an "escape" where the first reference was a mere slip of tongue which prosecutor immediately corrected and the jurors were thoroughly familiar with the term "escape" in connection with the incident.

10. Witnesses ⚷277(2)

Prosecutor on cross-examination in prosecution for attempted escape was entitled to seek clarification of a prison phrase utilized by the defendant in describing his own actions.

Richard H. Bagley, in pro. per.

Stanley Mosk, Atty. Gen., John S. McInerny, Joseph I. Kelly, Deputy Attys. Gen., San Francisco, for respondent.

SHOEMAKER, Justice.

Defendant Richard H. Bagley appeals from a conviction of attempted escape in violation of Penal Code, section 4530, and from an order denying his motion for a new trial.

The facts, which are substantially without dispute, reveal that on May 25, 1961, Richard Bagley and Larry Disbrow were inmates of the State of California Correctional Training Facility at Soledad, California. At approximately 1:45 p. m. on that day, Woodrow Lane, a guard on tower duty in the prison recreation yard, observed Bagley and Disbrow run past the out-of-bounds stakes toward the fence surrounding the yard. Immediately he ordered them to halt; they ignored the order and commenced climbing the fence. Lane then fired a warning shot. The men still continued ⊥485 to climb, so Lane fired at their feet and Disbrow was wounded. Both men dropped to the ground, and were taken into custody.

Sergeant Raynor asked Bagley what had happened, who replied that he had tried to go over the fence but that he had quit when he heard the shot. Upon further questioning by prison officers, Bagley stated that he and Disbrow had not been planning their escape for any length of time, but that right after lunch they had just suddenly decided to go. When asked why he wanted to escape, Bagley stated that he was doing "ten to life" and that he wanted to be free for a while.

Bagley's story was that he had previously requested a transfer to another institution, and that he had never intended to go over the fence but was merely attempting to create a scene and thereby compel the prison authorities to grant him a transfer. He further stated that he did not hear the tower guard order him to halt before firing, and that he jumped off the fence as soon as he heard the first shot.

[1] On June 21, 1961, the district attorney of Monterey County filed an information accusing Bagley and Disbrow of attempted escape. After a trial by jury, both defendants were found guilty as charged, and judgment accordingly entered. Defendant Bagley appeals therefrom.[1]

[2, 3] Appellant's first contention is that the testimony of the witnesses for the prosecution was contradictory, conflicting and argumentative, and that the evidence was therefore insufficient to support his conviction for attempted escape. This contention is wholly without merit. An examination of the record reveals that all of the "contradictions" and "conflicts" complained of are so minor in nature as to be almost imperceptible, and, in addition, have little or no bearing on the question of appellant's guilt. In any event, the credibility of witnesses is for the determination of the trier of fact. (People v. Haywood (1955) 131 Cal.App.2d 259, 261, 280 P.2d 180.) "On appeal, the court is bound by the findings of the trial court, if there is substantial evidence, contradicted or uncontradicted, to support the conclusion arrived at in the court below." (People v. Johnson (1955) 136 Cal.App.2d 665, 671, 289 P.2d 90, 94.) The ⊥486 record

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[1] Although notice of appeal was also filed by defendant Disbrow, he failed to file an opening brief after notice duly given in accordance with Rule 17(a) of the California Rules on Appeal, and his appeal was therefore dismissed.

shows evidence clearly sufficient to support his conviction for attempted escape. (See People v. Sharp (1959) 174 Cal.App. 2d 520, 344 P.2d 796; People v. Stabler (1962) 202 A.C.A. 942, 21 Cal.Rptr. 122.)

Appellant next asserts that he was deprived of a fair trial because he was denied counsel at the preliminary examination in the municipal court. The record reveals that appellant was informed of his right to have counsel prior to the preliminary hearing, but that he stated he desired to represent himself. Thereupon, appellant cross-examined both of the People's witnesses and was given an opportunity to present evidence on his own behalf. The court then found that there was sufficient cause to believe both defendants guilty of attempted escape and held them to answer. At this stage in the proceedings, appellant requested counsel and was informed by the court that he should make this request to the superior court at the time of his arraignment. Appellant then stated that he did not want legal information or assistance from an attorney but merely wanted to send a telegram to his attorney in Los Angeles. Appellant was represented by court-appointed counsel at his arraignment in the superior court, and throughout the trial.

[4] The facts thus reviewed show that appellant voluntarily chose not to be represented by counsel at the preliminary examination, but that court-appointed counsel was made available to him at all subsequent stages in the proceedings. Appellant has failed to show any error or prejudice resulting from the absence of counsel at the preliminary hearing. (See People v. Hightower (1961) 189 Cal.App. 2d 309, 312, 11 Cal.Rptr. 198.)

[5] Appellant next contends that he was prejudiced by defense counsel's failure to introduce into evidence a document which would have substantiated his testimony but which would have discredited the testimony of codefendant Disbrow. Appellant asserts that this error resulted from a conflict of interest between the two defendants which prevented defense counsel from providing both men with adequate representation. Here again, there is no evidence whatever that appellant was prejudiced by the act complained of.

The document in question was a prison record known as a "chronological evaluation" of appellant. Defense counsel, in examining the prison records officer, Mr. Stone, inquired whether this document indicated that appellant had requested a transfer to another institution prior to his attempted escape. ⌊487 Mr. Stone replied that the record showed a request for transfer to Tracy and a denial by the classification committee. Upon further questioning, Mr. Stone stated that his records did not indicate any transfer request by defendant Disbrow. Defense counsel then stated that there was no need to have the prison records introduced in evidence and that he would stand on the oral testimony. Appellant's entire chonological evaluation was subsequently read into evidence at the request of the prosecution.

Under such circumstances, appellant was not prejudiced because the actual document itself was not offered as an exhibit. Our examination of the record convinces us that appellant's theory that defense counsel was motivated by a desire to protect defendant Disbrow at appellant's expense is utterly inconsistent with the facts. (People v. Wren (1956) 140 Cal.App.2d 368, 370, 295 P.2d 54.)

[6-8] Appellant next objects to the giving of an instruction that the presumption that a witness speaks the truth may be overcome "by contradictory evidence, by the manner of the witness on the stand, the degree of intelligence exhibited by him, the manner in which he testifies, by the character of his testimony, by evidence showing his motives or an interest in the outcome of the case, or bias or prejudice against one of the parties; by evidence that on some former occasion he made a statement or statements inconsistent with his present testimony; or by proof that he has been convicted of a felony." It is appellant's position that

the reference to the degree of intelligence exhibited by a witness was extremely prejudicial to the defense, "no matter how taken," because defendant Disbrow is mentally deficient, and "your appellant is exceedingly bright * * *" Appellant also objects to the reference to proof of a felony conviction because he and his codefendant were both convicted felons and the only witnesses on behalf of the defense. Neither point is of any merit. There can be no doubt that the intelligence or mental condition of a particular witness, at least to the extent that it affects his powers of perception, memory or narration, may properly be considered by the jury. (See People v. Bell (1955) 138 Cal.App.2d 7, 12, 291 P.2d 150; People v. Dye (1947) 81 Cal.App.2d 952, 963, 185 P.2d 624; CALJIC 52 (Revised).) It is also well established that the testimony of a witness may be impeached by proof that he has suffered a prior felony conviction. 488 (Code Civ.Proc. § 2051.) "This rule applies to a defendant who testifies in his own behalf in a criminal trial despite the fact that such evidence may tend to prejudice him in the eyes of the jury." (People v. Williams (1945) 27 Cal.2d 220, 228, 163 P.2d 692, 696.)

[9] Appellant's final contention is that the prosecutor was guilty of prejudicial misconduct during the course of the trial because on two separate occasions he referred to the incident in the prison recreation yard as an "escape."[2] The first reference complained of occurred when the prosecutor was cross-examining appellant and asked the following question: "Now, then, at the time of this escape on May 25th—excuse me—at the time of this incident on May 25th you didn't actually know that Disbrow was going to go with you, did you?" Again, at a later state in the cross-examination, the following exchange occurred: "Q. Now this phrase 'hit the fence,' in the prison vernacular this means escape, does it not? A. Yes, it does. Q. That's what you did, hit the fence, isn't that right? A. Yes, I did hit the fence." It is appellant's position that the prosecutor's "improper comments" deprived him of a fair trial. This contention merits little discussion since the prosecutor's remarks were clearly neither improper nor in the least prejudicial to appellant.

The first reference to the word "escape" was obviously a mere slip of the tongue which the prosecutor immediately corrected. No objection was registered by appellant's counsel. In any event, the jurors were already thoroughly familiar with the term "escape" in connection with the May 25 incident. Prosecution witnesses had already testified to conversations with appellant during which he had been asked why he wanted to escape, and how long he had been planning the escape with Disbrow. Under such circumstances, it cannot be doubted that the prosecutor's inadvertent use of the term resulted in no real detriment to appellant.

[10] The second incident complained of constituted no more than entirely proper cross-examination of appellant in regard to a phrase which he himself had used in response to questions by his own counsel. The prosecutor, on cross-examination, was certainly entitled to seek clarification of a prison phrase utilized by appellant in describing his own actions. Appellant cannot 489 now complain because he himself replied that to "hit the fence" was to escape and that this was what he had done on the afternoon of May 25.

The judgment and order denying the motion for a new trial are affirmed.

KAUFMAN, P. J., and AGEE, J., concur.

Hearing denied; PETERS, J., dissenting, WHITE, J., sitting pro tem.

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[2] It may be noted that appellant also makes reference to additional misconduct occurring during the prosecutor's closing argument to the jury. Since the record on appeal does not include the arguments to the jury and appellant's request to augment the record was denied, this issue is not before the court.

208 Cal.App.2d 530

⊥530 ⊥ **The PEOPLE, Plaintiff and Respondent,**

v.

Emilio AQUILANTE, Vincent Principe, Jack Harry Hoogasian and Charles Isadore Romano, Defendants and Appellants.

Cr. 1813.

District Court of Appeal, Fourth District, California.

Oct. 15, 1962.

Prosecution on charges of grand theft, burglary and conspiracy. From an adverse judgment of the Superior Court, John A. Hewicker, J., and from an order denying motion for a new trial, the defendants appealed. The District Court of Appeal, Coughlin, J., held that evidence establishing five prior store thefts of men's suits by defendants, or some of them, which had been effected in a manner similar to that employed in the thefts of men's suits in question was relevant proof of existence of a continuing conspiracy and of a common design, plan, scheme and mode of operation engaged in by defendants, and court did not abuse its discretion in admitting such evidence.

Order affirmed.

1. Criminal Law 🔑372(5)

Evidence establishing five prior store thefts of men's suits by defendants, or some of them, which had been effected in manner similar to that employed in theft of men's suits in question was relevant proof of existence of a continuing conspiracy and of a common design, plan, scheme and mode of operation engaged in by defendants, and court did not abuse its discretion in admitting such evidence.

2. Criminal Law 🔑372(1)

Except when it shows merely criminal disposition, evidence that is relevant is not excludable because it reveals the commission of an offense other than that charged.

3. Criminal Law 🔑369(2)

If evidence of other crimes is relevant to prove a material fact in issue, it is for trial court in exercise of its judicial discretion to determine whether probative value of evidence is outweighed by its possible prejudicial effect and to admit or exclude it accordingly.

4. Criminal Law 🔑372(1)

Proof of similarity in general plan, scheme, design or mode of operation between that used by defendant in commission of a prior offense and that used in offense with which he is presently charged is relevant as a factor which tends to prove that the latter offense was committed by him.

5. Criminal Law 🔑372(5)

Cross-examination of defendants, who were charged with stealing men's clothes from department stores, respecting former thefts of men's clothes involving a plan, scheme, or mode of operation similar to that used in the thefts with which they were presently charged was proper.

6. Criminal Law 🔑300

A defendant's denial of guilt places in issue all matters implicit in his denial, including his general plan, scheme, design and mode of operation.

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Russell E. Parsons and Edward I. Gritz, Los Angeles, for defendants and appellants.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Jack K. Weber, Deputy Atty. Gen., for plaintiff and respondent.

⊥ COUGHLIN, Justice. ⊥531

The defendants were indicted for the offenses of grand theft, a violation of Section 487, subd. 1 of the Penal Code, of burglary, a violation of Section 459 of the Penal Code, and of conspiracy, a violation of Sections 182, 484–487 of the Penal Code; were charged with the commission of prior offenses; admitted the latter; denied the former; after trial by jury, were found guilty of all offenses; by judgment, were sentenced to imprisonment in the state prison; moved for a new trial, which was denied; appealed from the order of denial prior to the amendment of Section 1237 of the Penal Code eliminating such an appeal; and also appealed from the judgment.

The indictment in question followed the May 9, 1961 theft of 36 men's suits from a J. C. Penney store in San Diego ⊥532 and 16 men's suits from a Montgomery Ward store in the same city. The defendants and another man appeared in the J. C. Penney store on the date in question; four of them engaged the attention of the sales clerks while one of their party, the defendant Romano, was seen in the men's suit section, but the clerks were not able to wait upon him because they were kept busy by the other four; sometime in the course of events Romano obtained a large box from an employee who was emptying trash into a chute in another part of the store; nothing was purchased; after the men left, the department manager noticed that some suits were missing; and an inventory followed which disclosed a loss of 41 suits valued at approximately $1950. The defendants were identified by both the manager and a sales clerk as four of the men who had been in the store on the occasion in question. On the same day the defendants and another man were seen in the men's suit department of the Montgomery Ward store; the sales clerks therein were kept busy by some of the defendants and by two customers who were making purchases; the defendant Principe was seen carrying a large box toward the back of the store; the defendants Romano and Aquilante tried on coats; the defendant Hoogasian bought a shirt, but no purchases were made by the others who came with him; the next day it was noticed that the suit racks were considerably depleted; and an inventory followed which showed the loss of 19 suits. One of the sales clerks identified all four defendants as being in the men's department of the store; and another sales clerk identified the defendant Hoogasian as one of the five men who came into the store on the day in question. On the evening of this day the defendants Hoogasian and Principe were seen in the vicinity of a Cadillac automobile parked to the rear of a small office building in Los Angeles. They appeared to be taking something from the trunk of the automobile into the building. The defendants Romano and Aquilante joined them and entered into the back of the building. Because the circumstances seemed suspicious, the police were notified; upon arrival they looked through a bathroom window and saw the defendants Hoogasian and Principe removing labels from men's suits; when the police made their presence known by seeking entry, all of the defendants left the back room; Romano and Aquilante were caught while leaving the building; Hoogasian and Principe were found in a front office with the owner of the building; upon obtaining permission from the owner to do so, entry was made into the ⊥533 back room where men's suits were laying on the floor and on a desk; in the bathroom on the floor were eight or ten such suits together with labels and price tags; *in toto* 52 suits were found and of these, it was stipulated, 36 were the property of J. C. Penney Company, and 16 belonged to Montgomery Ward Company.

[1–3] During the course of the trial, over objection, the People introduced evidence establishing five prior store thefts of men's suits by the defendants, or some of them, which had been effected in a manner similar to that employed to effect the thefts in question. The defendants contend that the admission of this testimony was error. When testifying as witnesses on their own behalf, the defendants denied that they had stolen the suits in question; denied possession thereof at the time of their arrest; offered an alibi in support of a contention that they were not in San Diego on the date of the alleged thefts; and a further alibi as to the reason for being at the building where the stolen suits were recovered at the time they were taken into custody. Upon cross-examination, Romano and Aquilante, over objection, were interrogated concerning the details of certain prior offenses of which they had been convicted. It is contended that the order of the trial court overruling their objection to this examination also was error. Further, the defendants contend that the errors in question constituted a denial of due process of law.

> "The general rule, universally recognized, is that in a criminal prosecution the defendant can be tried for no other offense than that which he is charged in the indictment or information; evidence of collateral independent crimes is not admissible. (Citations.) The equally well-recognized exceptions to this rule are clearly defined. Evidence of other crimes may be admitted when it tends directly to establish the crime charged by proving a material fact, where it is part of the res gestae, or where it helps to disclose motive, intent, premeditation, guilty knowledge, malice, or a common plan or scheme." (People v. Albertson, 23 Cal.2d 550, 576, 145 P.2d 7, 20; in accord People v. Zankich, 189 Cal.App.2d 54, 62, 11 Cal.Rptr. 115.)

Stated otherwise, the rule is "that except when it shows merely criminal disposition (Citations), evidence that is relevant is not excluded because it reveals the commission of an offense other than that charged." (People v. Peete, 28 Cal.2d 306, 314–315, 169 P.2d 924, 929; in accord People v. Westek, 31 Cal.2d 469, 476, 190 P.2d 9; People v. Zankich, ⊥534 supra, 189 Cal.App.2d 54, 62, 11 Cal.Rptr. 115.) In the same vein, the court in People v. Woods, 35 Cal.2d 504, 509, 218 P.2d 981, 984, stated:

> "It is settled in this state that except when it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by the defense, is admissible although it may connect the accused with an offense not included in the charge." (In accord: People v. Zankich, supra, 189 Cal.App.2d 54, 63, 11 Cal.Rptr. 115.)

In a later and somewhat qualifying statement of the rule, the California Supreme Court declared that, "If such evidence is determined to be relevant to prove a material fact in issue, it is for the trial court in the exercise of its judicial discretion to determine whether its probative value is outweighed by its possible prejudicial effect and to admit or exclude it accordingly, * * *." (People v. McCaughan, 49 Cal.2d 409, 421–422, 317 P.2d 974, 982; cf. People v. Cavanaugh, 44 Cal.2d 252, 264, 282 P.2d 53; People v. Dabb, 32 Cal.2d 491, 500, 197 P.2d 1.)

Under the foregoing rules, evidence showing a prior offense has been admitted as proof of a common scheme, plan, or design of which the offense charged was a part (People v. Cavanaugh, supra, 44 Cal.2d 252, 265–266, 282 P.2d 53; People v. Peete, supra, 28 Cal.2d 306, 317, 169 P.2d 924; People v. Brown, 170 Cal.App.2d 80, 82, 338 P.2d 504; People v. Ross, 98 Cal.App.2d 805, 809, 221 P.2d 280; People v. King, 4 Cal.App.2d 727, 729–731, 41 P.2d 593—the facts of which are singularly analogous to those in the case at bar; People v. Cosby, 137 Cal.App. 332, 335, 31 P.2d 218), or of similarity in the method of operation, i. e., the *modus operandi* (People v. Johnson, 195 Cal.App.2d 825, 827–828, 16 Cal.Rptr. 290; People v. Zuniga, 156 Cal.App.2d 298, 302, 319 P.2d 111; People v. Gregor, 141 Cal.App.2d 711, 717–718, 297 P.2d 734; People v. Grimes, 113 Cal.App.2d 365, 369–372, 248 P.2d 130; People v. Egan, 133 Cal.App. 152, 157, 23 P.2d 1042; People v. McGill, 82 Cal.App. 98, 102–103, 255 P. 261); as proof of a continuing conspiracy to commit the offense of which that previously committed and that presently charged are the objects of a common design. (People v. Kynette, 15 Cal.2d 731, 746, 104 P.2d 794; People v. Lapierre, 205 Cal. 462, 468, 469, 271 P. 497; People v. Arnold, 199 Cal. 471, 486, 488, 250 P. 168; People v. Ash, 88 Cal.App.2d 819, 827–828, 199 P.2d 711; People v. Collier, 111 Cal.App. 215, 234, 295 P. 898; People v. Egan, supra, 133 Cal.App. 152, 157, 23 P.2d 1042; People v. Sampsell, 104 Cal.App. 431, ⊥535 438, 286 P. 434; People v. McGill, supra, 82 Cal.App. 98, 103, 255 P. 261; People v. Zimmerman, 3 Cal.App. 84, 88, 84 P. 446);

and as proof to connect several defendants with the conspiracy charged against them. (People v. Winthrop, 118 Cal. 85, 90–91, 50 P. 390.)

[4] Proof of similarity in the general plan, scheme, design or mode of operation between that used by a defendant in the commission of a prior offense and that used in the offense with which he is charged, is relevant as a factor which tends to prove that the latter offense in fact was committed by him. (People v. Cavanaugh, supra, 44 Cal.2d 252, 265–266, 282 P.2d 53; People v. Peete, supra, 28 Cal.2d 306, 319, 169 P.2d 924; People v. Thorne, 10 Cal.2d 705, 707–708, 76 P.2d 491; People v. Brown, supra, 170 Cal.App.2d 80, 83, 338 P.2d 504; People v. Burns, 109 Cal.App.2d 524, 536, 241 P.2d 308, 242 P.2d 9; People v. Cassandras, 83 Cal.App.2d 272, 279, 188 P.2d 546; People v. McGill, supra, 82 Cal.App. 98, 102–103, 255 P. 261.)

The evidence to which objection was made related to five prior offenses; in the first of these, Romano and a man named Parrish participated; in the second Aquilante, Romano and a man named Bozyk; in the third all four of the defendants and another unidentified man; in the fourth Principe and a man named Capollo; and in the fifth Aquilante, Hoogasian and Principe; each of the offenses involved the theft of men's suits; each took place in a store or department thereof where there was a limited number of sales clerks; in each the attention of these clerks was engaged by part of the group while one of their number effected the theft; in each a box or some receptacle was used to carry away the stolen articles; and there was a tendency to vary the locale of the operation from city to city. By proper instructions from the court, a consideration of evidence respecting the offenses of a particular defendant was limited to that defendant; a consideration of all such evidence was limited to specifically designated relevant issues; and the jury was cautioned that the evidence was not admitted "to prove distinct offenses or continual criminality."

[5] Under the decisions heretofore noted, this evidence was relevant proof of the existence of a continuing conspiracy and of a common design, plan, scheme and mode of operation engaged in by the defendants; establishes a striking similarity between the prior offenses and the offenses with which the defendants are now charged; and furnishes corroborative proof of their participation in the latter offenses.

We have reviewed the whole record, including the evidence,⊥and conclude that the ⊥536 trial court did not abuse its discretion in admitting such evidence. (See People v. McMonigle, 29 Cal.2d 730, 742–743, 177 P.2d 745.)

[6] In support of their contention that the court erred in overruling their objections to cross-examination with respect to the details of prior offenses of which they had been convicted, the defendants cite the decision in People v. Braun, 14 Cal.2d 1, 6, 92 P.2d 402. The rule there stated concerns the cross-examination of a defendant with respect to his previous conviction of a felony for the purpose of impeaching his testimony, and limits the extent thereof by prohibiting an inquiry into the details of the crime resulting in such conviction. The cross-examination of the defendants in the case at bar with respect to the details of their prior offenses was directed not only to the impeachment of their testimony but also, as heretofore noted, to other relevant issues in the case. Some of the objections to the questions eliciting details of the prior offenses were made upon the ground of immateriality and others upon the ground that the inquiry was without the scope of the direct examination. In either event the objections were without merit. Under the rules heretofore considered the evidence elicited was relevant. As witnesses, each of the defendants denied participation in the offenses with which he was charged. Evidence respecting his former activity in offenses involving a plan, scheme, design or mode of operation similar to that in which the participants in the offenses charged against him had engaged was relevant to

an issue incident to his denial of participation therein; tended to refute such denial; and cross-examination eliciting such did not exceed the scope of his direct examination. (People v. Tarantino, 45 Cal.2d 590, 599, 290 P.2d 505; People v. Kerns, 134 Cal.App.2d 110, 115, 285 P.2d 81.) A defendant's denial of guilt places in issue all matters implicit in his denial, including his general plan, scheme, design and mode of operation. (People v. Tarantino, supra, 45 Cal.2d 590, 599, 290 P.2d 505; People v. Peete, supra, 28 Cal.2d 306, 319, 169 P.2d 924; People v. Thorne, supra, 10 Cal.2d 705, 707–708, 76 P.2d 491; People v. Cassandras, supra, 83 Cal.App.2d 272, 279, 188 P.2d 546.)

The judgment and order denying a motion for a new trial are affirmed.

GRIFFIN, P. J., and STONE, J.,* concur.

208 Cal.App.2d 397

397 **Shigeru SUGIYAMA, Plaintiff and Appellant,**

v.

Leland J. CUNEO and Donna J. Cuneo; Redevelopment Agency of the City and County of San Francisco, Defendants and Respondents.

Civ. 20057.

District Court of Appeal, First District, Division 1, California.

Oct. 11, 1962.

Rehearing Denied Nov. 2, 1962.

Hearing Denied Dec. 5, 1962.

The holder of a third trust deed brought an action against the holder of a second trust deed and others for declaratory relief. The Superior Court, San Francisco County, George W. Schonfeld, J., rendered a judgment adverse to the holder of the third trust deed, and she appealed. The District Court of Appeal, Bray, P. J., held that the holder of the second trust deed was under no legal obligation to notify the holder of the third trust deed that the holder of the second trust deed was proceeding with foreclosure, where at a meeting between the holder of the second trust deed and attorney for holder of third trust deed the holder of the second trust deed definitely stated that he was going to foreclose.

Judgment affirmed.

1. Mortgages 🔑440

Holder of second trust deed was under no legal obligation to notify holder of third trust deed that holder of second trust deed was proceeding with foreclosure, where at meeting between holder of second trust deed and attorney of holder of third trust deed the holder of second trust deed definitely stated that he was going to foreclose. West's Ann.Civ.Code, § 2924b.

2. Mortgages 🔑241

Acts of holder of second trust deed in giving deed to condemnor of interest of holder of second trust deed in realty sought to be condemned and agreeing to accept his proportionate share of money to be paid by condemnor did not extinguish lien of holder of second trust deed on realty.

C. Dan Lange, Donald P. Nemir, San Francisco, for appellant.

Joseph L. Alioto, Walter F. Calcagno, San Francisco, for respondents Leland J. Cuneo and Donna J. Cuneo.

BRAY, Presiding Justice.

Plaintiff appeals from an adverse judgment in favor of defendants.

QUESTION PRESENTED. 398

Is the judgment supported by the evidence? This depends upon whether defendants Cuneo were entitled under the circumstances to stand upon their technical right to foreclose their second deed of trust without notice to their junior encumbrancer, plaintiff.

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* Assigned by Chairman of Judicial Council.

EVIDENCE.

This is purely a factual case, with very little conflict in the evidence.

Certain land in the San Francisco Western Addition Redevelopment Area belonged to the Reverend Brown. Prior to demolishment it contained a church with four apartment rental units above. It was originally subject to three deeds of trust, the first to McKeever for $9,000, the second to defendant Bories for $7,000, and the third to Bories for $13,500. However, Bories sold the second deed of trust to defendants Cuneo and the third to plaintiff Sugiyama. In the sale to the latter, it was agreed that plaintiff was to collect the first $11,500 principal and interest and Bories would receive the $2,000 balance, if collected.

Reverend Brown made payments on all three deeds of trust until February, 1959, although apparently the payments had been slowing down for some time, and Cuneo had on occasion received rental checks that were not cashable. The redevelopment program was under way. Certain buildings in the area had already been demolished. The Redevelopment Agency appraised the property at $22,000 and opened an escrow with a title company to acquire the property. On May 15, 1959, the title company was notified by the agency that a controller's warrant for $22,000 was available to be used for the purchase of the property. The title company then requested of Brown and the lienholders that they place their notes and deeds of trust, reconveyance, deeds, instructions and demands in escrow.

On April 21, Brown, evidently realizing that as the total amount of principal due on the liens (to say nothing of interest) was greater than the amount the agency would pay for the property, deposited a deed of his interest, with instructions to the title company to pay the entire purchase price to the lienholders. The deed and instructions were prepared for Brown by Cuneo. McKeever then deposited his note, deed of trust and request for reconveyance with instructions that he was to receive $8,669.64 plus interest. May 4, Cuneo deposited his note, deed of trust and request for reconveyance ⌊399 with a demand for $6,250.80 plus interest. May 15, plaintiff deposited her note, deed of trust and request for reconveyance and a demand for $13,413.03. (On May 4, Bories had filed a demand for a proportionate share of any payment made under plaintiff's third deed of trust.)

The demands being greater than the amount deposited by the agency, plaintiff sought legal advice of Attorney Carr. The latter concluded that an accounting should be made by the holders of the first and second deeds of trust, as plaintiff claimed there was a difference between the amount Cuneo was demanding on the second deed of trust and the amount Bories had represented was due thereon at the time he sold the third deed of trust to plaintiff.

To resolve the dispute between Bories and plaintiff as to who was entitled to the payments under the third deed of trust, Attorney Carr concluded that it was necessary to obtain a copy of the transcript in an action entitled Anderson v. Bories, out of which action the agreement to assign to plaintiff part of the third deed of trust had developed. Carr also desired to explore the possibility of a higher price being received from the agency.

In June, Carr and Cuneo discussed the situation and on June 5 Carr indicated to Cuneo that plaintiff would have to file a declaratory relief action, and demanded an accounting of Cuneo. Cuneo testified that Carr said that he would "mess me around in court." Cuneo refused to give Carr an accounting and stated that he would commence a foreclosure action. June 11, Cuneo recorded notice of default and of sale.

On June 12, the agency filed an eminent domain action, recording a lis pendens. Cuneo was served and obtained an open stipulation extending time. Plaintiff appeared in the action by answer and cross-complaint seeking the same declaratory relief as in this action. Bories was not served.

Plaintiff commenced this action in declaratory relief. Bories defaulted. July

19, McKeever supplied an accounting fully supporting his demand. Carr received the transcript he wished and apparently Bories conceded that plaintiff was entitled to any moneys payable under the third deed of trust up to the amount of her demand. During August, September and October, plaintiff had discussions with Bories, during which Bories apparently purported to speak for Cuneo, although without authority.

On October 6, the property was sold under the Cuneo second deed of trust at trustee's sale. Cuneo bid it in at ⊥400 a sum to cover McKeever's deed of trust and the amount due Cuneo plus expenses of sale. Cuneo thereupon demanded of the title company the $22,000, less the amount due McKeever on the first deed of trust. This demand the title company refused. Later, by stipulation of the parties, the title was cleared for the agency. McKeever received the amount due under his first deed of trust; Cuneo received the amount due under the second deed of trust, and the balance, $7,898.22, is held awaiting the determination of this action.

The trial court held that the sale under the Cuneo deed of trust was a valid sale, that as plaintiff had not requested notice of default pursuant to section 2924b, Civil Code, the sale wiped out plaintiff's interest in the property and the price being paid for it by the agency, and that Cuneo was entitled to the balance of the purchase price held by the title company. The court also found that the circumstances raised no equities in favor of plaintiff, or required Cuneo to give plaintiff any notice of the foreclosure proceedings.

We are not dealing here with the question of a moral obligation, but with whether Cuneo was under any legal obligation to notify plaintiff of the fact that he had recorded his notice of default and was proceeding to foreclose, or whether, as also contended by plaintiff, he had no right to foreclose.

[1] Cuneo was under no legal obligation to notify plaintiff that he was proceeding with the foreclosure. It is conceded that at the June 5 meeting between Cuneo and plaintiff's attorney, Cuneo definitely stated that he was going to foreclose. It then was incumbent upon plaintiff, if she desired notice of the foreclosure proceedings when brought, to comply with section 2924b, Civil Code, and request notice of default and of sale. After that meeting there was no contact between plaintiff and Cuneo, and hence no conduct of Cuneo's which could justify plaintiff's failure to attempt to find out whether Cuneo was carrying out the foreclosure which he had stated that he would start.

Cuneo, on June 10, withdrew from the escrow all of the documents he had theretofore deposited, signing a receipt to the title company therefor, upon which he wrote, "If further instructions are required they will be submitted by Western Title Insurance and Guaranty Company at my direction." This was the trustee in the deed of trust he was foreclosing.

Plaintiff contends that Cuneo had no right to foreclose, ⊥401 asserting that by assisting Brown in placing his deed in escrow with instructions to pay the lienholders Cuneo had waived further payment by Brown, Cuneo, in effect, looking to the money to be received from the Redevelopment Agency. What the agreement between Cuneo and Brown was does not appear. If Cuneo violated that agreement Brown would be the only one who could complain. It may very well be that Cuneo's knowledge of the escrow arrangement of all the parties would, had nothing else transpired, have placed an equitable duty upon Cuneo to notify plaintiff when he was withdrawing from the escrow and foreclosing, and had he failed to notify her thereof, he would be estopped to gain an advantage over her. But he did notify her.

[2] Plaintiff's contention that by obtaining an open stipulation from the Redevelopment Agency extending his time to answer and joining with Brown in agreeing with the agency to a $22,000 price for the property, Cuneo's lien under his deed of trust

was extinguished, is not well founded. His giving a deed to the agency of his interest in the property and of agreeing to accept his proportionate share of the $22,000, when paid, in nowise extinguished his lien on the property. In fact, if he had no interest in the property he would have no interest in the money the agency might pay for it.

There is nothing in the evidence which placed, as contended by plaintiff, any duty upon the Western Title Company, the trustee in the Cuneo deed of trust, to notify any of the parties of the foreclosure proceeding.

The court found that the trustee's sale "took place before the Redevelopment Agency came into possession of the premises, before any amount of the award was determined and paid, and before any title to the real property passed to the Redevelopment Agency." The evidence fully supports this finding.

Judgment affirmed.

SULLIVAN and MOLINARI, JJ., concur.

Hearing denied; WHITE, J., sitting pro tem.

208 Cal.App.2d 537

⊥537 ⊥ **The PEOPLE of the State of California, Plaintiff and Appellant,**

v.

Lesley Roy ALLEN, Defendant and Respondent.

Cr. 4062.

District Court of Appeal, First District, Division 2, California.

Oct. 16, 1962.

Prosecution for grand theft. The Superior Court, Contra Costa County, Martin E. Rothenberg, J., entered an order dismissing information against defendant, and the state appealed. The District Court of Appeal, Shoemaker, J., held that evidence presented at preliminary hearing was not sufficient to support municipal court's finding of reasonable and probable cause to believe that defendant committed crime of obtaining money from county by false pretenses, where there was no showing that defendant participated in activity of his wife in obtaining county aid after misrepresenting amount of personal property which she and defendant owned.

Order affirmed.

1. Indictment and Information 🔑144

A superior court, in ruling on motion to dismiss an information on ground of insufficiency of evidence presented at preliminary hearing, is without power to substitute its judgment as to weight of the evidence for that of the magistrate. West's Ann.Pen.Code, § 995.

2. False Pretenses 🔑4

Essential elements of crime of obtaining money by false pretenses are (1) an intent to defraud; (2) an actual fraud committed; (3) the use of false pretenses to perpetrate the fraud; and (4) reliance upon the fraudulent representations in parting with money or other property. West's Ann. Pen.Code, § 484.

3. Criminal Law 🔑59(5)

In order to be an "abettor," accused must have instigated or advised commission of crime or been present for purpose of assisting in its commission; he must also share criminal intent with which crime was committed.

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law 🔑238

The phrase "sufficient cause" in statute providing that defendant shall be held to answer if it appears from preliminary examination that public offense has been committed and there is sufficient cause to believe defendant guilty thereof means such state of facts as would lead man of ordinary caution or prudence to believe and conscientiously entertain strong suspicion of accused's guilt. West's Ann.Pen.Code, § 872.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇐238

Evidence presented at preliminary hearing was not sufficient to support municipal court's finding of reasonable and probable cause to believe that defendant committed crime of obtaining money from county by false pretenses, where there was no showing that defendant participated in activity of his wife in obtaining county aid after misrepresenting amount of personal property owned. West's Ann.Pen.Code, §§ 484, 872.

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Stanley Mosk, Atty. Gen., John S. McInerny, Edward P. O'Brien, Deputy Attys. Gen., San Francisco, for appellant.

Richard D. Sanders, Richard E. Hawk, Pittsburg, for respondent.

⊥538 ⊥SHOEMAKER, Justice.

This is an appeal by the People of the State of California from an order dismissing an information against Lesley Roy Allen.

The record reveals that after a preliminary examination of the defendants Lesley ⊥539 Allen and his wife, on a complaint⊥charging them with grand theft in violation of Penal Code, section 484, both defendants were held to answer. Thereafter, an information was duly filed by the district attorney of Contra Costa County charging both defendants with the above-mentioned offense. Defendant Lesley Allen was arraigned in the superior court and moved to dismiss the information pursuant to Penal Code, section 995. Said motion to dismiss was granted.

[1] The sole question raised by this appeal is whether the evidence presented at the preliminary hearing was sufficient to support the municipal court's finding of reasonable and probable cause to hold the defendant Lesley Allen. (People v. Jackson (1956) 146 Cal.App.2d 553, 303 P.2d 767.) The superior court, in ruling on the motion to dismiss the information, was without power to substitute its judgment as to the weight of the evidence for that of the magistrate. "If there is some evidence to support the information, the courts will not inquire into its sufficiency. Under section 995 of the Penal Code, the information will be set aside only where there is no evidence that a crime has been committed or there is no evidence to connect the defendant with a crime shown to have been committed." (People v. Platt (1954) 124 Cal.App.2d 123, 131, 268 P.2d 529, 534; also see People v. Malki (1960) 181 Cal.App.2d 118, 121–122, 5 Cal.Rptr. 207.)

In the case at bar, the evidence presented at the preliminary hearing established that the defendant's wife, Edith Allen, was receiving welfare payments of approximately $140 per month during 1960 and January of 1961 for the support of her four children by a previous marriage. In December of 1960, Mrs. Durkin, a Contra Costa County social worker assigned to Mrs. Allen's case, made a routine visit to the Allen home. When Mrs. Allen informed her that Mr. Allen had injured his leg, Mrs. Durkin discussed with him the possibility that he might apply for disability payments or Aid to Needy Children payments.

Thereafter, on February 8, 1961, Mrs. Allen visited Mrs. Durkin at the welfare office and told her that Mr. Allen had been injured in a fall from a horse, that he was not drawing disability payments, and that they needed help. In response to Mrs. Durkin's questions, Mrs. Allen stated that she and her husband owned no personal property other than a 1941 Chevrolet. She further stated that neither she nor her husband had disposed of any real or personal property during⊥the past year. After these ⊥540 statements had been filled in on the appropriate forms, Mrs. Allen signed an Application for Aid to Needy Children" and a "Statement of Facts Relating to Eligibility for Aid to Needy Children."

Thereafter, the welfare payments to the Allens were increased to cover the two children of Mr. and Mrs. Allen, and Mr. Allen himself as an incapacitated father. In February and March of 1961, the Allens received a total of $639 from the County of Contra Costa. The money was paid in the form of three separate warrants which were payable to Mrs. Allen and which were endorsed by her.

In March of 1961, Mrs. Durkin placed a hold on the Allens' April check as the result of an anonymous phone call informing her that the Allens owned some horses. Mr. and Mrs. Allen then came into the welfare office and inquired why their check was being held. Mrs. Durkin informed them that the office was attempting to verify whether or not they owned horses of a value exceeding the $600 personal property limitation of the Aid to Needy Children program. Mr. and Mrs. Allen denied that they owned any horses.

On May 16, 1961, Deputy Sheriff John Van Hagen proceeded to the Allen home to serve an arrest warrant on Mr. Allen. The deputy found Mr. Allen hiding in a closet.

In addition to the evidence above summarized, there was also testimony indicating that Mr. Allen had in fact been the owner of several horses of a value in excess of $600 at the time that his wife had applied for and received financial aid from the county.

[2] Penal Code, section 484, provides in part that "Every person * * * who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money * * * is guilty of theft." The essential elements of the crime of obtaining money by false pretenses are (1) an intent to defraud; (2) an actual fraud committed; (3) the use of false pretenses to perpetrate the fraud; and (4) reliance upon the fraudulent representations in parting with money or other property. (People v. Caruso (1959) 176 Cal.App.2d 272, 276, 1 Cal.Rptr. 428.)

In the instant case, the evidence presented at the preliminary hearing was clearly sufficient to show that respondent's wife, by falsely representing that she and respondent owned no personal property other than a 1941 Chevrolet, was successful in obtaining county welfare payments to which she was not entitled. Although it is true that there was no ⊥541 direct evidence indicating that Mrs. Allen acted with an intent to defraud, there was ample circumstantial evidence from which such an intent could be inferred. (See People v. Caruso, supra, at p. 278, 1 Cal.Rptr. at p. 433.) There can be no doubt that the prosecution sustained the burden of showing that the crime of obtaining money by false pretenses had been committed.

Turning next to the evidence connecting respondent with the crime, it becomes apparent that an entirely different situation is presented. It must first be remembered that respondent took no part in the discussions immediately preceding the filing of the welfare application. Neither did he sign the application itself or the "Statement of Facts Relating to Eligibility for Aid * * *" Although it is true that respondent later denied owning any horses, this statement was made at a time when the welfare payments to the Allens had already been discontinued by the county. Respondent's statement, although obviously false, could certainly have induced no reliance on the part of the county and, indeed, was made at a time when the crime charged had already been completed.

Appellant concedes that respondent "did not personally make any false representations," but urges that there was at least probable cause to believe that he aided and abetted his wife in the commission of the crime. In support of this contention, appellant points out that in December of 1960, Mrs. Durkin suggested to respondent that he apply for county aid. According to appellant, the very fact that respondent's wife subsequently did apply for such aid is itself evidence of a "tacit understanding" between respondent and his wife that they would attempt to obtain welfare payments despite the fact that they owned several horses. Appellant also asserts that respondent demonstrated a consciousness of guilt when he subsequently denied ownership of the horses and when he hid in the closet to avoid arrest.

[3] In order to be an abettor, the accused must have instigated or advised the commission of the crime or been present for the purpose of assisting in its commission. He must also share the criminal intent with which the crime was committed. (People v. Villa (1957) 156 Cal.App.2d 128, 133–134, 318 P.2d 828.) In the case at bar, the evidence reveals that appellant was not present when his wife misrepresented the amount of personal property which she and respondent owned. The warrants by which the welfare payments were made were all payable to and endorsed by his wife. Although it is certainly possible that respondent shared ⌊542 his wife's criminal intent and instigated or advised the commission of the crime, the evidence before us does not support it. When Mrs. Durkin suggested that respondent apply for aid, there is no evidence that she informed him of the $600 personal property limitation. Neither is there any evidence that respondent had obtained county aid before, that his wife had told him of the limitation, or that he was otherwise apprised of its existence. Under these circumstances, it is entirely possible that respondent, being incapacitated, merely asked his wife to apply for county aid but was never aware that she obtained that aid only by means of false statements.

[4, 5] Penal Code, section 872, provides that a defendant shall be held to answer if it appears from the examination that "a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof * * *." The phrase "sufficient cause" has been equated with "reasonable and probable cause" (People v. Nagle (1944) 25 Cal.2d 216, 222, 153 P.2d 344, 347) and has been held to mean "such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." (Rogers v. Superior Court (1955) 46 Cal.2d 3, 7–8, 291 P.2d 929; Perry v. Superior Court (1962) 57 A.C. 302, 309, 19 Cal.Rptr. 1, 368 P.2d 529.) In the instant case, it cannot be said that the lower court erred in concluding that the prosecution had failed to produce sufficient evidence connecting respondent with the crime charged.

Order dismissing the information is affirmed.

KAUFMAN, P. J., and AGEE, J., concur.

208 Cal.App.2d 554

⌊554 **Seymour M. LAZAR, Plaintiff and Appellant,**

v.

ESTATE of Nathan Richard LAZAR, Deceased, Defendant and Respondent.

Civ. 25934.

District Court of Appeal, Second District,
Division 1, California.
Oct. 16, 1962.

Rehearing Denied Nov. 14, 1962.
Hearing Denied Dec. 12, 1962.

Action brought by plaintiff seeking to obtain judgment which could be satisfied from assets belonging to decedent at time of his death or from assets held by him for benefit of plaintiff. The Superior Court of Los Angeles County, Frank Balthis, J., granted defendant's motion for order quashing service of summons and sustained demurrer to complaint without leave to amend, and an appeal was taken. The District Court of Appeal, Wood, P. J., held that plaintiff had erroneously named decedent's "estate" instead of executors of decedent's will as defendant and had improperly served summons and complaint by mailing them to office of attorney for executors, but held that since their attorney, and presumably the executors, were aware that executors should have been designated as defendants and since, contrary to attorney's contention, it could not be determined from complaint that claims of plaintiff were barred by statute of limitations, it was error to sustain demurrer to complaint without leave to amend.

Judgment reversed.

1. Executors and Administrators ⚷438(1)

The "estate" of a decedent is not an entity known to law, and plaintiff, seeking to obtain judgment which could be satisfied from assets belonging to decedent at time of his death or from assets held by decedent for benefit of plaintiff, should have named executors of will of decedent, rather than decedent's "estate," as defendant.

2. Executors and Administrators ⚷453(2)

A decedent's "estate" was not an entity in favor of which judgment could be obtained.

3. Executors and Administrators ⚷441

Mailing summons and complaint to office of attorney for executors of will of decedent was not proper manner for serving such documents.

4. Process ⚷158

If court had made only order quashing defective service of summons and complaint, which erroneously named decedent's "estate" as defendant, plaintiff would have been entitled to amend his complaint to name proper defendants (executors of decedent's will) and could have made proper service of summons and amended complaint.

5. Executors and Administrators ⚷441

If attorney for executors of decedent's will made general appearance when he sought not merely quashing of service of summons and complaint (naming decedent's "estate" as defendant) but general relief in name of the "estate" (i e., relief prohibiting amendment and denying recovery by plaintiff), court should not have sustained demurrer without leave to amend.

6. Executors and Administrators ⚷441

If only appearances were asserted special appearances by non-entity (the "estate") for purpose of quashing service and demurring to complaint naming non-entity as defendant, court should not have sustained demurrer without leave to amend, and should not have rendered judgment that plaintiff take nothing.

7. Executors and Administrators ⚷224

Probate code section pertaining to time for filing claims of creditors is not applicable where claimant seeks to impose trust upon property which was held by decedent. West's Ann.Prob.Code, § 714.

8. Limitation of Actions ⚷127(1)

Under some circumstances pleading may be amended after period of time specified in statute of limitations has expired.

9. Pleading ⚷225(1)

Where plaintiff erroneously named decedent's "estate", instead of executors of decedent's will, as defendant, and improperly served summons and complaint by mailing them to office of attorney for executors, but their attorney, and presumably the executors, were aware that executors should have been designated as defendants and, contrary to attorney's contention, it could not be determined from complaint that claims of plaintiff were barred by statute of limitations, it was error to sustain demurrer to complaint without leave to amend.

Marvin A. Freeman and Ivon B. Blum, Beverly Hills, for appellant.

Ezra E. Stern, Los Angeles, for respondent.

⊥WOOD, Presiding Justice. ⊥555

On May 8, 1961, the demurrer of "Estate of Nathan Richard Lazar, Deceased," to the complaint was sustained without leave to amend. Also at that time, the court granted defendant's motion for an order quashing service of summons.

A judgment, which was entered on May 10, 1961, recited: that the demurrer and motion to quash service of summons came on for hearing; Ezra E. Stern, attorney, made a special appearance on behalf of "the defendant herein"; that plaintiff did not appear; that the demurrer having been sustained without leave to amend, and the motion to quash service of summons having been granted, it is ordered, adjudged, and decreed "that the plaintiff take nothing by his cause of action on file herein," and that defendant receive judgment for $12.50 costs.

Plaintiff appeals from the judgment.

The demurrer recited: that "the defendant 'Estate of Nathan Richard Lazar, Deceased,' above-named, and without admitting, and in fact denying, the existence of said defendant as a legal entity capable of being sued, and by way of SPECIAL APPEARANCE only, and not by way of general appearance, demurs to the Complaint" upon the ground that the "Court has no jurisdiction of the person of said defendant." It was recited further therein that "said defendant prays that this demurrer be sustained without leave to amend, that plaintiff take nothing by reason of his Complaint and that the said defendant have costs of suit herein incurred." The demurrer was signed: "Ezra E. Stern Attorney for 'Defendant.'"

The notice of motion to quash service of summons recited: That on May 8, 1961, the "'defendant' above named will move the court for an order quashing service of summons," or in the alternative for an order quashing summons; that the motions will be made upon the grounds that there is no party defendant named in said summons or "before the court upon whom service of process may be made, and further that ⊥556 no service of summons was made on any defendant herein." Under the title of the notice of motion, the following words appear: "(Special Appearance) (Accompanying Demurrer to Complaint)."

The declaration of Mr. Ezra E. Stern with respect to the notice to quash service stated: he is an attorney at law; on April 19, 1961, at his office, he received through the mail an envelope from Seymour M. Lazar (plaintiff) which envelope contained a copy of summons and complaint in this said action, together with a document entitled Exhibit "A"; that at no time was said summons or complaint or a copy thereof served personally on him (declarant); that he was not the therein named defendant "Estate of Nathan Richard Lazar, deceased," nor was he authorized to accept service of process for or on behalf of said defendant; that said declaration is made for the purpose of procuring an order of court quashing service of summons on (declarant) and on said defendant, or for an order quashing said summons.

The complaint alleged that Nathan Richard Lazar died on October 10, 1958; plaintiff filed a creditor's claim "in the Estate" of said deceased in the Superior Court of Los Angeles County; said claim was rejected on or about January 20, 1961; plaintiff is the son of Nathan Richard Lazar, the decedent; plaintiff and decedent "had a relationship of trust" wherein the decedent managed the money and any financial interest plaintiff may have had; the financial arrangement with decedent commenced when plaintiff was sixteen years of age; when plaintiff was eighteen years of age they engaged in numerous transactions together; in June 1946 they purchased 100 shares of Broadway State Bank stock, which bank was later merged with the Security-First National Bank, and said estate is holding said shares or the equivalent thereof; in 1947 plaintiff sold some land for $5,000 and delivered said money to decedent to be used in his business; in 1948 plaintiff and decedent engaged in the business of second trust deed financing, and plaintiff became a real estate broker, and thereafter for a period of approximately ten years plaintiff delivered all his commissions as such broker to decedent who managed said funds and invested them in first and second trust deeds—the total amount of such commissions was not less than $120,000; in 1951 plaintiff became an attorney at law, and thereafter as an escrow holder in connection with the trust deed business he received escrow fees which he delivered to decedent who used said funds for invest-

⊥557 ments—the total amount of such⊥fees was not less than $30,000; beginning in 1952 and continuing until the time of death of the father, the plaintiff received fees for collecting the payments on trust deeds, which fees he delivered to decedent who used said funds for investment purposes—the total amount of such fees was not less than $45,000; in 1952, 1953, and 1954, plaintiff received $7,200 as attorney's fees from one Hunsaker, which amount plaintiff delivered to decedent who used the same for investments; also from 1952 to 1954 plaintiff received other amounts as attorney's fees in connection with the trust deed business, which fees were delivered to decedent who used the same for investments—the total amount of such fees was not less than $25,000; about September 1953 one Orduno made an assignment for benefit of creditors which assignment included real property on which decedent held a deed of trust, and thereafter, pursuant to a program suggested by plaintiff, the decedent advanced $20,000 to the assignee for an assignment to decedent of the real property and the oil interests of Orduno therein—that decedent had agreed that he would give plaintiff 50 per cent of the profits derived from the real property and oil interests, if plaintiff would devise a method or program whereby decedent could acquire such property and oil interests; that such 50 per cent, agreed to be paid to plaintiff, was not less than $35,000; the decedent purchased certain deeds of trust for plaintiff, and thereafter decedent received the funds from those deeds—the amount of such funds was not less than $45,000.

[1–3] It is conceded that plaintiff Seymour M. Lazar, an attorney at law, appearing in propria persona, erred in naming the "Estate of Nathan Richard Lazar, Deceased," as the defendant in the action (instead of naming the executors of the will of said decedent as defendants). The "Estate" of a decedent is not an entity known to the law. (Tanner v. Best, 40 Cal.App.2d 442, 104 P.2d 1084.) In Estate of Bright v. Western Air Lines, 104 Cal.App.2d 827, 828–829, 232 P.2d 523, 524, it was said: "An 'estate' is not a legal entity and is neither a natural nor artificial person. It is merely a name to indicate the sum total of the assets and liabilities of a decedent, or of an incompetent, or of a bankrupt. [Citations.] An 'estate' can neither sue nor be sued." It is apparent that plaintiff intended to commence an action, according to proper procedural methods, for the purpose of recovering certain amounts from assets belonging to decedent, or held by decedent for the plaintiff, at the time of decedent's⊥death. ⊥558 The plaintiff failed to designate as a defendant a natural or artificial person who was authorized to act as the representative of decedent. The summons and complaint were mailed to the office of the attorney for the executors of the will of the decedent. This was not a proper manner for serving such documents. In any event, irrespective of plaintiff's failure to name a proper defendant and to serve the summons and complaint properly, the attorney who received the documents filed a demurrer on behalf of "the defendant," stating therein that the defendant "Estate," without admitting and in fact denying the existence of defendant as a legal entity, and by way of special appearance only, demurs to the complaint upon the ground that the court has no jurisdiction of the person of said defendant. The prayer in the demurrer was that the demurrer be sustained without leave to amend, that plaintiff take nothing by the complaint, and that "defendant" have costs. (That Mr. Stern was the attorney for the executors of the will of decedent is shown in his affidavit in opposition to motion to set aside ruling on demurrer. It was said therein that Mr. Stern, on behalf of the coexecutors, sent to plaintiff a rejection of creditor's claim [Clerk's Tr., p. 42.])

With reference to amending the complaint to include the executors as the named defendants, the respondent "Estate" asserts there was no party defendant or any controversy before the court as to which an amendment could be made. Respondent's position seems to be that even though the

"Estate" is not a legal entity *against* which judgment may be obtained, it should be regarded as an entity *in favor* of which judgment may be obtained.

The asserted special appearances on behalf of the "Estate" for the purposes of demurring and of moving to quash service of summons and complaint were made by the attorney who was the attorney for the executors of the will of said decedent. By such appearances it was sought not only to quash such service but also to obtain further relief by way of an order sustaining the demurrer without leave to amend, and a judgment that plaintiff take nothing by reason of the complaint. The attorney's request for such order and judgment on behalf of the "Estate" indicates that the attorney considered that the asserted special appearances, for the purposes of raising the point that the defendant "Estate" was a non-entity, entitled such alleged defendant to more relief than merely quashing service of the summons and complaint. The demurrer was sustained without leave to amend, and the 559 judgment provided that plaintiff take nothing by the complaint. A result of granting the additional relief under the asserted special appearances is that the plaintiff, notwithstanding his inadvertence or other reason for naming the "Estate" as the defendant, was denied the right to amend his complaint to name as the proper defendants the executors of the will of said decedent.

[4–6] If the court had made only an order quashing service of summons and complaint, the plaintiff would have been entitled to amend his complaint to name the proper defendants (the executors), and he could have made proper service of the summons and the amended complaint. By reason, however, of the order prohibiting plaintiff from amending his complaint, the non-entity defendant (as to which, service was quashed because it was a non-entity) obtained an order which in effect granted relief on the merits of the case (in favor of the non-entity) in the same manner that relief might have been granted if there were proper defendants. Such a result indicates that the attorney for the executors who filed the asserted special appearances for the non-entity (the "Estate") was seeking general relief on the merits in the name of the "Estate," which relief ordinarily would be sought by the executors. The attorney who appeared for the "Estate" states in his brief that "it must have been obvious to the lower court that the logical defendants should have been the executors of the last Will of said Nathan Richard Lazar, deceased." Appellant argues that, under these circumstances where the attorney for the executors sought such general relief in the name of the "Estate" (i. e., relief prohibiting amendment and denying recovery by plaintiffs), the trial court should have ruled that the executors had made a general appearance in the action. It is not necessary to determine herein whether there was such a general appearance. If there was such a general appearance, the court should not have sustained the demurrer without leave to amend. If the only appearances were the asserted special appearances by the non-entity (the "Estate") for the purpose of quashing service and demurring, the court should not have sustained the demurrer without leave to amend, and should not have rendered judgment that plaintiff take nothing.

[7–9] Respondent asserts that the court properly sustained the demurrer without leave to amend. The argument with respect to this assertion is that the statute of limitations (Prob.Code, § 714) had run as to the executors, and since they could not have been brought in as parties within the proper time, it 560 would have been a meaningless act to grant leave to amend. Said section 714 of the Probate Code provides: "When a claim is rejected by the executor or administrator or by the judge, written notice of such rejection shall be given * * * to the holder of the claim * * * and the holder must bring suit in the proper court against the executor or administrator, within three months after date of service of such notice * * *; otherwise the claim shall be forever barred." The complaint alleges that the claim was rejected on or about January 20, 1961. The action was commenced on April 18, 1961. There is no allegation in the complaint as to when, if at all, a written notice of rejection of the claim was served on plaintiff. This action was commenced within the time required by said section 714. That section pertains to claims of creditors, and it "states the time within which an action upon a creditor's claim must be commenced." (De Hermosillo v. Morales, 146 Cal.App.2d 819, 829, 304 P.2d 854, 861.) In the present case, some of the allegations in the complaint are to the effect that decedent held some of the property as trustee for the benefit of plaintiff. Said section 714 is not applicable where plaintiff seeks to impose a trust upon property which was held by a decedent. (Elizalde v. Elizalde, 137 Cal. 634, 642, 66 P. 369, 70 P. 861; see Estate of Dabney, 37 Cal.2d 672, 680, 234 P.2d 962.) In the present case it appears that the claims of plaintiff were not limited to creditor's claims, and therefore section 714 was not applicable to all the claims alleged in the complaint. It also appears that the complaint does not show when, if at all, notice of rejection of the claim was served. It cannot be determined from the complaint that the claims of plaintiff were barred by the statute of limitations. Furthermore, it is to be noted that under some circumstances a pleading may be amended after the period of time specified in a statute of limitations has expired. In Austin v. Massachusetts Bonding & Insurance Co., 56 Cal.2d 596, 602–603, 15 Cal. Rptr. 817, 820; 364 P.2d 681, 684, it was said: "[I]t is settled that a defendant sued by a fictitious name and later brought into the case by an amendment substituting his true name is considered a party to the action from its commencement for purposes of the statute of limitations. A defendant unaware of the suit against him by a fictitious name is in no worse position if, in addition to substituting his true name, the amendment makes other changes in the allegations on the basis of the same general set of facts. And of course, as to a defendant who knows that he has been designated by a fictitious name in the original complaint, application of the modern rule does ⌊561 not affect him differently from a defendant designated by his true name."

In the present case it is apparent, as above indicated, that plaintiff intended to commence an action, according to proper procedural methods, for the purpose of obtaining a judgment which could be satisfied from assets belonging to decedent at the time of his death, or from assets held by him for the benefit of plaintiff. The name, "Estate of Nathan Richard Lazar, Deceased," which was used as the name of the defendant, was not used as a fictitious name (as in the cited case), but it is apparent that the use of that name under the circumstances here was intended as the proper legal name under which plaintiff might prosecute his action and satisfy the judgment from such assets. The attorney for the executors appeared in the action on behalf of the named defendant "Estate." He was of the opinion (as stated in his brief) that it was obvious that the logical defendants should have been the executors. Under such circumstances it is reasonable to assume that the executors were aware that the word "Estate," used in naming the defendant, was an erroneous designation of the defendants. It is apparent that the executors would not be taken by surprise if the complaint were amended to name the executors as the defendants. The plaintiff was entitled to amend the complaint.

The judgment is reversed.

FOURT and LILLIE, JJ., concur.

208 Cal.App.2d 690

⊥690 ⊥ **G. Kathryn ZINKE, Plaintiff and Appellant,**

v.

ZINKE REBOTTOMING SHOE CO., Inc., a corporation, Zinke Re-Newing Shoe Corporation, a corporation, California Leather Jobbing Corp., a corporation, Zinke Factory Shoe Repairing Co., a corporation, J. D. Zinke, Zelda Zinke, aka Zelda Zeitler, and L. J. Hughes, Respondents,

Joseph W. Zinke et al., Defendants.

Civ. 25918.

District Court of Appeal, Second District,
Division 1, California.

Oct. 19, 1962.

Rehearing Denied Nov. 14, 1962.

Hearing Denied Dec. 12, 1962.

Divorce action in which the Superior Court of Los Angeles County, Philbrick McCoy, J., entered order sustaining demurrer and order dismissing the fourth cause of action and the plaintiff appealed. The District Court of Appeal, Wood, P. J., held that where the dismissal of the fourth cause of action was entered pursuant to stipulation of the parties, plaintiff who was a party to stipulation could not complain of the order, and the order sustaining a demurrer was not appealable.

Purported appeal from order sustaining demurrer dismissed, order dismissing fourth cause of action affirmed, and judgment of dismissal as to all but one defendant affirmed.

1. Stipulations 🔑14(6)

Where pursuant to stipulation of parties court dismissed fourth cause of action in divorce suit, order would not be disturbed on appeal prosecuted by party to stipulation.

2. Divorce 🔑184(1)

Upon dismissal of fourth cause of action of divorce suit pursuant to stipulation of parties, question as to whether court had erred in sustaining demurrer to fourth cause of action became moot.

3. Appeal and Error 🔑102

Order sustaining demurrer is not an appealable order

G. Norman Kennedy, Pasadena, for appellant.

Schauer, Ryon & McIntyre, Santa Barbara, and Jerry F. Brown, Glendale, for respondents.

⊥ WOOD, Presiding Justice. ⊥691

This is an action by G. Kathryn Zinke against Joseph W. Zinke for a divorce. The first cause of action of the third amended complaint (hereinafter referred to as the complaint) is based on a charge of adultery; the second on a charge of extreme cruelty; the third on a charge of habitual intemperance. The fourth cause of action is based on the charge of adultery referred to in the first cause of action, and it alleges further that: the community property includes shares of stock or interests in four corporations, defendants herein; that Joseph W. Zinke and two other persons named as defendants are the officers and directors of the corporations; another person (named as a defendant) was formerly an officer of these corporations.

All the defendants demurred to the complaint. The defendants other than Joseph W. Zinke also made a motion to dismiss the complaint, and a motion to strike certain portions thereof. On June 9, 1961, the demurrer of Joseph W. Zinke to the fourth cause of action was sustained with leave to amend "only in so far as plaintiff may wish to allege a cause of action to set aside the husband's transfer of community real property not joined in by plaintiff." The demurrer of the other defendants to the first three causes of action was sustained without leave to amend, and their motion to strike was granted as to the fourth cause of action.

On June 16 a judgment was entered dismissing "the complaint" as to all defendants except Joseph W. Zinke. On July 11 plaintiff's attorney and Joseph W. Zinke's attorney stipulated in writing "that the court may make and enter its order dismissing the fourth cause of action." The stipulation included the following statement: "This stipulation is without prejudice as to any further rights either of the parties may have with respect to said order [of June 9] sustaining demurrer and order dismissing fourth cause of action including, but not limited to, such right of appeal as may exist." On August 1 an order was made dismissing the fourth cause of action.

Plaintiff states in her notice of appeal that she appeals from the judgment entered on June 16, 1961 (the judgment of dismissal as to defendants other than Joseph W. Zinke), "and from the certain order made by the said court on June 9, 1961, in favor of the defendants in the above styled cause and against the plaintiff and from the whole thereof, as to said judgment entered on June 16, 1961, and from said order made on June 9, 1961, in favor of defendant, Joseph W. Zinke, as ⊥692 against the plaintiff and from the judgment entered August 2, 1961." Apparently the orders referred to are the order of June 9, sustaining the demurrer of Joseph W. Zinke to the fourth cause of action, and the order of August 1 dismissing the fourth cause of action.

The fourth cause of action includes allegations: setting forth statistical facts required in a divorce action; charging Joseph W. Zinke with adultery; and listing property which it is claimed is community property. Among the items of property listed are: "(c) Zinke Re-Bottoming Shoe Co., Inc., 4500 shares of capital stock, * * *; (d) Zinke Re-Newing Shoe Corp., 52,251 shares of capital stock, * * *; (e) California Leather Jobbing Corp., 24,166 shares of capital stock, * * *; Zinke Factory Shoe Repairing Co., interest unknown." (The corporations above named are defendants in the action.) The cause of action also includes the following allegations: The defendants now have possession of all the community property of the parties except the family residence and household furniture; defendant Joseph W. Zinke, by mismanagement, waste, fraud and gift has conspired with defendants J. D. Zinke, Zelda Zinke, and L. J. Hughes to deprive "the community here" and plaintiff of assets and earnings rightfully belonging to "the community." The following acts are set forth to support the allegations of conspiracy: Payment of personal expenses of Joseph W. Zinke, J. D. Zinke, and Zelda Zinke from corporate funds; transfer of assets of the corporations to Zelda Zinke; sales of personal property of the corporation by Joseph W. Zinke, and the retention by him of the proceeds of the sales; failure to obtain notes from Joseph W. Zinke for money loaned to him by the corporations; waste and diminishment of the assets of the corporations for the personal use and benefit of Joseph W. Zinke, J. D. Zinke, and Zelda Zinke; concealment from the shareholders of one of the corporations that shareholders' meetings had been held, and failure to hold "announced" meetings; failure of Joseph W. Zinke, J. D. Zinke, Zelda Zinke, and one of the corporations to declare a dividend, other than one cent a share, on the stock of the corporation for the year 1958, although J. D. Zinke told the attorney for the corporation that the corporation had $100,000, and the attorney told J. D. Zinke that "he" would have to declare a dividend; wilful concealment, by the officers and directors of the corporation, from the "community estate" and plaintiff, of the assets and earnings of the corporations.

⊥693 The fourth cause of action alleges further, in substance, as follows: By reason of the conduct of defendants, plaintiff's community interest in the capital and income of the corporations has been concealed and wrongfully taken from her. The individual defendants have fraudulently converted to their use money which should be declared as dividends. Each of the corporations is the alter ego of defendants Joseph W. Zinke, J. D. Zinke, and Zelda Zinke, and the corporations are operated for the personal use and benefit of said defendants. There is no adequate remedy at law by which plaintiff can ascertain the community assets of plaintiff and Joseph W. Zinke or the income of Joseph W. Zinke. The affairs of the corporations have been "operated" by defendants J. D. Zinke and Zelda Zinke, since 1951. Zelda Zinke was secretary and treasurer of the corporations from

1951 to October 1958, and is now executive assistant to J. D. Zinke. Defendants Joseph W. Zinke, J. D. Zinke, and L. J. Hughes are officers and directors of each of the corporations. Since 1951 none of the corporations has declared dividends consistent with the real earnings thereof. Zinke Factory Shoe Repairing Company is a wholly owned subsidiary of Zinke Re-Newing Shoe Corporation; the other corporate defendants are owned by members of the Zinke family, other than plaintiff. Defendants Joseph W. Zinke, J. D. Zinke, and Zelda Zinke should be declared to be trustees of all money and property acquired, retained and expended for their personal use and benefit. Defendant Joseph W. Zinke has mismanaged the affairs and community property of said defendant and plaintiff, and to allow him to continue to manage such affairs will work a great monetary disadvantage with respect to plaintiff's interest in the community property; a receiver should be appointed to manage the community affairs pending the determination of the action.

The prayer of the complaint is that: the marriage be dissolved; plaintiff have custody of the minor children; the community property be awarded as equity may require; defendants be enjoined from disposing or encumbering the community property; Joseph W. Zinke be enjoined from disposing or encumbering the separate property of the parties; Joseph W. Zinke be ordered to pay reasonable sums for the support of plaintiff and the minor children, and for attorney's fees; a receiver of the community property be appointed; a receiver of the corporate defendants be appointed; the court declare that the defendants are trustees of such assets of defendants as rightfully belong to plaintiff as her interest 694 in the community property; an accounting be made of the affairs of the corporations and "partnerships"; the court decree that each of the corporations is the alter ego of the individual defendants and partnerships, and that each of the corporations is a family partnership consisting of Joseph W. Zinke, J. D. Zinke, and Zelda Zinke; the court award to plaintiff, as equity may require, her community interests in the partnerships.

As above stated, plaintiff appeals the judgment of dismissal (of June 16, 1961) as to the defendants other than Joseph W. Zinke. It seems that she also appeals from the order (of June 9) sustaining the demurrer of Joseph W. Zinke to the fourth cause of action, and from the order (of August 1) dismissing, upon stipulation, the fourth cause of action.

Appellant does not contend that any of the first three causes of action states a cause of action against the defendants other than Joseph W. Zinke. Their demurrer to those causes of action was sustained without leave to amend.

The defendants other than Joseph W. Zinke made a motion to dismiss the complaint, and to strike portions of the complaint. Their motion to strike the fourth cause of action was granted. (It does not appear that a ruling was made on their motion to dismiss.) A judgment was entered (June 16) dismissing the complaint as to all defendants other than Joseph W. Zinke. The demurrer of Joseph W. Zinke to the fourth cause of action was sustained without leave to amend, except as to amending relative to alleged transfer by husband of community real property. Thereafter, on July 11, plaintiff's attorney and Joseph W. Zinke's attorney stipulated that, "the Court may make and enter its order dismissing the fourth cause of action." Pursuant to the stipulation, the court dismissed the fourth cause of action on August 1, 1961. As hereinabove shown, the stipulation included a statement that it was "without prejudice as to any further rights either of the parties may have with respect to said order sustaining demurrer and order dismissing fourth cause of action including, but not limited to such right of appeal as may exist." The reference therein to a right of appeal with respect to an order based upon a stipulation is not clear. It is clear that plaintiff consented to the dismissal of the fourth cause of action.

[1–3] In Brooms v. Brooms, 151 Cal. App.2d 351, 352, 311 P.2d 567, 568, it was said: " 'It is an elementary and fundamental rule of appellate procedure that a judgment or order 695 will not be disturbed on an appeal prosecuted by a party who consented to it.' * * * A stipulation is a consent within the meaning of this rule." In the present case, in view of such stipulation, the order of August 1, dismissing the fourth cause of action, will not be disturbed. Upon dismissal of the fourth cause of action, the question as to whether the court erred in sustaining the demurrer of Joseph W. Zinke to the fourth cause of action became moot. Furthermore, the order sustaining the demurrer is not an appealable order. (Lavine v. Jessup, 48 Cal.2d 611, 614, 311 P.2d 8.)

As above indicated, the judgment of dismissal as to the defendants other than Joseph W. Zinke was entered prior to the stipulation (for dismissal of the fourth cause of action) between plaintiff's attorney and Joseph W. Zinke's attorney. The other defendants were not parties to the stipulation. The stipulation, however, was that the court might dismiss the fourth cause of action. The court, by the order of August 1, dismissed the cause of action. The order is not limited to a dismissal of the cause of action as to Joseph W. Zinke. Appellant states, "This case arises in connection with the fourth count of the Third Amended Complaint." She contends that the fourth cause of action states a cause of action "to vindicate" her rights with respect to the community property. It seems that appellant seeks a reversal of the judgment dismissing the complaint as to the defendants other than Joseph W. Zinke for the purpose of proceeding, in the divorce case, on the fourth cause of action (wherein Joseph W. Zinke is not a party). That cause of action, pursuant to stipulation of plaintiff's attorney and Joseph W. Zinke's attorney, was dismissed by the order of August 1. The effect of that dismissal was to eliminate the fourth cause of action from the divorce case. Reversal of the judgment dismissing the complaint as to the defendants other than Joseph W. Zinke would not reinstate the fourth cause of action which had been dismissed upon stipulation subsequent to the judgment of dismissal. Furthermore, in the fourth cause of action plaintiff sought a divorce from Joseph W. Zinke and an award of community property. Of course, Joseph W. Zinke is an indispensable party to that cause of action. Reversal of the judgment of dismissal as to the other defendants would not reinstate the cause of action with respect to him. Under such circumstances, the judgment of dismissal will not be disturbed.

In view of the above conclusions, it is not necessary to determine other contentions.

696 The purported appeal from the order sustaining the demurrer of Joseph W. Zinke is dismissed. The judgment of dismissal as to the defendants other than Joseph W. Zinke, and the order of August 1 dismissing the fourth cause of action, are affirmed.

FOURT and LILLIE, JJ., concur.

Hearing denied; SCHAUER, J., not participating.

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208 Cal.App.2d 659

659 **STATE of California, acting by and through the DEPARTMENT OF WATER RESOURCES, Petitioner,**

v.

SUPERIOR COURT of the State of California IN AND FOR the COUNTY OF BUTTE, Respondent.

NATOMAS COMPANY, Real Party in Interest.

Civ. 10559.

District Court of Appeal, Third District, California.

Oct. 18, 1962.

Rehearing Denied Nov. 13, 1962.

Hearing Denied Dec. 12, 1962.

Suit by state to compel Superior Court to make an order granting state immediate possession of certain lands which contained dredger tailings. The District Court of Appeal, Schottky, J., held that dredger rocks and aggregates, which were dredged from a pond in course of mining operation and which were returned to the pond by the miner, which followed no particular method of operation in fixing value of rocks and had not thereafter used the land, which had grown over with natural vegetation and which was taxed only as real property and conveyed as such, constituted land and not personalty and as such could be immediately condemned by State for reservoir purposes, but even if the miner had treated the property as personalty, it could be considered as land for condemnation purposes.

Writ of mandate issued.

1. Mandamus 🔑51

Mandamus is proper remedy to secure an order of immediate possession of land by State where Superior Court has erroneously refused to issue an order granting immediate possession on ground that lands are not to be used for reservoir purposes. West's Ann.Const. art. 1, § 14.

2. Constitutional Law 🔑13

Object and purpose sought to be accomplished by an amendment to the constitution is an important factor in ascertaining intent of electorate in adopting such amendment.

3. Constitutional Law 🔑16

Argument in favor of adoption of a constitutional amendment sent to the electorate is some evidence of intent with which it was adopted even though it is not controlling.

4. Eminent Domain 🔑187

If land is needed for construction of a reservoir, it is land for reservoir purposes under constitutional amendment providing for immediate possession regardless of whether the land is the site of the dam or land containing necessary materials for construction of a project which has as its purpose the creation of a reservoir. West's Ann.Const. art. 1, § 14.

5. Property 🔑4

Whether dredger tailings are land or personalty is ordinarily a question of fact.

6. Eminent Domain 🔑187

Dredger rocks and aggregates, which were dredged from pond in course of mining operation and which were returned to pond by the miner, which followed no particular method of operation in fixing value of rocks and had not thereafter used the land, which had grown over with natural vegetation and which was taxed only as real property and conveyed as such, constituted land and not personalty and as such could be immediately condemned by State for reservoir purposes, but even if miner had treated property as personalty, it could be considered as land for condemnation purposes. West's Ann.Const. art. 1, § 14.

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Stanley Mosk, Atty. Gen., by F. G. Girard, Deputy Atty. Gen., Sacramento, for petitioner.

Webster V. Clark, of Rogers, Clark & Jordon, San Francisco, Robert V. Blade, Oroville, for real party in interest.

⊥SCHOTTKY, Justice. ⊥661

This is a petition by the State of California to compel the superior court to make an order granting the state immediate possession of certain lands which contain dredger tailings owned by the real party in interest, Natomas Company.

The superior court refused to issue its order granting immediate possession of the lands in question because the superior court was of the opinion that the lands are not lands to be used for reservoir purposes within the meaning of article I, section 14, of the Constitution.

[1] Mandamus is the proper remedy to secure an order of immediate possession where the superior court has erroneously refused to issue an order granting immediate possession. (Central Contra Costa etc. Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462). The fact that eventually

the state may obtain an order of possession by judgment is not a satisfactory substitute for the order for immediate possession sought herein. (Central Contra Costa etc. Dist. v. Superior Court, supra.)

The facts in the instant proceeding disclose that the state has received a license from the Federal Power Commission to construct an earth filled dam on the Feather River. A contract for the construction of the dam has been let. The state desires to use dredger tailings on certain lands located approximately six miles below the dam site, which are owned by the Natomas Company, for the construction of the dam. Oroville Dam is to be constructed as an earth embankment structure. It will rise some 735 feet above the bed of the Feather River and when completed will impound 3,484,200 acre feet of water over 15,485 acres of land. Some 78 million cubic yards of dredger tailings will be used to comprise the earth fill of the embankments of the proposed dam. Part of the tailings are involved in this action.

The lands in controversy here were dredged between 1900 and 1925. The purpose of the dredging operation was to profit from the sale of the gold and platinum and the value of the sand, gravel and boulders for aggregates. The method of the dredge operations essentially was as follows: A bucket scooped undredged materials from the area which was being dredged. The material obtained was dumped into a hopper from which it went into a revolving screen which separated the larger materials, over three-fourth inches in size, from smaller matter. The larger materials went to the end of the screen and were dumped onto a conveyor belt which carried them to the end of the dredge where the materials were ⊥662 dis⊥charged. The smaller materials were treated to recover the gold and platinum and the residue was also discharged. Everything that was scooped out of the pond in which the dredge was operated was returned to the pond except the precious metals. No particular manner of operation was employed to take into account the value of the rocks.

Natomas operated a rock crushing plant in Oroville until 1929 and engaged in the aggregates business until 1929. Dredger tailings on land owned by Natomas were used as the raw material for the plant. In 1929 all the dredged lands were leased as land to Pacific Coast Aggregates at a minimum rental plus royalties. A portion of these lands are now being sold under an installment sales contract. The particular lands in controversy have never been used since the conclusion of the dredging operations. The Natomas Company has never filed any statement with the county tax officials showing that the dredger tailings are personal property. The lands have always been taxed as real property.

The first question presented is whether the state is entitled to an order of immediate possession (assuming the dredger tailings are land) of the lands.

Article I, section 14, of the State Constitution provides: "Private property shall not be taken or damaged for public use without just compensation having first been made * * *, and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made * * * in any proceeding in eminent domain brought by [one of the above corporations '* * * or similar public corporation'] * * * the aforesaid * * * may take immediate possession and use of any right of way or lands to be used for reservoir purposes * * * upon * * * giving such security * * * as the court in which such proceedings are pending may direct, * * *."

The argument presented to the voters in support of the amendment permitting immediate possession of lands to be used for reservoir purposes read: "It has long been the policy of this State, approved by the people of California, that sovereign agencies such as the State itself, or counties or cities, should have the right, when lands are required for rights of way such as roads and highways, to take immediate ⊥663 possession upon payment into court of the amount fixed by the judge to cover any award by the jury as the value of the land. This same authority, so far as concerns land for rights of way, also now exists in the case of irrigation, drainage, levee and reclamation districts.

"The reasons for this policy are obvious. Unless the State highway authorities, or the county or city, could take possession, upon payment into court of the amount fixed as compensation, of property required for highways, roads or streets, private property owners could hold up for years the construction of our highways. Since the sovereign agency must be entitled to eventually obtain the required property, it has long been recognized that the practical and sensible thing was to allow the public agency to take possession at once so that construction work and development would not be delayed.

"With the increased need for conserving and utilizing our water resources this same authority is found necessary in so far as applies to lands for reservoir sites. If the policy is wise as to rights of way for roads, streets, canals and ditches, it would seem to be equally sound and necessary in the case of reservoir sites.

"Likewise, the authority which is found necessary for irrigation drainage, levee and reclamation districts should obviously likewise be available to the new and recently created types of districts, such as metropolitan water districts, municipal utility districts, municipal water districts and water conservation districts.

"This amendment does away with the unfair discrimination which now exists between districts performing the same functions.

"This amendment simply extends the policy that has long been recognized, not only as desirable, but as absolutely necessary in order that government may carry on its functions. Unless this amendment is adopted it will be possible for one individual to hold up in litigation for many years the construction of essential works for the public's development or utilization of water.

"An owner of private property can in no way be injured by this amendment, for he is protected in his rights by full compensation, whereas the people as a whole are greatly benefited in enabling projects to be constructed immediately, instead of being subjected to long and expensive delay through the arbitrary action of an individual property owner in refusing to accept a reasonable price for his property."

⊥664 [2, 3] As stated in the argument to the voters, the object of the amendment was to facilitate early construction of reservoir projects. The object and purpose sought to be accomplished by an amendment to the Constitution is an important factor in ascertaining the intent of the electorate in adopting such amendment (City and County of San Francisco v. San Mateo, 17 Cal.2d 814, 818, 112 P.2d 595), and the argument in favor of the adoption of a constitutional amendment sent to the electorate is some evidence of the intent with which it was adopted even though it is not controlling. (Cypress Lawn Cemetery Ass'n. v. San Francisco, 211 Cal. 387, 295 P. 813.)

[4] The amendment provided for immediate possession of "lands to be used for reservoir purposes." It does not by its terms contain any limitation that immediate possession may only be had of land to be used for reservoir sites, though in one portion of the argument the phrase is used. The purpose of the amendment was to provide for prompt construction of essential works for the public development or utilization of water. If land is needed for the construction of a reservoir, it is land for reservoir purposes whether it is the site of the dam or land containing necessary mate-

rials for the construction of a project which has as its purpose the creation of a reservoir. To narrowly construe the amendment would defeat its purpose. Such construction would be improper. (See Central Contra Costa etc. Dist. v. Superior Court, supra 34 Cal.2d 845, 215 P.2d 462, where the amendment was liberally construed.)

The second question is whether the dredger tailings are land. It has been stated that "The miner who owns the ore owns the tailings and débris, unless the instrument which creates the mineral interest provides otherwise. He may dispose of them as personalty; he may simply dump them and treat the dump as a part of his land; or he may abandon them, by relinquishing possession and by intending thereby to relinquish ownership." (4 American Law of Mining, tit. XXI, Tailings and Débris, pp. 101–102.)

In discussing the question whether mine tailings are personalty or real property the Arizona Supreme Court said in Steinfeld v. Omega Copper Co., 16 Ariz. 230, 141 P. 847, at page 848: "* * * The vital fact to be determined is whether the ore was so annexed to the realty and remained so annexed thereto as to become a part and parcel thereof. If so, it passed with the conveyance of the mines. The intention with which the owner of the property extracted the ore from the ⊥665 ground and the purpose and intention of the owner with which it was placed on the dump is controlling in arriving at a solution of the question of whether the ore after having been extracted and placed in the dump was personalty or realty.

"Only one witness testified relative to these matters. This witness was Fred G. Hughes. The 'Old' Omega Copper Company owned the mines, and Hughes was its superintendent. Under Hughes' supervision the ore was extracted. He testified:

" 'At the time I took that ore out we had no intention of doing anything with it. * * * There was simply—naturally in working a mine you have got to get rid of your waste or ores that you are using, and it was just put out on the dump to give us a chance to develop and get out better ore to send to the smelter. In other words, I moved it out there to get a chance to get out our better ore to send to the smelter. At the time we took that ore out and put it on the dump, it at that time had no value.'

"This evidence is of such a substantial nature that a jury would be justified in drawing the natural inference therefrom that the owner's purpose and intention in extracting the ore from the ground and placing it on the dump was not to sever the ore from the realty, but to remove a part of the realty from the workings underground to the surface, then such removal had no effect to change the character of the ore moved. It remains realty. No one has ever contended that because the owner of realty removes a portion of earth from one part of the premises to another that such portion removed necessarily becomes personal property by reason of the fact of removal."

[5, 6] Whether tailings are land or personalty is ordinarily a question of fact. (Manson v. Dayton, 8 Cir., 153 F. 258; Conway v. Fabian, 108 Mont. 287, 89 P.2d 1022.) It is only if one inference can be properly drawn from the evidence that the question is one of law. (3 Witkin, California Procedure, Appeal, sec. 88, pp. 2251–2252.) We believe that as a matter of law the dredger tailings involved in this case are land. When the lands were dredged the rocks and aggregates were returned to the pond. No particular method of operation was followed in order to take into account the value of the rocks. Since these lands were dredged they have not been used in any manner. Natural vegetation has grown throughout the area. The property has been treated as land by Natomas both in conveyances and in leases. Natomas has paid only real property taxes on the land. There are no facts ⊥666 in the record to show that Natomas ever treated or dealt with the property as personalty. The evidence that the purpose of the operation in part was to profit from the value of the sand,

gravel and aggregates does not permit an inference that the tailings were personalty. The material scooped up by the dredge was returned to the approximate location from which it was removed except the larger materials were on the surface. Such an operation can not change the nature of the tailings to personalty. But, even if Natomas had treated the property as personalty, nevertheless for the purposes of a condemnation action it would be considered land. (City of Los Angeles v. Hughes, 202 Cal. 731, 737, 262 P. 737.) The dirt and aggregates removed from land and then redeposited on land is land for the purposes of condemnation.

For the above reasons a writ of mandate will issue requiring the superior court to vacate its previous order and fix the amount of deposit necessary to secure the real party in interest the prompt payment of just compensation upon the condemnation of the property. When this is done the court shall make an order giving the State of California immediate possession and use of the property sought to be condemned.

PEEK, P. J., and PIERCE, J., concur.

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208 Cal.App.2d 589

⊥589 ⊥ **The PEOPLE, Plaintiff and Respondent,**

v.

Ruth BAWDEN, Defendant and Appellant.

Cr. 8060, 8061.

District Court of Appeal, Second District, Division 4, California.

Oct. 16, 1962.

Rehearing Denied Nov. 1, 1962.

Hearing Denied Dec. 12, 1962.

Defendant was convicted in the Superior Court, Frederick W. Mahl, Jr., J., of abortion and conspiracy to commit abortion, and she appealed from the judgment and from orders denying her motion for new trial and revoking probation and sentence. The District Court of Appeal, Jefferson, J., held that testimony of mother and stepmother of abortee as to arrangements made through defendant for the abortion, and testimony of a codefendant that he received name and telephone number of another abortee from defendant and gave one-half of net profits from the abortion to defendant, and that name of such abortee was found on a slip of paper in defendant's home, in her handwriting, was sufficient corroboration of abortees' testimony to sustain conviction.

Judgment of conviction, orders denying motion for new trial and revoking probation and judgment pronounced thereon affirmed.

1. Abortion ⚷11

In order to sustain a conviction for abortion, testimony of woman upon whom the abortion has been performed and testimony of accomplices must be corroborated by other evidence. West's Ann.Pen.Code, § 1108.

2. Abortion ⚷11

Testimony of mother and stepmother of abortee as to arrangements made through defendant for the abortion, and testimony of a codefendant that he received name and telephone number of another abortee from defendant and gave one-half of net profits from the abortion to defendant, and that name of such abortee was found on a slip of paper in defendant's home, in her handwriting, was sufficient corroboration of abortees' testimony to sustain conviction. West's Ann.Pen.Code, § 182, subd. 1; § 274.

3. Abortion ⚷11
Conspiracy ⚷47

Evidence was sufficient to sustain conviction for abortion and conspiracy to commit abortions. West's Ann.Pen.Code, § 182, subd. 1; § 274.

4. Conspiracy ⚷47

Direct evidence is not required to establish a conspiracy, but circumstantial evidence may be relied upon.

5. Arrest 🔑71

Legality of an arrest does not determine lawfulness of a search incident thereto.

6. Constitutional Law 🔑262

Search of defendant's home and seizure of a telephone book and memorandum and use thereof in trial did not violate defendant's constitutional right to due process, although search was made without a warrant, where search was made incident to a valid arrest based on probable cause to believe defendant guilty of certain crimes.

7. Arrest 🔑63(4)

Officers' arrest of defendant without a warrant, on suspicion defendant was guilty of illegal abortion activity, was lawful in view of fact officers, based on knowledge of her prior conviction of a conspiracy to commit abortion with certain party engaging in suspicious activities, and based on information concerning her continued involvement in illegal activity, had reasonable cause to believe her guilty of illegal activity.

8. Criminal Law 🔑982.9(1)

Judgment revoking probation could be upheld, even if a subsequent judgment of conviction were reversed, in view of fact circumstances not warranting conviction may justify a court in revoking probation on a prior offense. West's Ann.Pen.Code, § 1203.2.

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Russell E. Parsons, Los Angeles, for Ruth Bawden, defendant and appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., George W. Kell, Deputy Atty. Gen., for plaintiff and respondent.

⊥591 ⊥JEFFERSON, Justice.

The grand jury returned an indictment charging defendant in Counts VI and XIII with abortion in violation of section 274 of the Penal Code, and with con⊥spiracy, with several codefendants, to commit abortions, in violation of section 182, subdivision 1, of the Penal Code. As to the conspiracy, ⊥592 twelve overt acts were charged. A prior conviction of abortion and one of conspiracy to commit abortion were alleged against defendant. The indictment charged codefendants with similar offenses all of which were disposed of by pleas and without a trial.

Defendant made a motion pursuant to section 995 of the Penal Code which was denied. A plea of not guilty was entered and the matter was set for trial. Trial was by court, trial by jury having been duly waived. The cause, pursuant to stipulation of defendant and all counsel, was submitted to the court on the testimony contained in the transcript of the proceedings had before the grand jury, with both sides reserving the right to present further testimony. Additional testimony was offered, and defendant testified in her own behalf. Defendant was found guilty as charged; the prior convictions were found to be true as alleged; probation was denied; and defendant was sentenced to state prison for the term prescribed by law on each of the counts charged against her with the terms to run concurrently.

The court made a finding that defendant was in violation of probation. Probation was revoked, and defendant was sentenced to state prison for the term prescribed by law on each of two counts, one of abortion and the other of conspiracy to commit abortion, to run concurrently with each other and concurrently with the sentences in the other case.

Defendant prosecutes this appeal from her conviction, the order denying motion for new trial, the order revoking probation and the judgment pronounced therein.

A summary of the evidence pertinent to the contentions of defendant on this appeal reveals that one Dorothy Jean Faulkner, believing herself to be pregnant, on or about December 15, 1959, discussed her condition with Allan Margolis and asked him to arrange for some help. She testified that on January 5, 1960, she received a telephone call from a woman who identified herself as "Ruth." The woman calling over the telephone commented to her, "You have a problem," and she told her that someone else would call. Later another woman telephoned her and identified herself as "Edith", the doctor's nurse, and she told her that the price of an abortion would be $450. On January 6, 1960, she went to the Seaside Hospital where she met Edith who escorted her to a yacht at an anchorage. Codefendant Greenhill (not appealing here), and a man ⌊593 called Danny also boarded the yacht, and after they put out to sea, Greenhill performed an abortion on her. During the return trip she gave Danny $400 in currency.

Allan Margolis was granted immunity from prosecution by the court and was ordered to testify. He stated that in the latter part of December 1959 he discussed Miss Faulkner's pregnancy with her and agreed to arrange an abortion for her. He had previously gone to defendant, Ruth Bawden, to arrange for an abortion on another girl which had been performed at defendant's home. He called defendant at the same number he had called previously, CLinton 5–6749, and he recognized the answering voice as that of defendant. He told her that he wanted to proceed with an abortion for Miss Faulkner and they made arrangements to set up a date for it. He learned later that the arrangement had not gone through, and in the meantime Miss Faulkner arranged for the abortion herself. He testified that he had provided the $450 paid by Miss Faulkner for her abortion.

Valerie Chaille testified after an order of the court granting her immunity from prosecution. She related that in the early part of January 1960 believing herself to be pregnant she discussed the matter with her mother and decided to terminate the pregnancy. On January 22, 1960, she went to a parking lot with her mother where they met "Edith" who escorted them to a yacht anchored at Long Beach. Danny Dyer was the operator of the boat, and the abortion was performed by Greenhill aboard the yacht.

Marian Springer, Valerie Chaille's mother, testified after an order of the court granting her immunity from prosecution. She stated that after learning of Valerie's pregnancy and agreeing to help her, she got in touch with a Virginia Vance who gave her a telephone number at which she could contact defendant, Ruth Bawden. She called a number, which she recalled followed a CLinton prefix, and discussed with defendant the pregnancy and the possibility of an abortion. Later she received a call from a man who identified himself as a doctor; and subsequently, after a call from "Edith" during which arrangements were agreed upon including the fee of $450, she received a further call from the doctor in which he agreed to go ahead with the abortion under the arrangements Edith had made. She and her daughter met Edith who took them aboard a yacht which was operated by Danny Dyer to whom she paid the fee of $450.

Virginia Vance, the wife of Valerie Chaille's father, testified ⌊594 after an order of the court granting her immunity from prosecution. She stated that in January of 1960 Marian Springer called her and informed her that they had decided to terminate Valerie's pregnancy. Mrs. Vance agreed to help and gave Mrs. Springer a CLinton telephone number where she could contact "Ruth." Mrs. Vance had obtained this telephone number at the time of a previous abortion in which she had participated. She identified a piece of paper bearing the telephone number CLinton 5–6749 and the name of Ruth Bawden as the one she received in connection with the previous abortion.

Leon Greenhill previously entered a plea of guilty and was ordered to testify at the trial. He stated that he received information that Miss Faulkner desired an abortion from defendant Ruth Bawden, whom he had known for about four or five years. Defendant gave him the telephone number and asked him to contact Miss Faulkner. On January 6, 1960, he performed an abortion upon Miss Faulkner aboard the yacht

"Westerly." He also received information concerning Valerie Chaille from defendant who gave him the name and telephone number of Valerie's mother whom he contacted in order to make arrangements for the abortion upon her daughter. He paid one half of the net receipts from these two abortions to defendant. He estimated that defendant had referred about twenty abortions to him during the period between December 15, 1958, and the date of the arrest.

The yacht "Westerly", located at the anchorage at Long Beach, had been under surveillance by police officers for approximately two months prior to defendant's arrest. The police officers had observed and photographed a number of persons who entered the yacht, and among these persons were Dorothy Faulkner and codefendants Leon Greenhill, Edith Dyer and Danny Dyer. Police officer Fred Mitchell testified that after the arrest of Edith and Danny Dyer, he questioned Edith Dyer en route to the police administration building. She told him that she became involved in this enterprise after having obtained an abortion for her sister through defendant Bawden about one year prior to the date of this arrest. Following the abortion on her sister, the Dyers agreed to assist by picking up women and bringing them to the place where the abortions were to be performed. The Dyers had purchased the yacht "Westerly" upon which the abortions had been performed about eight months prior to the date of arrest. Mrs. Dyer told the police officers that defendant Bawden was ⊥595 at the head of this operation. Officer Mitchell testified, "I related this information to my lieutenant upon arriving at the Police Building, and he immediately ordered Sergeant Le Page and Hille to go to the residence of Mrs. Bawden and to place her under arrest." Prior to this order of arrest, the officers had checked the records of the telephone company which indicated that defendant had been in communication with the yacht anchorage where the abortions were being performed. Defendant and codefendant Greenhill had previously been convicted together for performing abortions, and both of them were presently on probation.

It was stipulated that there was no warrant for arrest of defendant nor a search warrant. The two police officers went to defendant's home, were admitted and placed her under arrest. They searched the house and seized a telephone directory, a personal address book and a few slips of paper which they believed to have evidentiary value. The items taken from defendant's home were entered into evidence as exhibits. There was a partial erasure of the telephone number of the yacht anchorage which had been written in the telephone book. A qualified expert testified that in his opinion the name of one of the abortees, Jean Faulkner, on one of the exhibits was written by defendant.

Defendant testified in her own behalf. She denied that she had participated in or received any profits from any of the abortions. She admitted receiving money from codefendant Greenhill's wife, but stated this was the return on a $350 loan she had made to Mrs. Greenhill to have her little girl's teeth straightened. She admitted talking on the telephone to Valerie Chaille's mother who she said only asked, "Is this the right number for Dr. Greenhill?" She also admitted the telephone conversation with Margolis but stated that he merely called her to confirm the accuracy of Dr. Greenhill's number. She admitted writing the telephone number of the anchorage which had been written in the telephone book but stated she had never called that number. An employee of the telephone company testified that the number formerly listed to defendant was Clinton 5–6749 and that her present number is Clinton 5–7913.

[1, 2] In order to sustain a conviction of the crime of abortion the testimony of the woman upon whom the abortion has been performed and the testimony of accomplices must be corroborated by other evidence. (Pen.Code, § 1108.) Defendant ⊥596 contends that there was not sufficient corrobora-

tion of the abortees' and accomplices' testimony in this case.

"Corroboration is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the woman is telling the truth. [Footnote and Citations.] It has been held that the corroborative evidence need not by itself establish that the crime was committed or show all the elements thereof, but it must relate to some act or fact which is an element of the offense. [Citations.] It must create more than a suspicion, but it may be sufficient even though slight and entitled to but little consideration when standing by itself. [Citations.]

"A woman who has submitted to an abortion is not an accomplice of the persons charged with procuring or conspiring to procure the miscarriage. [Citations.] The testimony of any one of the [abortees] can be corroborated by that of a witness who was an accomplice, * * * and the testimony of the accomplice can be corroborated by that of any one of the [abortees]. [Citations.]" (People v. Gallardo, 41 Cal.2d 57, 62, 257 P.2d 29, 32, 33.)

While we have heretofore summarized the testimony adduced at the trial, testimony of one of the abortees, Dorothy Faulkner, is corroborated by the testimony of codefendant Greenhill in that he received Miss Faulkner's name and telephone number from defendant Bawden, and he gave one-half of the net profits from that abortion to defendant. There was further corroboration by the testimony of Allan Margolis. Police officer Fred Mitchell testified he saw Miss Faulkner and photographed her as she went on board the yacht "Westerly" for her abortion. There was a slip of paper taken from defendant's home which had the name of Jean Faulkner written in the handwriting of defendant. The testimony of the other abortee, Valerie Chaille, was corroborated by the testimony of her mother and stepmother.

[3, 4] Defendant next contends the evidence was not sufficient to establish any of the counts of which defendant-appellant stands convicted. Concerning the conspiracy charge, "Direct evidence is not required to establish a conspiracy, but circumstantial evidence may be relied upon. This rule is sanctioned for the obvious reason that experience has demonstrated that as a general proposition a conspiracy can only be established by circumstantial evidence. '"* * * it is not often that the direct fact of an unlawful design which is ⊥597 the essence of a conspiracy can be proved otherwise than by the establishment of independent facts, bearing more or less closely or remotely upon the common design [citation]; and it is not necessary to show that the parties met and actually agreed to undertake the performance of the unlawful acts (citing authority), nor that they had previously arranged a detailed plan * * * for the execution of the conspiracy (citing authority.)" [Citation.]'" (People v. Massey, 151 Cal.App.2d 623, 651, 312 P.2d 365, 382.)

Without a further review of the facts it is obvious that the finding of a conspiracy to commit abortion and the abortion as well as defendant's participation therein are supported by substantial evidence which was considered by the trier of fact.

Defendant's final contention is that the search of defendant's home and the seizure of the telephone book and memorandum and the use thereof in the trial violated both the Fourteenth Amendment of the Constitution of the United States and article I, section 19, of the California Constitution, in that the search was made without a search warrant and not incident to a valid arrest.

"Penal Code section 836 states: 'A peace officer may make an arrest * * * without a warrant * * * 3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.' Reasonable cause is such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest, strong suspicion, that the person in question is guilty of a crime. In considering the question of reasonable cause for the officer to act, the court looks only to the facts and circumstances presented to the officer at the time he was required to act. (People v. Ingle, 53 Cal.2d 407, 412, 414, 2 Cal.Rptr. 14, 348 P.2d 577.)" (People v. Luckman, 198 Cal.App.2d 347, 352, 18 Cal. Rptr. 167, 170.)

[5] However, the legality of an arrest does not determine the lawfulness of a search incident thereto. (People v. Brown, 45 Cal.2d 640, 643, 290 P.2d 528.) "[T]he reasonableness of a search is not to be justified by what the search turns up 'but by appearances to the searcher at the time of his action.' So long as the officer reasonably evaluates these appearances and acts accordingly the rights of the accused are adequately safeguarded." (People v. Sanson, 156 Cal.App.2d 250, 254, 319 P.2d 422, 425.)

[6, 7] The evidence, as we have stated before, shows that there was probable cause to believe defendant guilty of the ⊥598 crimes as charged in the indictment. The officers in making this arrest had received information concerning this defendant's involvement in the illegal activity. They knew of her prior conviction of a conspiracy to commit abortions with the same parties now under suspicion. They had checked her telephone number which was the same as had been used for contacts by persons seeking abortions.

[8] Defendant in appealing from the order revoking probation contends that in the event the appeal from the judgment of conviction were to be reversed the judgment revoking probation would also have to be reversed. This does not follow, because often circumstances not warranting conviction may fully justify a court in revoking probation on a prior offense.

"In section 1203 of the Penal Code (1203.2 as amended) it is provided that the court is authorized to revoke an order for probation if there is reason to believe from the report of the probation officer or otherwise that the defendant had violated the terms of his probation. The discretion of the court to revoke an order of probation is 'very broad'. [Citation.] No formal procedure is provided for presenting charges of violation of probation. The court may make an order revoking probation based upon facts presented in an informal charge from which the court has reason to believe that the defendant has violated his probation or is unfit to be at large. [Citation.]" (People v. Silverman, 33 Cal.App.2d 1, 5, 92 P.2d 507, 509.)

The judgment of conviction, orders denying motion for a new trial and revoking probation and judgment pronounced thereon are affirmed.

BURKE, P. J., and FORD,* JJ., concur.

208 Cal.App.2d 516

⊥516 **J. V. EVANS, Petitioner and Respondent,**

v.

CITY OF ORANGE et al., Respondents and Appellants.

Civ. 7039.

District Court of Appeal, Fourth District, California.

Oct. 15, 1962.

Rehearing Denied Nov. 8, 1962.

Hearing Denied Dec. 12, 1962.

A mandamus proceeding was brought to require city and city council to terminate all proceedings in connection with annexation of territory under the Annexation of Uninhabited Territory Act. The Superior Court of Orange County, Franklin G. West, J., rendered a judgment adverse to the city and city council, and they appealed. The District Court of Appeal, Brown, J., held that petition for annexation was filed on February 14, where the petition was signed but not dated on or about February 3, and on February 6 it was taken into city and left with director of public works, and on February 14 boundary commission made its report and approval of proposal, and city clerk received the petition on February 14, and city council on February 14 adopted a resolution giving notice of annexation and setting date of protest hearing, and that evidence sustained the finding that the territory proposed to be annexed was inhabited on February 14 and hence could not be annexed.

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* Assigned by Chairman of Judicial Council.

Judgment affirmed.

1. Municipal Corporations ⚷33(8)

Determination by city that given area is uninhabited for annexation purposes under Annexation of Uninhabited Territory Act involves jurisdictional question on which depends very power of city to act, and such jurisdictional question is subject to judicial inquiry. West's Ann.Gov.Code, §§ 35300 et seq., 35303.

2. Municipal Corporations ⚷33(5)

Petition for annexation of land to city under Annexation of Uninhabited Territory Act was filed on February 14, where petition was signed but not dated on or about February 3, and on February 6 it was taken into city and left with director of public works, and on February 14 boundary commission made its report and approval of proposal, and city clerk received petition on February 14, and city council on February 14 adopted resolution giving notice of annexation and setting date of protest hearing. West's Ann.Gov.Code, §§ 35000 et seq., 35002, 35300 et seq., 35301, 35303, 35305–35307.

3. Appeal and Error ⚷930(1)

In reviewing evidence on appeal, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged in to uphold verdict if possible.

4. Appeal and Error ⚷989

When verdict is attacked as being unsupported, power of reviewing court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

5. Appeal and Error ⚷996

When two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial court.

6. Municipal Corporations ⚷33(6)

Evidence sustained finding that territory proposed to be annexed to city as uninhabited territory was inhabited on date of filing of petition for annexation and hence could not be annexed. West's Ann.Gov. Code, § 35303.

7. Municipal Corporations ⚷29(4)

Section of Annexation of Uninhabited Territory Act defining uninhabited territory as territory where less than 12 registered voters "reside" within territory at time of filing of petition for annexation or institution of proceedings on motion of city legislative body means that if there are less than 12 registered voters from area to be annexed, then territory is "uninhabited territory". West's Ann.Gov.Code, § 35303.

See publication Words and Phrases for other judicial constructions and definitions.

8. Municipal Corporations ⚷29(1)

The 1961 amendment of the Annexation of Uninhabited Territory Act providing that territory shall be deemed uninhabited if less than 12 persons, who have been registered to vote within territory for at least 54 days, reside within territory at time of filing of petition for annexation or institution of proceeding on motion of city legislative body is not retroactive. West's Ann.Gov.Code, § 35303.

9. Municipal Corporations ⚷33(9)

One who objects to his realty being included in proposed annexation under Annexation of Uninhabited Territory Act may pursue any valid method he desires to defeat annexation. West's Ann.Gov.Code, § 35300 et seq.

Cecil C. Wright, Orange, and Dungan & Tobias and George H. Tobias, Costa Mesa, for respondents and appellants.

Jacobs, Jacobs, Nelson & Witmer and Paul B. Witmer, Jr., Santa Ana, for petitioner and respondent.

⌊517 BROWN, Justice.*

This is an appeal from the judgment rendered in favor of respondent holding that the city did not have jurisdiction to proceed with the annexation of certain lands.

The Facts

In January 1961 the representatives of the corporate owners of property lying southeast of the City of Orange contacted certain officials of the city, namely, the City Manager, Director of Public Works and the City Attorney, relative to annexation of this property to the City of Orange under the Annexation of Uninhabited Territory Act of 1939, Government Code section 35300 et seq. The officials furnished the owners with a form prepared by the city together with a petition for annexation. The petition was signed but not dated on or about February 3, 1961, and on February 6th it was taken into the City of Orange and left with the Director of Public Works. The ⌊518 director gave this petition number 159 and placed a penciled notation of "2/6/61" on it. The proposal was then submitted to the Orange County Boundary Commission with a letter signed by the city attorney. On February 14th the boundary commission made its report and approval of the proposal. The Director of Public Works placed the date of February 14th opposite each signature on the petition and gave it to the city clerk with instructions for presentation to the city council that evening. The city clerk stamped said petition with that date and the city council on the evening of February 14th adopted a resolution giving notice of said annexation and setting the date of the protest hearing pursuant to Government Code sections 35305, 35306 and 35307. The resolution contains a recital that the petition was filed after the proposal was submitted to and reported by the boundary commission.

On or about February 6, 1961, there were eleven registered voters in the area, Mr. and Mrs. Burton Rowley, Lois Rowley, William B. Rowley, June Fletcher, Theola Kesling, Eva E. Tobias, Don M. Fletcher, Jack V. Evans, Cynthia Evans and Thelma Evans. Of the above persons, Mr. and Mrs. Rowley were in another part of the United States acting as missionaries at the time, and Cynthia Evans was in Berkeley where she had been attending the University of California. On the day that the city council acted on the matter two additional persons became registered, to wit, Genevieve Chuml and Karl Kesling.

Thereafter, the respondent sought a peremptory writ of mandate to require the City of Orange and the city council to terminate all its proceedings in connection with No. 159 because such proceedings and resolution were illegal for the reason that at the time the petition was filed there were twelve or more registered voters residing in the area and that the area was not contiguous to the City of Orange. The city answered, claiming that the petitioner had waived his rights because he had failed to file a written protest; that he did not come into court with clean hands. Thereafter, the case was tried by the court without a jury and in its findings of fact and conclusions of law the court determined that annexation proceedings were commenced pursuant to the Annexation of Uninhabited Territory Act of 1939; that the territory to be annexed was not uninhabited within the requirements of section 35303 of the Government Code; that it was contiguous to the City of Orange; and rejected the defenses.

The City of Orange thereafter moved for a new trial and ⌊519 further moved to set aside the judgment and notice of appeal from the judgment was filed.

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* Assigned by the Chairman of the Judicial Council.

When Was the Petition for Annexation Filed?

The procedure for annexation of uninhabited territory under Government Code section 35300 et seq. provides in section 35301 that article I of this chapter applies, which commences with section 35000.

Section 35002 of the Government Code reads as follows:

"No petition seeking the annexation of territory to a city shall be circulated or filed, nor shall any public officer accept any such petition for filing, nor shall any legislative body initiate proceedings to annex on its own motion, until the proposal for the annexation of territory to a city has been submitted to and reported upon to the proponents by the boundary commission of the county with respect to the definiteness and certainty of the proposed boundaries."

It is appellants' position that this proposal or petition was actually on file as of February 6th when it was left with Mr. Harper, the Director of Public Works, though Mr. Harper testified that he made the penciled notation and that it did not purport to be an official filing stamp. Appellants claim that Mr. Harper, while not authorized by the ordinances of the City of Orange, or by any written command or authorization, had in fact been handling these various matters under instructions from the city council for some period of time. Appellants also claim that section 35002 does not name the person to whom petitions for annexation are to be filed and that therefore Mr. Harper was the official designated and authorized to accept such petitions.

In Childress v. Peterson, 18 Cal.2d 636, 641–642, 117 P.2d 336, in a mandamus proceeding, the court held that the testimony of the acting chief of police as to oral statements regarding official action was inadmissible to vary the written records and explain the reduction shown on the ordinance and that the official record of the action of the council could not be altered by oral statements of individual councilmen. Therefore, the testimony of Weimer, the City Manager of the City of Orange, and Harper, the Director of Public Works, was incompetent to prove the filing on February 6th or any other time prior to February 14, 1961.

Appellants also state that this petition was filed on February 6th because the number was attached to it on that date; that evidence shows that the signers signed it on February 3d ⌊520 though they did not date the petition; that the petition was actually sent to the boundary commission on February 6th; that even though Mr. Harper wrote the date of February 14th opposite each signature and the clerk had stamped on the petition the date he received it, February 14th, and the petition was actually presented to the city council on that date, nevertheless, the actual date the petition was filed was February 6th and that if it were to be held that such petitions could be filed only with the city council, then there would be delay because the city councils customarily do not meet every day and citizens would have to wait until the city council would have its next meeting.

There is no doubt that on February 6th there were less than twelve registered voters in the territory proposed to be annexed.

[1] The determination by a city that a given area is uninhabited for annexation purposes under the Annexation of Uninhabited Territory Act of 1939 involves a jurisdictional question on which depends the very power of the city to act. Jurisdictional questions are subject to judicial inquiry. (People v. City of Richmond, 141 Cal.App.2d 107, 117, 296 P.2d 351.)

Of the many cases we have read, all matters of annexation have been discussions of petitions filed directly with the legislative body. In City of Port Hueneme v. City of Oxnard, 52 Cal.2d 385, 390, 341 P.2d 318, 321, the court paraphrased section 35303 as follows:

> "Section 35303 provides that 'territory shall be deemed uninhabited if less than twelve registered voters re-

> side within it at the time of the filing [with the city legislative body] of the petition for annexation or the institution of proceedings on motion of the city legislative body.'"

In the case before us, the court found that on February 6th and 14th, 1961, there were eight persons who were registered voters physically residing and domiciled in the area; that on February 6th and 14th, Mr. and Mrs. Burton Rowley and Cynthia Evans were registered voters within the area to be annexed but were physically absent, and that on February 14th two persons, Genevieve Chuml and Karl W. Kesling, executed affidavits of registration and were physically residing within the territory to be annexed, and the court further found that on February 14th there were more than twelve registered voters within the territory and that there were more ⊥521 than twelve registered voters *residing* in the territory. There was substantial evidence to support the court's finding of fact.

We think it is immaterial to determine whether or not the city clerk received the petition on the afternoon of February 14th, inasmuch as the city council did actually get the papers on February 14th and acted on them.

In McDowell & Craig v. City of Santa Fe Springs, 54 Cal.2d 33, 36, 4 Cal.Rptr. 176, 178, 351 P.2d 344, 346, the court said:

> "Although proceedings preliminary to presentation of the signed petition to the legislative body differ somewhat under the two annexation acts, we are satisfied that the point of time at which contiguity is to be determined was intended by the Legislature to be the same for both inhabited and uninhabited territory; viz., the receipt by the legislative body of the signed petition, or any authorized initiation of annexation proceedings by that body upon its own motion."

It was the lower court's memorandum opinion that indicated that the proceeding prior to February 14th was in a proposal form and there was no receipt by the legislative body of the signed petition at least until the city clerk took the petition before the city council.

In People ex rel. City of Torrance v. City of Gardena, 192 Cal.App.2d 686, 13 Cal.Rptr. 742, the court held that Government Code section 35002 which states that a petition for annexing territory cannot be filed with the city council until the matter has been approved by the boundary commission, is mandatory in contests between two cities. In other words, the petition cannot be filed with the city until the boundary commission has acted. In the same case, however, it is implied by dicta that as far as individuals in the city are concerned this is not mandatory, and implies that a petition can be prematurely filed with the council.

In Jefferson Union Sch. Dist. v. City Council, 129 Cal.App.2d 264, 277 P.2d 104, it is stated that the provisions of section 35002 of the Government Code are directory and not mandatory, at least to the extent of the noncompliance involved in that case. The court, in effect, said that the context of the verb "shall" in section 35002 requires a construction other than the definition found in the "general provisions" of section 14 of the Government Code, to the extent at least that there has been a technical noncompliance, and this does not violate section 14 of the Government Code which states that "shall" is mandatory and "may" is permissive.

In People ex rel. Klevesahl v. City of San Bruno, 124 Cal.App.2d 790, 794, ⊥522 269 P.2d 211, 214, it was said:

> "The courts should not so technically construe such statutes as to compel absolute and literal compliance with every word contained therein, because to do so, in many cases, would result in defeating the will of the majority in situations where no one was or could be misled."

The court did say, however, that:

> "The fundamental purpose of the regulatory provisions of the statute is to assure a fair election to the property

> owners in the area to be annexed, and to assure them that they will not be imposed upon or misled."

In a somewhat comparable situation are the sections covering organization of new cities. Government Code section 34303.5 states that no petition may be circulated or filed with the board of supervisors until the matter has been submitted to and a report received from the boundary commission. Section 34308 states that if the report of the boundary commission shows that the petition is signed by the requisite number of qualified signers and accurately describes the boundaries, the board shall direct its clerk to accept the petition for filing and file it as soon as the sufficient amount of money for costs has been paid. This is discussed in Borghi v. Board of Supervisors, 133 Cal. App.2d 463, 469–470, 284 P.2d 537, 541:

> "In annexation proceedings, as we have shown, it is not the preliminary proceedings which the Legislature has determined shall give control, but the point when the governing body has approved the circulation of the petition for annexation. In incorporation proceedings it is the point where the petitioners for incorporation have completed their work, namely, the payment of the costs fixed by the board—and the board is obligated to call the election."

[2] We can apply the same rules for the city as are applied with reference to petitions to the board of supervisors, which are more explicit in Government Code section 34308.

Was the Territory Proposed to be Annexed Inhabited or Uninhabited on February 14?

Section 35303 of the Government Code defines "uninhabited territory" as a territory where "* * * less than twelve registered voters reside within it at the time of the filing of the petition for annexation or the institution of proceedings on motion of the city legislative body."

[3–5] The court found that there were more than twelve registered voters who resided on the premises. That finding may not be disturbed on appeal unless the evidence of facts is free from substantial conflict, and reasonable minds can draw but one inference from the facts, which inference clearly shows that less than twelve registered voters, within the meaning of the statute, resided on the territory here involved on February 14, 1961. In making a determination we are mindful of long established rules of appellate evidentiary review, so well expressed in Crawford v. Southern Pacific Company, 3 Cal.2d 427, 429, 45 P.2d 183, 184, where the court said:

> "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

In Central Mfg. Dist., Inc. v. Board of Supervisors, 176 Cal.App.2d 850, 857, 1 Cal. Rptr. 733, 738, the court said:

> "Necessarily, respondent is bound by findings of fact based upon substantially conflicting evidence."

And at page 859, 1 Cal.Rptr. at page 739, further said:

> "The court found that the averments of said paragraph 9 (*re* number of registered voters in area) were untrue, thus removing that area from the possibility of annexation as uninhabited territory."

[6] Genevieve Chuml, one of the persons whom appellants claim was a non-

resident of the territory proposed to be annexed, testified that she had formerly lived on the premises with her parents in 1947; that she had moved back with her parents to the premises in the early part of February 1961; that she intended to remain there; that she had possessions there; that she wanted to move back to be closer to her children. We feel that there is no doubt that Mrs. Chuml was residing on the premises on February 14th, and the court so correctly found.

As to Mr. and Mrs. Burton Rowley, the testimony showed that they had voted at every election from this address from 1936 to 1960; that they owned real estate in the territory to be annexed; that Mr. Rowley was a retired school teacher; that the Rowleys had purchased a house trailer and for the last two or three years had been "trailering" while acting as missionaries; that between trailer trips they returned to the ten-acre ranch, living at the small house at the upper end of the ⊥524 property in which they keep fishing equipment, clothes and furniture, tools, cookware, dishes, etc. and that they come back from their trailer trips from time to time and stay at their small house on the property.

There is conflicting testimony by George H. Tobias, a witness for appellants, as to certain telephone conversations which he had with Mrs. Rowley in Teton National Park on June 14, 1961, when she told him that she had been in Arizona in February 1961 at a church mission; that she had been back in Orange County in the latter part of February 1961 or the first part of March 1961; that on February 14th she was in Arizona; that she and her husband had been in Oregon at a bible conference; that the Rowleys regarded their place of living at the Newport Boulevard address (the home which is now rented to the son and daughter-in-law) within the annexed territory; that they would return to Orange County in October or November of 1961 and would stay in their trailer on their return which they would park by the small house on their ten-acre property; and that as far as their future was concerned, it was indefinite.

Cynthia Evans is the daughter of respondent and has lived on the property of her father within the territory to be annexed for 17 years, going to the University of California in 1960 and living in a small cottage in Berkeley with two other girls. Since she did not graduate in February 1961 as expected, she remained at her college address to study so that she could retake her examination. In her testimony she said she planned to return to the property in Orange County upon her graduation. It was brought out that there was a telephone listed in her name but she testified she did not sign for the installation or pay the bill and that one of the other girls in the cottage with her did this without her knowledge and that at all times she had maintained her voter's residence at the Orange County location.

The terms "reside," "residence" and "domicile" are terms of various import and have various meanings depending upon the purposes for which the statute is used. In some instances, "domicile" and "residence" are synonymous and sometimes they have other shades of meaning. In attachment proceedings such as in Egener v. Juch, 101 Cal. 105, 35 P. 432, 873, the court defined "residence" as meaning actual, as distinguished from a constructive or legal, residence.

In Bohn v. Batter Biscuits, Inc., 26 Cal.App.2d 61, 64, 78 P.2d 1177, 80 P.2d 484, the term "reside" as used in section 395 of the ⊥525 Code of Civil Procedure dealing with venue, was defined as not meaning domicile, and that in common sense, the word "reside" means to abide continuously, to sojourn, etc. However, this case was criticized as being inconsistent with itself, as discussed in Burt v. Scarborough, 56 Cal.2d 817, 820, 822, 17 Cal.Rptr. 146, 148, 366 P.2d 498, 500, where the court said:

> "The appellate court reversed [in Younger v. Spreckels, 12 Cal.App. 175, 106 P. 895], saying at pages 177–178, 106 P. at page 897: 'Within the con-

templation and meaning of the statute a person can have but one *bona fide* residence. Residence depends upon intention as well as fact; and in its ordinary acceptation it is the place where one remains when not called elsewhere on business, pleasure or for other temporary purpose. The mere inhabitancy of a summer home or country house at certain seasons of the year or at certain times would not make the party inhabiting said house a resident of the county in which such house is situated. The material question is the *animo manendi*. Although one may abide at times in a place for pleasure or health or repose it does not become his domicile unless it be his intention to remain there. The place of residence within the meaning of the statute is the fixed home of a party as understood by himself and his neighbors and friends.'

"This construction of the 'residence' provision of section 395 as referring to a single residence, corresponding to domicile, has since been consistently followed by our courts with the two exceptions hereinafter noted and discussed. * * *

"Since the first decision of the question in 1909 in Younger v. Spreckels, supra, 12 Cal.App. 175, 106 P. 895, and the other decisions cited herein, the Legislature has frequently amended section 395 in other particulars but has left the 'residence' provision untouched. (See e. g., Stats.1911, ch. 421, p. 847; Stats.1933, ch. 744, p. 1840; Stats.1939, ch. 981, p. 2733; Stats. 1951, ch. 869, p. 2384; Stats.1955, ch. 832, p. 1447.) This, at the very least, may be taken as some indication that the Legislature is satisfied with the construction put on the 'residence' provision by the courts."

In Burt v. Scarborough, supra, the defendant had a law office in Los Angeles and lived in Orange County, spending about fifty percent of his time in each place. He had a telephone, personal effects, bank accounts and maintained club memberships in Los Angeles, but was a registered voter and spent the weekends in Orange County. There, the court held that for the purpose of venue statutes, he resided in Orange County.

526 Elections Code section 14282 defines the "residence" of a person as "* * * that place in which his habitation is fixed and to which, whenever he is absent, he has the intention of returning."

Section 14283 of the Elections Code states that, "A person does not gain or lose residence solely by reason of his presence at or absence from a place * * * nor while a student of any institution of learning, * * *." And section 14284 states that, "A person who leaves his home to go into another state or precinct in this State for temporary purposes merely, with the intention of returning, does not lose his residence."

Historically, the original purpose of the uninhabited annexation statute, adopted in 1899, appears to have been to allow uninhabited areas to be annexed by cities without the necessity of an election.

Shepherd v. Board of Supervisors, 137 Cal.App. 421, 428, 30 P.2d 578, 582, defined the word "uninhabited" as follows:

> "Clearly the term 'uninhabited,' as it is used in the annexation statute which is here involved, means that the property is not presently occupied by persons who actually live or abide thereon."

With the growth of cities in California and the continued desire to enlarge the cities by annexation without the necessity of an election, and in instances where there are two people living on the property who are interested in its being annexed to a city, the Legislature in 1945 amended the Annexation of Uninhabited Territory Act of 1939 to say that any territory where there were less than three qualified electors residing shall be deemed uninhabited territory. In 1947 the Act was again amended by increasing the number from less than three to less than twelve and changing the phrase "qualified electors" to "registered voters." Here we have a much stricter method for handling annexation, though it can be said that this liberalized the law, which it did to the extent of making it easier for cities to annex an area without the necessity of an election, thereby saving expense, and to count people within the area proposed to be annexed.

Again in 1961 the Legislature amended the Act to require that the registered voters must now be registered to vote for at least 54 days prior to the filing of the petition, whereas before, people who lived in areas were protected from being annexed against their will by the fact that they were living in an inhabited area with less than twelve registered voters ⊥527 (becoming an uninhabited area), which is purely a fiction in the law.

Is it possible for a registered voter of *X* County to reside within *Y* County which has the uninhabited annexation proceeding pending? This is answered in United States Pipe & Foundry Co. v. City Council, 150 Cal.App.2d 630, 310 P.2d 431. There, the court said, "Registration, as well as residence, must be within the annexation area to meet the code requirements," and, "Whether they resided in the area was a question of fact * * *."

In section 395 of the Code of Civil Procedure, regarding venue, it is provided:

> "* * * the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action."

[7] It appears that appellants' theory would be that an uninhabited area could have 100 or more registered voters but if less than 12 actually physically resided on the area to be annexed, then section 35303 of the Government Code would apply. We think that the Legislature intended by this section to mean if there are less than 12 registered voters from the area to be annexed, then the property is uninhabited.

Amendment to Government Code Section 35303

In 1961 the Legislature amended the statute to read:

> "For purposes of this article territory shall be deemed uninhabited if less than 12 [~~registered voters~~] *persons who have been registered to vote within the territory for at least 54 days* reside within [~~it~~] *the territory* at the time of the filing of the petition for annexation or the institution of proceedings on motion of the city legislative body."

(The amendment covered the deleted words and portions shown by italics.)

The amendment to the bill came as a result of a report of the Interim Committee on Municipal and County Government. On April 18, 1961, Assemblyman Bradley introduced the bill, AB 2696, which had many other amendments and changes; it was signed by the Governor on July 19, 1961, and went into effect in September 1961. In Chapter VIII of the Final Report of the Assembly Interim Committee on Municipal and County Government, volume 6, number 16, referring to the recodification of annexation and related incorporation statutes, it is stated:

> "It is felt by most experts in this field that the ⊥528 bulk of these defects can be corrected by a careful recodification designed to attain clarity with a minimum of substantive legislative change."

In Chapter IX, the conclusion to the Report—

> "As stated earlier, this report was not meant to outline definite Committee recommendations but only to indicate the findings and recommendations of the four main groups in this field.
>
> "* * * the Committee has come to certain conclusions which are not meant to be definite legislative recommendations as such but only to be recommended as guides to be used by those drafting substantive legislative

> changes in the annexation and incorporation statutes. * * *
>
> "Changes in the law must recognize the rights of individuals, as well as the rights of cities and counties in their total relationship to each other."

This report only shows the summary of the hearings, the view of the county supervisors, the Attorney General and the City League of Municipalities and there is no definite recommendation for a change to Government Code section 35303 which would show that such was intended, if introduced, to be merely clarifying and not a substantive change. Appellants claim that the digest to the bill shows legislative intent but any reference to AB 2696 by means of the Legislative Counsel's digest (Joint Assembly and Senate Rules) is purely for information purposes to the members of the Legislature and in no way can indicate what the intent of the Legislature is.

No doubt the portion relating to this amended section received some support from the case of Perham v. City of Los Altos, 190 Cal.App.2d 808, 12 Cal.Rptr. 382, which was decided in April 1961 and has to do with the annexation of uninhabited territory. There, the court said that the filing of the petition for annexation was not for an election and the applicable statutes provide for no election. In other words, the court stated there that while one must have a year's residence in the state and ninety days in the county and 54 days in the precinct prior to the day of the election this does not prevent him from registering as a voter and the 54-day requirement is purely for the purpose of facilitating the orderly arrangement of the precincts for use at an election. Thus, a person who registers is deemed to be a registered voter whether or not he can vote immediately.

It is appellants' contention that this change in the law comes as a result of the
529 legislative study, the Attorney General's opinion (29 Ops.Cal.Atty.Gen. 204) being in conflict with City of Port Hueneme v. City of Oxnard, supra, 52 Cal.2d 385, 341 P.2d 318, and therefore, the appellants take the position that this amendment was purely a clarification and was retroactive to and including February 1961. Appellants have cited several cases involving retail sales tax, building and loan association, revenue and taxation, franchise tax, unemployment insurance and corporations franchise tax acts as being examples of establishing the rule that where there is a clarifying change in the law, and not a substantive change, it may have a retrospective effect. The cases cited by appellants may be summarized by the following quoted from County of Alameda v. Clifford, 187 Cal.App.2d 714 at pages 722–723, 10 Cal.Rptr. 144 at page 150:

> "'Although courts ordinarily infer an intent to change the law from a material change in the language of a statute [citations], the circumstances may indicate merely a legislative intent to clarify the law [citations].' W. R. Grace & Co. v. Cal. Emp. Comm., 1944, 24 Cal.2d 720, 729, 151 P.2d 215, 221; see also Union League Club v. Johnson, 1941, 18 Cal.2d 275, 278, 115 P.2d 425."

[8] We believe that the amendment to the Act is not retroactive; that the law existing on February 14th provided that the number of registered voters on that date must be less than twelve for the territory to be deemed uninhabited; and that it was not the intent of the Legislature to make this new amendment retroactive, nor was the measure a clarifying one.

[9] While respondent mentions the defense of unclean hands, we are not discussing that item for the reason that appellants make no issue in their brief as to this point. We agree with the trial judge who said that, "One who objects to his property being included in a proposed annexation may pursue any valid method he desires to defeat the annexation."

The judgment is affirmed.

GRIFFIN, P. J., and COUGHLIN, J., concur.

208 Cal.App.2d 347

⊥347 ⊥**BARCLAY KITCHEN, INC., Plaintiff and Respondent,**
v.
CALIFORNIA BANK, Defendant and Appellant.
Civ. 25856.

District Court of Appeal, Second District, Division 4, California.
Oct. 10, 1962.
Rehearing Denied Oct. 26, 1962.
Hearing Denied Dec. 5, 1962.

Action against bank by its depositor for negligent breach of contract of deposit. The Superior Court of Los Angeles County, Fletcher Bowron, J., rendered judgment for depositor and bank appealed. The District Court of Appeal, Burke, P. J., held that bank, which permitted employee of depositor to submit several deposit tickets for deposit of single check, resulting in inaccurate rendition of deposits on statement of account and causing loss to depositor, was liable for loss.

Judgment affirmed as to bank's liability and reversed on issue of damages.

1. Principal and Agent 🔑119(1)

To establish ostensible authority in agent, it must be shown that principal, intentionally or by want of ordinary care, has caused or allowed third person to believe agent possesses such authority. West's Ann.Civ.Code, § 2317.

2. Principal and Agent 🔑106

Authority of employee to make deposits in employer's bank account and to fill out deposit tickets did not extend to making out deposit tickets which inaccurately reflected nature of deposit, and bank, which accepted deposits without making some effort to ascertain employee's authority beyond her own representations that such mode of deposit was necessary for bookkeeping purposes, could not absolve itself from liability for losses sustained by employer by asserting ostensible authority in employee. West's Ann.Civ.Code, § 2317.

3. Principal and Agent 🔑92(1)

Agent's authority cannot be delineated by his own representations and such rule is not changed when relationship of parties is bank and depositor. West's Ann.Civ. Code, § 2317.

4. Corporations 🔑429

Where depositor is corporation, bank must ascertain that acts of agents of corporation are authorized. West's Ann.Civ. Code, § 2317.

5. Corporations 🔑432(12)

Evidence sustained finding that bookkeeper and general officer manager of corporate depositor did not have ostensible authority to make out deposit tickets which inaccurately reflected nature of deposits. West's Ann.Civ.Code, § 2317.

6. Banks and Banking 🔑119

Relationship of bank and depositor is founded on contract.

7. Banks and Banking 🔑119

Contract entered into when depositor opens general checking account at bank is usually implied one.

8. Customs and Usages 🔑8

Custom and usage in business of banking may be part of contract of deposit if such custom or usage is reasonable and does not contravene any principle of law.

9. Banks and Banking 🔑121, 151

By accepting deposit tickets of depositor's employee inaccurately reflecting nature of deposit resulting in rendering inaccurate statements in depositor's account, bank negligently performed its duty to render faithful and accurate accounts under contract of deposit.

10. Torts 🔑15

Defendant is not liable for plaintiff's injury unless in fact he causes injury.

11. Torts 🔑15

Act or omission that is substantial factor in bringing about result will be considered cause in fact and will be considered substantial factor, if result could not have occurred without it.

12. Torts 🔑27

Causation of injury need not be established with absolute certainty and it is sufficient if plaintiff introduces evidence from which reasonable men may conclude that it is more probable that defendant's conduct was cause than that it was not.

13. Appeal and Error 🔑900

Inference in record must be taken most favorably to respondent.

14. Banks and Banking 🔑121

Inasmuch as it appeared that thefts from employer by employee would have been discovered except for negligence of bank in permitting employee to file inaccurate deposit slips, bank was liable for loss even though bank's conduct was not sole cause of loss.

15. Negligence 🔑56(1.2, 1.3, 1.9)

Defendant's negligence need not be sole cause of injury to establish liability and where act complained of is substantial contributing factor it is sufficient, but defendant's act must be legal or proximate cause of plaintiff's injury.

16. Negligence 🔑62(3)

Although intervening criminal acts in some cases may supersede defendant's negligence, test is whether actor should have realized, at time of his negligent conduct, likelihood that, as result of conduct, third person might commit intentional tort or crime, but defendant need not foresee precise injury or exact manner in which it occurs and it is sufficient if result is within ambit of risk created by defendant.

17. Banks and Banking 🔑151

Bank has duty to render accurate statements to depositors.

18. Banks and Banking 🔑133

Since bank knowingly permitted irregular procedures in deposit slips of employee of depositor, it could not be heard to say that its breach of duty would not foreseeably have effect similar to that actually occurring when employee took depositor's funds.

19. Banks and Banking 🔑121

Bank which negligently accepted inaccurate bank deposit slips from depositor's employee could not be held responsible for losses occurring before its negligent act.

20. Banks and Banking 🔑133

Depositor's delay in failing to discover errors in bank's statements did not bar its action against bank because of laches, where statement conveyed no intimation of irregular procedure of bank.

21. Banks and Banking 🔑151

Provision requiring depositor to notify bank with regard to errors does not apply in case where error or irregularity cannot be ascertained from face of statement.

22. Subrogation 🔑6

Right of subrogation does not exist in favor of surety on fidelity bond except against persons who participated in wrongful act of principal.

23. Subrogation 🔑7(1), 33(1)

Where bank's negligence made possible consummation of fraudulent scheme of employee of depositor and bank's employees admittedly departed from ordinary course of their banking business and should have been alert to employee's misrepresentation of authority, surety on fidelity bond was subrogated to rights of depositor to extent of losses attributable to bank's negligence.

* * *

Swanwick, Donnelly & Proudfit and Donald O. Welton, Los Angeles, for defendant and appellant.

Voegelin, Barton, Harris & Callister, Gary E. Gunderman and E. Talbot Callister, Los Angeles, for plaintiff and respondent.

⊥349 BURKE, Presiding Justice.

Plaintiff-respondent Barclay Kitchen, Inc. (Barclay) by amended complaint sued and recovered judgment against defendant-appellant California Bank (Bank) and National Surety Corporation (Surety) for over $11,000 ⊥350 in losses resulting from the defalcations of Thelma T. Gianopulus, a trusted employee of Barclay. Surety takes no part in this appeal.

Mrs. Gianopulus was a "one-man office" for Barclay. She acted as purchasing agent, bookkeeper, and performed other incidental duties. She was authorized to make deposits in Barclay's account with Bank and to withdraw up to $1,000 cash each week for use as change in the business over the weekend. These withdrawals, which were usually made in the amount of $900 per week, were to be redeposited to the account on the first banking day after the weekend. Mrs. Gianopulus failed to redeposit many of these $900 weekly cash withdrawals and fraudulently appropriated these sums to her own use.

To cover her defalcations, Mrs. Gianopulus deposited in Barclay's account on December 19, 1957, a Diners' Club check payable to Barclay in the amount of $4,260.48, along with $795.50 in cash. Bank accepted deposit tickets prepared by her indicating four separate deposits of $900 each and one deposit of $1,455.98. Similar transactions occurred on March 19, 1958, and on April 23, 1958.

Bank accepted the deposits in this form upon Mrs. Gianopulus' representation that it was necessary "for bookkeeping purposes."

The posting of deposits by Bank to depositors' statements of account is on the basis of individual deposit tickets. If several items are listed on one ticket, that sum is posted to the account; if each item is listed on a separate ticket, it is posted individually to the account. This is a customary and acceptable practice of Bank. However, by permitting Mrs. Gianopulus to submit several deposit tickets for the deposit of a single check, the resultant posting to the account misrepresented the single deposit as being several individual deposits in amounts corresponding to the amounts of change withdrawals. The inaccurate rendition of these deposits on the statement of account is the claimed basis of the Bank's liability.

The deposit slips themselves serve only as a preliminary step in the negligent act of Bank. Viewed alone the slips did not cause the loss because Barclay did not require duplicates and the originals were not seen by Barclay's accountants before the losses were discovered. However, acceptance of the deposit slips in the form in which Mrs. Gianopulus made them out caused the deposit amounts to be posted to Barclay's ⌊351 statements in a manner which misled Barclay to believe that certain statement credits were cash redeposits when in fact they were portions of Diners' Club checks. Therefore, viewed as a whole the deposit slips and the resulting postings to Barclay's statements combined as a cause in misleading Barclay, permitting Mrs. Gianopulus to carry out her scheme of defalcation.

Barclay's internal bookkeeping system also aided Mrs. Gianopulus to conceal her thefts. Testimony for Barclay indicated that meals purchased by customers of plaintiff on Diners' Club cards would be entered on the cash receipts journal and then posted to accounts receivable under Diners' Club. Mrs. Gianopulus never posted the receipt of the Diners' Club check of December 1957. She posted the Diners' Club checks involved in the second and third transactions in amounts respectively $1,800 less than the actual amounts of the checks. The effect of Mrs. Gianopulus' posting in this manner was to indicate on the books that more money was due from the Diners' Club than actually was owed, thereby reconciling her company books with the actual amounts she had deposited in the bank.

The discrepancy between the amounts paid by Diners' Club and the amounts owed by it were not readily apparent because Barclay closed its books at the end of the month, but the Diners' Club closed its books on the 24th of each month. This meant there was always an outstanding balance due from the Diners' Club, being the amount accruing from the 24th to the end of the month, plus the amount of the prior month. The difference could not be learned from the Diners' Club because they did not confirm balances owed by them.

Additionally, one McGee, Barclay's accountant who examined the books monthly, testified that in reconciling the bank statements, Mrs. Gianopulus represented to him that the $900 items in the three transactions were redeposits of weekend withdrawals; that the books and records so indicated; that he treated them as such and that the books balanced.

The court gave judgment on the theory of negligence against Bank for $11,467.67, the full amount of Barclay's loss. Judgment against Surety was $4,013.86, the amount of liability under its fidelity bond, but that amount is to be reduced by any recovery from Bank exceeding $7,453.81, the difference between the total loss and Surety's liability on the basis of subrogation. Only Bank has appealed from the judgment in favor of Barclay.

⊥352 On appeal Bank raises two primary questions:

1. Whether or not Bank was justified in assuming that, because of her position with Barclay, Mrs. Gianopulus had authority to make the deposits in the manner indicated thereby estopping Barclay from contending Bank caused its loss.

2. Whether or not the acts of Bank in accepting deposits of a single check as several separate deposits was a breach of duty owed Barclay and a legal cause of Barclay's loss.

As subsidiary points Bank also contends:

3. The action is barred by laches because Barclay did not report irregularities in the bank statement as prescribed by bank rules.

4. As between Bank and Surety, Surety should bear the loss because the doctrine of subrogation does not apply in favor of a surety on a fidelity bond except against persons who participated in the wrongful act of the principal.

[1, 2] As to whether Mrs. Gianopulus had ostensible authority to represent deposits of single Diners' Club checks as several separate and distinct deposits of cash, the question must be answered in the negative. To establish ostensible authority in an agent, it must be shown that the principal, intentionally or by want of ordinary care, has caused or allowed a third person to believe the agent possesses such authority. (§ 2317, Civ.Code; Hill v. Citizens Nat. Trust & Savings Bank, 9 Cal.2d 172, 176, 69 P.2d 853.) Here it is contended that by virtue of her position as bookkeeper and general office manager, which included the express authority to make deposits in plaintiff's bank account, no limit would impliedly be placed on the manner in which Mrs. Gianopulus made the deposits. While it is true that she did have authority to make deposits, and incidentally to fill out deposit tickets, that authority did not extend to making out deposit tickets which inaccurately reflected the nature of the deposit.

[3, 4] Bank has not shown how the form of deposits accepted in this case were in any way necessary to the performance of Mrs. Gianopulus' duties with Barclay. The officers of Bank who approved the deposits testified that the procedure employed here by Bank employees was irregular and contrary to policies and procedures of Bank. While it is true that Mrs. Gianopulus told the Bank employees that the mode of deposit was "necessary for bookkeeping purposes," it is elementary that an agent's authority cannot be delineated by his own representations. (Boren v. State Personnel Board, ⊥353 37 Cal.2d 634, 643, 234 P.2d 981; Torrance National Bank v. Enesco Fed. Credit Union, 134 Cal.App.2d 316, 322, 285 P.2d 737.) This rule is not changed when the relationship of the parties is bank and depositor (Otis Elevator Co. v. First National Bank, 163 Cal. 31, 46–47, 124 P. 704, 41 L.R.A.,N.S., 529); and where the depositor is a corporation the bank has a legal duty to ascertain that the acts of the agents of the corporation are authorized. (Torrance National Bank v. Enesco Fed. Credit Union, supra, p. 327, 285 P.2d 743, p. 744.) Having accepted the deposits in question, admittedly irregular, without some effort to ascertain the agent's authority beyond her own representations, Bank cannot now absolve itself from liability by asserting an ostensible authority in the agent where in fact no authority was given.

[5] Additionally it may be noted that the issue of ostensible authority is a ques-

tion of fact. (Henry Cowell Co. v. Santa Cruz Bank, 82 Cal.App. 519, 522, 255 P. 881.) Here the trial court found, upon substantial evidence, that there was no ostensible authority.

Bank asserts that there is no evidence in the record to support a finding that acceptance by Bank of these irregular deposits "were in violation of its contract of deposit with plaintiff and were in violation of the written instructions given to and accepted by said Bank as set forth aforesaid."

[6–8] The relationship of bank and depositor is founded on contract. (Allen v. Bank of America, 58 Cal.App.2d 124, 127, 136 P.2d 345.) The contract entered into when a depositor opens a general checking account at a bank is usually an implied one. (See Glassell Dev. Co. v. Citizens National Bank, 191 Cal. 375, 379, 216 P. 1012, 28 A.L.R. 1427; 7 Am.Jur. 286.) Custom and usage in the business of banking may be part of a contract of deposit if such custom or usage is reasonable and does not contravene any principle of law. (See Davis v. First National Bank of Fresno, 118 Cal. 600, 602, 50 P. 666.)

[9] In the case at bar the trial court found that "the contract of deposit existing between plaintiff and said Bank required, among other things, that said Bank render to plaintiff a true and accurate statement and account of all transactions in connection with said commercial banking account." Bank does not seriously dispute this element of its contract with Barclay, but argues that it has not been violated. This contention cannot be sustained. Bank impliedly promised to keep accounts according to usual customs and procedures and ⌊354 render statements of account in accordance therewith. The testimony of Mr. Marcoux and Mr. Jones noted above shows that those procedures were not followed. Upon learning of the first transaction Mr. Marcoux instructed the teller involved not to accept future deposits in this form, yet on two more occasions such deposits were accepted. Since the effect of this irregular procedure was to render inaccurate statements in Barclay's account of deposits, it must be held that defendant acted negligently in performing its duty to render faithful and accurate accounts under the contract of deposit with plaintiff.

Bank next contends that even if acceptance of deposits from Mrs. Gianopulus in the manner described was a negligent breach of the contract with its depositor Barclay, its negligence was not the proximate cause of Barclay's loss. In this regard Bank raises two points: (1) Bank's conduct did not in fact cause the loss and (2) even if that conduct was such a cause, the intervening criminal acts of Mrs. Gianopulus' embezzlement supersede Bank's negligence.

(1) Was Bank's conduct in fact a cause of Barclay's loss?

[10–12] The rule is that defendant is not liable for plaintiff's injury unless in fact he causes the injury. "The whole doctrine of responsibility for negligence is based upon the postulate that without such negligence the injury would not have occurred, * * *." (Osborn v. City of Whittier, 103 Cal.App.2d 609, 616, 230 P. 2d 132; McVay v. Central Calif. Inv. Co., 6 Cal.App. 184, 188–189, 91 P. 745, 747.) The test for determining cause in fact has been clearly articulated in Prosser, Torts, 2d ed., p. 218:

> "If the defendant's act or omission was a substantial factor in bringing about the result, it will be regarded as a cause in fact. Ordinarily it will be such a substantial factor if the result would not have occurred without it.
>
> "The plaintiff is not required to establish the fact of causation with absolute certainty. It is sufficient that he introduces evidence from which reasonable men may conclude that it is more probable that the defendant's conduct was a cause than that it was not."

California cases are in accord with this statement. (Woo v. Martz, 110 Cal.App. 2d 559, 563, 243 P.2d 131; Gibson v. Garcia, 96 Cal.App.2d 681, 685, 216 P.2d 119.)

[13, 14] The primary cause of Barclay's loss clearly was Mrs. Gianopulus' thefts. She was enabled to conceal her scheme over a period of time because Diners' Club billings ⊥355 were not checked against receipts from the Diners' Club. But, taking the inference in the record most favorable to respondent, as we must (Stasulat v. Pacific Gas and Elec. Co., 8 Cal.2d 631, 633, 67 P.2d 678; Arthur v. Santa Monica Dairy Co., 183 Cal.App.2d 483, 485, 6 Cal.Rptr. 808), the Bank's negligence also aided the concealment. Under the accounting method employed by Barclay, the accountant testified that he relied upon the rendition of individual deposits in the statement to correlate receipts and disbursements. The court found that the statements "misled plaintiff so as to enable said Thelma T. Gianopulus to fraudulently appropriate the moneys of plaintiff as described [above]." The issue of actual cause is one of fact for the trier. (Basin Oil Co. v. Baash-Ross Tool Co., 125 Cal.App.2d 578, 603, 271 P.2d 122.) Since there is substantial evidence in the record to show the thefts would have been discovered but for the bank's negligence, that negligence was a substantial factor in causing the loss and therefore must be regarded as a cause in fact of the loss.

[15] Defendant's negligence need not be the sole cause of an injury to establish liability. Where the act complained of is a substantial contributing factor it is sufficient. (Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 234, 282 P.2d 69; Westover v. City of Los Angeles, 20 Cal.2d 635, 639, 128 P.2d 350.) But this rule is further qualified: The defendant's act must also be a legal or proximate cause of the plaintiff's injury. (Champion v. Bennetts, 37 Cal.2d 815, 821, 236 P.2d 155.)

[16] Bank contends that its negligence was a prior and remote cause of Barclay's loss; that its negligence is superseded by Mrs. Gianopulus' criminal acts and for that reason it cannot be held liable. While intervening criminal acts in some cases may supersede the defendant's negligence, the test is whether the actor should have realized at the time of his negligent conduct that there was a likelihood that as a result thereof a third person might commit an intentional tort or crime. (Mosley v. Arden Farms Co., 26 Cal.2d 213, 218, 157 P.2d 372, 158 A.L.R. 872; Terrell v. Key System, 69 Cal.App.2d 682, 688–689, 159 P.2d 704.) The defendant need not foresee the precise injury or the exact manner in which it occurs. (Terrell v. Key System, supra.) It is sufficient if the result is within the ambit of risk created by defendant.

[17, 18] Bank officers here testified to their knowledge of the part the bank statements played in forming the protective ⊥356 aspect of plaintiff's accounting. Defalcations of dishonest employees is one of the risks the system is designed to guard against. The duty of Bank to render accurate statements contemplates this aspect of protection. Since Bank knowingly permitted the irregular procedures, it cannot now be heard to say that breach of its duty under the circumstances in this case would not foreseeably have an effect like that actually caused.

[19] However, we fail to perceive how the Bank could be held responsible for any loss occurring *prior* to any negligent conduct on its part which improperly represented a deposit thus shielding Mrs. Gianopulus' defalcation. Plaintiff declares that the deposit negligently accepted on December 19, 1957, resulted in an inaccurate statement at the time when Mrs. Gianopulus' thefts should have first been discovered. Yet in its complaint plaintiff alleges that Mrs. Gianopulus' thefts commenced sometime after April 30, 1957, nearly eight months before Bank's first negligent act. It cannot be said that Bank was responsible in any way for the prior losses. Since judgment was given against Bank for the whole amount of Barclay's loss, we must reverse the judgment on the issue of damages with instructions to the trial court to determine the amount of loss sustained by Barclay after the negligent conduct of Bank.

[20, 21] The Bank's contention that Barclay's delay in failing to discover errors in the statements bars this action because of laches is without merit. The provision requiring the depositor to notify Bank with regard to errors does not apply in this case where the error or irregularity cannot be ascertained from the face of the statement. (See Basch v. Bank of America, 22 Cal.2d 316, 326, 139 P.2d 1; Sommer v. Bank of Italy, etc., Assn., 109 Cal.App. 370, 375, 293 P. 98.) Here the statement conveyed no intimation of the irregular procedure of Bank.

[22] As a final point Bank argues that as between Bank and Surety, Surety should bear the loss; that the right of subrogation does not exist in favor of a surety on a fidelity bond except against persons who participated in the wrongful act of the principal.

[23] But in the present case, unlike the cases cited by Bank, Bank is not an innocent third party. In Meyers v. Bank of America, 11 Cal.2d 92, 77 P.2d 1084, the court held the surety liable as against the bank where the bank, not being a wrongdoer, paid money in 357 the ordinary course of its business upon checks, the genuineness of which it had no reason to doubt, and from which it received no benefits. Here, Bank was not innocent. Its negligence made possible the consummation of Mrs. Gianopulus' fraudulent scheme. Its employees admittedly departed from the "ordinary course" of their banking business. They should have been alert to Mrs. Gianopulus' misrepresentation of authority.

Bank argues that subrogation also was not allowed in Liberty Mutual Ins. Co. v. Kleinman, 149 Cal.App.2d 404, 407, 308 P.2d 347, but there it is expressly pointed out that the third person's conduct was not considered negligent.

Under the circumstances here the court properly subrogated Surety to the rights of Barclay. However, it should be noted that Surety will be liable without set-off against Bank for such portion of the losses determined on retrial not to be attributable to Bank's negligence to the extent such losses are covered by the fidelity bond.

The judgment is affirmed as to Bank's liability and reversed on the issue of damages with directions to determine the amount of damages actually caused by Bank's negligence in accordance with this decision. Costs on appeal shall be borne by Bank.

JEFFERSON and FORD,* JJ., concur.

Hearing denied; WHITE, J., sitting pro tem.

208 Cal.App.2d 298

Robert M. HALDANE, age 4, Frederick T. Haldane, age 8, Alexander B. Haldane, age 13, by their father and guardian ad litem, Eldon O. Haldane, Plaintiffs and Appellants, 298

v.

Mrs. Vernon C. (Daisy) BOGY, Defendant and Respondent.

Civ. 26076.

District Court of Appeal, Second District,
Division 2, California.
Oct. 9, 1962.

Action for alleged conspiracy and malpractice wherein the Superior Court of Los Angeles County, Macklin Fleming, J., rendered a judgment of dismissal and plaintiffs appealed. The District Court of Appeal, Herndon, J., held that complaint, filed by divorced husband as purported guardian of minor children, against attorneys, one of whom successfully represented wife in divorce action, and two friends of divorced wife, one of whom was alleged to have harbored the children and encouraged the divorce, as a result of which the children assertedly lost a sum which they would have expected to inherit from the parties, was insufficient to plead cause on any theory.

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* Assigned by Chairman of the Judicial Council.

Affirmed.

See also 25 Cal.Rptr. 392.

1. Appeal and Error ⇨133

Appeal purportedly from judgment which record did not show had been entered would be treated as from minute order granting motion to dismiss.

2. Attorney and Client ⇨129(2)

One not alleged to be an attorney could not be guilty of "malpractice".

3. Attorney and Client ⇨129(2)
Conspiracy ⇨18

Complaint for alleged malpractice and conspiracy, filed by divorced husband as purported guardian of minor children, against attorneys, one of whom successfully represented wife in divorce action, and two friends of divorced wife, one of whom was alleged to have harbored the children and encouraged the divorce, as a result of which the children assertedly lost a sum which they would have expected to inherit from the parties, was insufficient to plead cause on any theory.

4. Evidence ⇨43(3)

Court properly took judicial notice of records in divorce action referred to in complaint by name and case number.

5. Pleading ⇨223

Dismissal was properly granted after court had properly sustained demurrers with leave to amend which was not taken advantage of. West's Ann.Code Civ.Proc. § 581, subd. 3.

◆

Eldon O. Haldane, in pro. per.

No appearance for respondent.

⌊299 ⌊HERNDON, Justice.

[1] This is an appeal purportedly taken from a judgment of dismissal entered in favor of respondent following the failure of appellant to amend his complaint within the time allowed after respondent's general and special demurrers had been sustained. The record before us does not indicate that any formal judgment was in fact entered, but does contain a duly entered minute order granting respondent's motion to dismiss the action. We shall therefore treat the appeal as having been taken from this order. (Herrescher v. Herrescher, 41 Cal.2d 300, 303–304, 259 P.2d 901; Jeffers v. Screen Extras Guild, Inc., 107 Cal.App.2d 253, 254, 237 P.2d 51; Wilson v. Frakes, 178 Cal.App.2d 580, 581, 3 Cal.Rptr. 434.)

The complaint is captioned "COMPLAINT—Malpractice; Damages and Conspiracy" and contains nine pages consisting entirely of conclusions and vituperative personal attacks upon the several named defendants. It was filed by appellant *in propria persona* in his capacity as purported guardian *ad litem* of his three minor children. The named defendants are two attorneys, one of whom successfully represented appellant's wife in her divorce action against appellant, two are friends of appellant's wife, one of whom is the respondent herein, and appellant's ex-wife whom he has joined as a party defendant only for the alleged reason that she refused to join as a party plaintiff.

No useful purpose would be served in discussing appellant's complaint in detail, for it is inconceivable that a pleading so completely lacking in factual allegations or specifications could provide any guidance as a standard of reference in future cases. It is sufficient to say that the complaint sounds in self-pity and resentment, but states no facts sufficient to constitute a cause of action under any theory of law. As nearly as can be determined from this unfortunate man's⌊rambling allegations, it is ⌊300 his contention that, as the result of the defendants' advising and assisting his wife to divorce him, the minor children of the parties suffered the loss of $30,000 which they "would have expected to inherit" from the parties. Attached to the complaint as "Exhibit A" is what is alleged to be a partial reporters' transcript of the divorce hearing wherein appellant's wife and eldest son testified to appellant's alcoholism and absences from the family residences. The complaint also prays for an award of $3,000,000.00 as exemplary damages.

[2, 3] Respondent herein is not alleged to be an attorney and therefore could not be guilty of "malpractice". Haldane v. Freedman, 204 A.C.A. 538, 22 Cal.Rptr. 445 decided by Division One of this court on June 8, 1962, is a case involving this appellant in which an issue concerning privity in the attorney-client relationship is discussed and decided against appellant. Further, this decision refers to section 700 of the Civil Code providing that "A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind" and holds that any such alleged expectancy is not such a vested right as will support an action of this type.

The sole reference to respondent found in appellant's complaint is contained in the following paragraph: "That defendant Daisy [Mrs. Vernon C.] Bogy during June, 1960, wrongfully harbored, housed and concealed the [minor children] from their father, without any warrant in law, against his will, over his vigorous protest and demand that they be returned to the family home in Reseda, California. She advanced costs in the amount of approximately $50.00 in her zeal to accomplish the wrongful filing of the divorce complaint NWD 724. She joined with the other defendants in a venomous effort to wilfully and maliciously injure [the minor children's] father by actively encouraging [the minor children's] mother to file a divorce suit—in conspiracy, concert and confederation with the other defendants—all to the injury and damage to these [minor children]."

In Rudley v. Tobias, 84 Cal.App.2d 454, 190 P.2d 984, it was determined that under our Codes, particularly sections 43.5 and 49 of the Civil Code, an action may not be maintained by a child to recover for the alienation of a parent's affections even where, as the result thereof, the children have been abandoned by their father. Certainly the above quoted paragraph states no cause of action against respondent.

[4] ⊥ Furthermore, since appellant's complaint makes specific reference to the prior divorce action by name and case number, and in effect seeks to make a collateral attack upon the judgment therein, it was proper for the trial court to take judicial notice of the records therein. (Legg v. Mutual Benefit Health & Accident Assn., 184 Cal.App.2d 482, 487, 7 Cal.Rptr. 595; Taliaferro v. Taliaferro, 178 Cal.App.2d 140, 141, 2 Cal.Rptr. 716.) The record therein indicates that appellant's wife was granted custody of the children on June 2, 1960, and was forced to leave the family residence on June 18, 1960, due to the improper conduct of appellant. On July 1, 1960, the wife was granted the exclusive right to occupy the family residence and apparently then returned thereto. It would therefore appear that during the period respondent is alleged to have "harbored, housed and concealed" the minor children, they were, in fact, legally with their mother and in her custody.

[5] Respondent filed general and special demurrers which were very properly sustained on July 31, 1961, with twenty-days leave to amend. Appellant having elected not to amend, respondent's motion to dismiss was properly granted and entered on September 7, 1961. (Code Civ. Proc. § 581, subd. 3; Stowe v. Fritzie Hotels, Inc., 44 Cal.2d 416, 424, 282 P.2d 890.)

Appellant's brief is in large measure only a repetition of his feelings of persecution and contains no actual assignment of error. His only explanation of his failure to amend his complaint is his statement that one of the grounds for the demurrer was "uncertainty" and that he "could have amended and alleged the respondent's address to be 3279 Laurel Canyon Blvd., etc., declined to do so since it is inconceivable that respondent does not know her own address or what went on inside her own house."

The judgment of dismissal is affirmed.

FOX, P. J., and ASHBURN, J., concur.

208 Cal.App.2d 302

⊥302 ⊥**Eldon O. HALDANE, Plaintiff and Appellant,**

v.

Mrs. Vernon C. (Daisy) BOGY, Defendant and Respondent.

Civ. 26077.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1962.

Divorced husband's action against two attorneys and friend of divorced wife for alleged intentional infliction of emotional distress. The Superior Court of Los Angeles County, Macklin Fleming, J., rendered a judgment of dismissal and the plaintiff appealed. The District Court of Appeal, Herndon, J., held that the complaint averring that defendant friend of divorced wife paid one of the attorneys to file the successful but allegedly groundless divorce action and harbored plaintiff's wife and children in her home was insufficient to allege any cause.

Affirmed.

1. Appeal and Error 🔑133

Appeal purportedly from judgment which record did not show had been entered would be treated as from order granting motion to dismiss.

2. Evidence 🔑43(3)

Court properly took judicial notice of record in divorce action referred to in complaint.

3. Torts 🔑26(1)

Divorced husband's complaint against attorneys and friend of divorced wife, for alleged infliction of emotional distress, averring that such friend of wife paid one of the attorneys to file the successful but allegedly groundless divorce action and harbored plaintiff's wife and children in her home, was insufficient to allege any cause. West's Ann.Civ.Code, § 43.5; West's Ann. Code Civ.Proc. § 581, subd. 3.

Eldon O. Haldane, in pro. per.

No appearance for respondent.

HERNDON, Justice.

[1] This is an appeal purportedly taken from a judgment of dismissal entered in favor of respondent in a companion case to Haldane v. Bogy, 25 Cal.Rptr. 389, passed upon this day by this court. Again the record fails to disclose the entry of a judgment; hence, we shall consider the appeal as having been taken from the order granting respondent's motion to dismiss the action⊥following appellant's failure to amend his complaint within the time allowed. ⊥303

[2, 3] Appellant's complaint filed *in propria persona* is captioned *"Complaint—Damages* (Intentionally Inflicting Severe Emotional Distress and Bodily Harm Resulting From It)" and, as in Haldane v. Bogy, 25 Cal.Rptr. 389, is a conglomerate of abusive epithets and conclusions stating no cause of action. Attached thereto as Exhibit A is a photo copy of appellant's wife's first amended complaint for divorce. Although appellant alleges that this document is a sham and "had been months in secret preparation" and was filed "for the malicious, sadistic satisfaction of the three named defendants", it appears from the record in said divorce action of which the trial court properly took judicial notice, (Taliaferro v. Taliaferro, 178 Cal.App.2d 140, 141, 2 Cal.Rptr. 716), that his wife's *original* complaint for divorce had set forth the simple statement of a charge of cruelty as permitted by section 426b of the Code of Civil Procedure and that the particularized amendment had been filed only after appellant had demurred to the original complaint on the ground of uncertainty.

The defendants in the instant action are two attorneys who have been licensed to practice law in California since 1915 and 1933, respectively, and the respondent, a "family friend of many years." Appellant's complaint states: "All three named defendants are women of advanced years, lonely, frustrated, embittered, unhappy; they are professional misanthropists and troublemakers, with a seething hatred of the male." Expressions such as these generally tell more of the character of the author than of the parties described; obviously, they add nothing to the substance of a pleading.

The complaint's sole direct statement regarding respondent is the following: "Defendant Mrs. Vernon C. (Daisy) Bogy aided and abetted the other defendants at every turn; she paid $50.00 to attorney Wilhelmina Helen King Chagnon to file the original groundless action alluded to; she wrongfully harbored and secreted plaintiff's wife and children during June, 1960 for the purpose of diminishing and nullifying plaintiff's influence over his own family; all of these acts were done with express and expressed purpose to injure plaintiff, cause him severe and prolonged mental and physical anguish." As indicated in Haldane v. Bogy, 25 Cal.Rptr. 389, the records in the divorce action indicate that appellant's wife had been granted custody of the children on June 2, 1960, and appellant had been enjoined and restrained from annoying and
304 molesting her pending further proceedings. Despite the restraining order, however, appellant's conduct had forced his wife to leave the family residence until she was able to obtain a further court order regarding her right to sole occupancy and possession thereof. Subsequently, she obtained, by way of a stipulated default hearing, an interlocutory judgment of divorce based upon her testimony and that of appellant's eldest son.

The only cause of action which appellant's complaint even remotely approaches is one for alienation of affections, and actions on that ground have been abolished in California by section 43.5, Civil Code. (Ikuta v. Ikuta, 97 Cal.App.2d 787, 789, 218 P.2d 854.)

Respondent's general and special demurrers having been properly sustained, and appellant having chosen not to amend within the time allowed, the order of dismissal made under section 581(3), Code of Civil Procedure, was likewise proper. In his brief appellant, as in Haldane v. Bogy, 25 Cal. Rptr. 389, again chooses to ignore all the stated grounds for the demurrer to his complaint except the one of uncertainty and repeats his statement that he could have amended but declined to do so because respondent's knowledge of her address and her conduct was "superior" to his own.

In his brief, appellant quotes Werner v. Times Mirror Co., 193 Cal.App.2d 111, 123, 14 Cal.Rptr. 208, 216, for the proposition that: " 'The law does not provide a remedy for every annoyance that occurs in everyday life. Many things which are distressing or may be lacking in propriety or good taste are not actionable.' " Although his comment thereon is that "[t]he above language is indeed apropos, whether the problem be defamation, invasion of privacy, or domestic relations matters," he seems totally unable to follow the quoted precepts which he himself finds applicable here.

On the contrary, he asserts, "appellant seeks to set the record straight, punish the wrongdoers in a legal and proper manner, recoup as much of the money loss as possible, restore his family to safety and solvency, attend to the problems at hand with prudence, understanding, patience and some intelligence. Thus, if the wrongdoers are officially discredited and repudiated by reason of their misconduct, excused from any further meddling or interference, plaintiff's wife, liberated from their undue influence, may return unto the paths of righteousness * * *."

We earnestly submit for appellant's honest consideration the thought that his own 305 best interests and the best interests of his children would be served far more if he would drop his role of avenging angel and devote the time and the very great amount of money which he is wasting on this expensive and fruitless litigation to the costs of educating the children he loves, so that they will be better prepared to lead happy and useful lives.

Affirmed.

FOX, P. J., and ASHBURN, J., concur.

208 Cal.App.2d 653

⊥653 ⊥**EICHLER HOMES, INC., a corporation, Plaintiff and Appellant,**

v.

The COUNTY OF MARIN, State of California, Defendant and Respondent.

Civ. 20235.

District Court of Appeal, First District, Division 3, California.

Oct. 18, 1962.

Action to recover for the amount of remedial work the plaintiff was forced to do to improve a subdivision in accordance with standards contained in a county ordinance incorporated by reference in a drainage construction contract. From an adverse judgment in Superior Court, County of Marin, N. Charles Brusatori, J., the plaintiff appealed. The District Court of Appeal, Devine, J., held that where drainage construction contract provided that construction should be done in accordance with plans as prepared by plaintiff's engineer and to be done strictly in accordance with a county ordinance which was incorporated into the contract and that the plans were adequate to accomplish the work covered in a good workmanlike manner and in accordance with accepted construction practices, contract was construable as incorporating a warranty that work be done according to the criteria set forth in the ordinance and where such standards were not met, plaintiff was obligated to perform the work in accordance with the ordinance standards and to do the remedial work.

Judgment affirmed.

1. Contracts 🔑147(3)

The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable; each clause helping to interpret the other. West's Ann. Civ.Code, § 1641.

2. Contracts 🔑166

Effect must be given to writings incorporated by reference.

3. Drains 🔑49

Where county ordinance was expressly incorporated into an agreement for drainage construction, effect must be given to the ordinance.

4. Contracts 🔑175(1)

Where contract is ambiguous and it does not appear which party caused the uncertainty to exist, it is presumed in case of a contract between a private and a public body to have been caused by the private body. West's Ann.Civ.Code, § 1654.

5. Drains 🔑49

Where drainage construction contract provided that construction should be done in accordance with plans as prepared by plaintiff's engineer and to be done strictly in accordance with a county ordinance which was incorporated into contract and that plans were adequate to accomplish work covered in a good workmanlike manner and in accordance with accepted construction practices, contract was construable as incorporating a warranty that work be done according to the criteria set forth in the ordinance, and where such standards were not met, plaintiff was obligated to perform the work in accordance with the ordinance standards and to do the remedial work. West's Ann.Civ.Code, §§ 1641, 1654.

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Crimmins, Kent, Bradley & Burns, John L. Bradley, San Francisco, for appellant.

E. Warren McGuire, County Counsel, Robert A. Smallman, Deputy County Counsel, San Rafael, for respondent, County of Marin.

⊥DEVINE, Justice. ⊥654

The facts in this case are agreed upon between the parties. A contract for subdivision of a tract was made by plaintiff's predecessor in interest, a corporation named Old County Company. Plaintiff having been substituted to all of the rights and duties of the predecessor, the contract is referred to herein in all respects as plaintiff's, and no further reference is made to the predecessor.

The subdivision work was completed early in 1957. In February, 1958, there were heavy rains, and flooding occurred in a drainage system within the subdivision. It is agreed that the drainage system for that area was inadequate, but the responsibility therefor is in dispute. The deficiency was not in the workmanship of the construction of the drainage system, but in the plans, which called for pipes which, it is agreed, were of insufficient dimensions. Plaintiff replaced the pipes with larger ones, following demand by the county, but it is conceded that this action was in no sense an admission of liability, and that plaintiff's rights were completely reserved by agreement between the parties made prior to the replacing job.

The mistake resulted from errors by an engineer, Mr. Aitken, employed by plaintiff. According to an engineer namd Nolte, who was retained by plaintiff after the flooding in order to evaluate the criteria used in the Aitken drainage computations, the tributary area itself as set forth by Aitken in his plan was one third of the actual area, and the true area could have been ascertained, to exact measurement, by a field survey, which Aitken did not perform, although there were no circumstances which would have prevented such a survey. Aitken's error, in turn, resulted from his use of a faulty earlier map prepared by an architect for another corporation. There were errors also in estimates of maximum rainfall within a twenty-five year period (the significance of this period appears below), and in estimating coefficient of runoff, a factor which indicates how much of the water falling in the tributary area is not absorbed and must be carried off by drainage. The last two criteria are not subject to exact measurement. The actual quantity of water to be disposed of should have been postulated at six times the quantity resulting from Aitken's computations. The flooding would have resulted from his erroneous finding of the tributary area alone.

Before the subdivision work was commenced, the plans prepared by Aitken were submitted to Mr. Brigham, the county road commissioner, who made a check, but did not make a field survey. Brigham would generally approve any drainage plan providing pipe capacity which he deemed adequate based on his evaluation of the criteria involved, although he and the subdivider's engineer might differ as to the values of the individual criteria. In like manner, Brigham would generally refuse to approve a plan providing for pipe capacity which he deemed insufficient, even though the engineer had chosen criteria values within the range indicated as aforesaid. Aitken knew that this procedure had been customarily followed in Brigham's office. It was in fact followed in this case. Brigham approved the plan.

The contract (including material in an extension agreement) provides (1) that the construction shall be done in accordance with the plans and specifications as prepared by Aitken; (2) that the work shall be done strictly in accordance with Ordinance No. 640 of the County of Marin, and in accordance with the approval of the tentative map and master plan for the area as approved by the Marin County Planning Commission; (3) that the ordinance of Marin County is incorporated into the contract; and (4) subdivider warrants that the plans and specifications are adequate to accomplish the improvement work covered by the agreement in a good workmanlike manner and in accordance with accepted construction practices, and that should the plans and specifications at any time prove to be inadequate in any respect, subdivider agrees to make such changes as are necessary to accomplish the work in a good workmanlike manner and in accordance with accepted construction practices.

Ordinance No. 640 requires the following in respect of drainage and flood control: "3.1(k) Provision shall be made for drainage and flood control in accordance with the approved improvement plan." "3.3 * * * The County Road Commissioner shall inspect the improvement plan for compliance with the provisions of this Ordinance, standard engineering practices, and any other requirements of the County. * * Within ten days after receipt of the improvement plan the Road Commissioner shall approve or disapprove the same. Such action shall be in writing." "3.2(e) All provisions for drainage and flood control shall be established on the basis of computation of anticipated twenty-five (25) year frequency storms for maximum periods of intensity for the entire drainage basin which the subdivision serves and shall be made in accordance with the approved improvement plan. Drainage structures and ditches shall be of a size and nature to provide sufficient ⊥656 open areas ⊥ to carry the calculated storm water from such drainage areas as based on standard engineering principles. Where free fall of water occurs, then satisfactory means shall be provided to prevent erosion of soil. Culverts shall have concrete head walls and wing walls where conditions require. Standard drop inlet catch basins shall be constructed, in accordance with Table 2."

The court, having made findings of fact which conform with the stipulation, concluded that plaintiff warranted that the plans and specifications were adequate to provide satisfactory drainage facilities for the subdivision, that plaintiff is statutorily obligated to improve the subdivision in accordance with standards contained in Marin County Ordinance No. 640, and that plaintiff is obliged to do the remedial work.

Appellant claims that these conclusions are wrong, and that appellant's warranty was merely to perform in a workmanlike manner the work designated in Aitken's plan, and that plaintiff's statutory liability was discharged by complying with an approved plan.

Appellant also contends that even if otherwise there would be liability, plaintiff is relieved by mutual mistake, and that there should be a partial rescission which, while allowing all the rest of the contract to remain, would relieve appellant of responsibility to construct the drains in accordance with the ordinance.

Although the questions of warranty and of obligation arising from the ordinance are discussed separately in the briefs, they are considered together in this opinion, because fundamentally appellant's position is the same, namely, that what appellant was obliged to do was no more than to construct in a workmanlike manner what was required in the approved plan, and that the ordinance, as well as the contract, required no more.

We accept the construction placed upon the contract that it requires compliance with the ordinance over and above compliance with the approved plan, and we accept the court's construction that the ordinance requires drainage structures which are in fact of a size sufficient to carry storm water (calculated at twenty-five year maximum intensity) from the drainage area, based on standard engineering principles.

[1] Our reasoning is this: Where reference is made to the ordinance in paragraph one of the contract, the obligation on the contractor is to construct in accordance with Aitken's plans and specifications, but the contract goes on to say that the work is also to be done in accordance with Marin County ⊥657 Ordinance No. 640. If the doing of the work according to Aitken's plan constituted doing it in compliance with the ordinance, there would be no need of the statement that it must also be done in accordance with the ordinance. The ordinance goes farther and states that, under standard engineering practices, the capacity of a pipe designed to take water from a given inlet is to be based upon three criteria, namely, size of the tributary area, rainfall intensity over the tributary area, in the maximum amount that would probably occur once in twenty-five years, and coefficient of runoff. It is true that the contract specifically requires the work to be done in accordance with the plan, as well as with the ordinance, but the two requirements may be construed together by regarding the contract as imposing on the subdivider the responsibility of complying with the Aitken plan, even if it were to go beyond the demands of the ordinance, and complying with it by doing in a workmanlike

way what is required in the plan, but also of complying with the ordinance even if the Aitken plan falls short of the demands of the ordinance. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. (Civ.Code, § 1641; Hoagland v. City of Los Angeles, 103 Cal.App.2d 499, 229 P.2d 823.)

[2, 3] Effect must be given to writings incorporated by reference (Oberg v. City of Los Angeles, 132 Cal.App.2d 151, 159, 281 P.2d 591), and the Marin County Ordinance is expressly incorporated into the agreement of April 10, 1956.

[4] Where the contract is ambiguous, if, as in this case, it does not appear which party caused the uncertainty to exist, it is presumed in the case of a contract between a private party and a public body, to have been caused by the private party. (Civ. Code, § 1654; Oberg v. City of Los Angeles, supra, p. 158, 281 P.2d 591.)

[5] Applying the above rules of construction, we regard the contract as incorporating a warranty that the work would be done according to the criteria set forth in the ordinance. The case thus is distinguishable from Bancroft v. San Francisco Tool Co., 120 Cal. 228, 52 P. 496, cited by appellant, wherein the contractor had done no more than agree to perform in a workmanlike manner the construction of elevators according to submitted plans and specifications, and had made no warranty as to sufficiency of the plan or design; and from United States v. Spearin, 248 U.S. 132, 39 S. Ct. 59, 63 L.Ed. 166, ⊥658 in which the contractor had agreed to build a dry dock according to plans furnished by the government.

It is argued by appellant that the standards set forth in the ordinance are simply a guide for the subdivider's engineer, and that when the improvement plan is approved, the subdivider's sole duty is to comply with the plans and specifications. The ordinance does not state, however, that approval of the plan supplants the standards contained in section 3.2(e) of the ordinance, namely, drainage for storms of anticipated maximum intensity in a twenty-five year period for the entire drainage basin, the system to be based on standard engineering principles. These standards were not met, particularly with regard to the drainage basin, which actually was three times the size of that which was mapped.

Appellant further argues that the duty imposed upon the county road commissioner by section 3.3 of the ordinance must be made meaningful by holding that even if there is error in the plan as submitted to him, he must correct it; and if he does not, his approval of the plan determines the standards to be those contained in it. The ordinance does not say this.

The case of Hagginwood Sanitary Dist. v. Downer Corp., 179 Cal.App.2d 756, 3 Cal. Rptr. 873, cited by appellant, is distinguishable The rule cited in that case (at p. 760, 3 Cal.Rptr at p. 876) is that "the decision of an engineer or superintendent approving or disapproving the work as performed under a contract is in the absence of fraud, bad faith or mistake conclusive and binding on the parties where the contract either expressly provides that it shall be final and conclusive or in plain language shows that it was the intention of the parties that the person to whom the question is submitted shall be the final arbiter of it," but in this case there is no such express provision nor is there plain language showing that the engineer is to be the final arbiter of the sufficiency of the plans.

The ordinance imposes certain duties of inspection on the road commissioner, and requires him to approve or disapprove the plan within ten days after he has received it. We do not regard these provisions of the law as exonerating appellant upon the road commissioner's approval of the plan. To hold that it does so would nullify the requirements of the ordinance which, apart from its effect ex proprio vigore, is incorporated into the contract.

Appellant's point on mistake, and partial rescission, is without merit. As we have interpreted the contract, under the rules ⊥659 of construction given above, appellant warranted an adequacy of the plans, and the very purpose of that warranty was to guard against mistakes and miscalculations contained in these plans.

Judgment affirmed.

DRAPER, P. J., and SALSMAN, J., concur.

208 Cal.App.2d 410

⌊410 ⌊**The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Amos Moody GREEN, Defendant and Appellant.

Cr. 8063.

District Court of Appeal, Second District, Division 1, California.

Oct. 11, 1962.

Hearing Denied Dec. 10, 1962.

The defendant was convicted of armed robbery. The Superior Court of Los Angeles County, Clement D. Nye, J., rendered a judgment and an order denying a motion for new trial, and the defendant appealed. The District Court of Appeal, Lillie, J., held that adjudication of contempt of counsel of defendant for tardiness in presence of jury was not prejudicial error.

Judgment and order affirmed.

1. Criminal Law 🔑1141(1)

In prosecution for robbery committed on April 4, defendant's arrest April 14 would be presumed to have been for such crime, negativing claim that admission of evidence of arrest for another offense was error, where there was no showing that he was arrested on April 14 on any charge other than robbery. West's Ann.Pen.Code, § 211.

2. Criminal Law 🔑1141(1)

Error will not be presumed on appeal.

3. Witnesses 🔑374(1)

It is proper for prosecution to introduce evidence as to bias or prejudice of defense witness, his connection with defendant, and nature, length of time, and place of association of witness with defendant, even though such evidence may disclose prior arrest or jail sentence.

4. Criminal Law 🔑1169(2)

Admission of testimony of police officer in robbery prosecution that prospective defense witness was arrested when defendant was arrested was not prejudicial error, in view of subsequent lengthy defense testimony of defense witness relative to his presence in automobile of defendant at time of arrest, possession and intended use of guns by witness, and his activities sometime prior to arrest, and defense counsel's redirect examination of defense witness relative to his arrest.

5. Witnesses 🔑349

It was not error for prosecution to cross-examine companions of defendant in prosecution for robbery committed on April 4 concerning events immediately prior to arrest of defendant on April 14, over objection that prosecution was attempting to show that defendant and companions were contemplating robbery on April 14, where cross-examination did not show anything from which it could be inferred that they intended to commit another robbery or tried to do so. West's Ann.Pen.Code, § 211.

6. Criminal Law 🔑1168(2)

It was not prejudicial error for prosecution to have revolver, which was found in automobile of defendant along with guns identified as having been used in robbery, but which was not used in robbery, marked for identification, where the revolver was not marked for identification until after defense offered evidence concerning guns and revolver found in automobile, and revolver was neither offered nor received in evidence.

7. Criminal Law 🔑1166½(12)

Adjudication of contempt of defendant's counsel for tardiness in presence of jury was not prejudicial error.

8. Criminal Law 🔑1169(1)

It was not prejudicial error to admit in evidence in robbery prosecution receipt, which was found in automobile driven by defendant at time of arrest, and showing that tire was purchased in area of robbery on date of robbery, where defendant had denied to arresting officer that he or automobile, to which only he and his girl friend had access, had been in area of robbery, and defendant never explained, either to officers or to jury, how receipt came into his possession. West's Ann.Pen.Code, § 211.

Harold J. Ackerman, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

⊥411 ⊥LILLIE, Justice.

Green and one Rowe were accused of armed robbery in violation of section 211, Penal Code; Green was also charged with three prior felony convictions, which he admitted. Defendants were tried before a jury and found guilty. From the judgment of conviction and order denying a motion for new trial only Green appeals.

⊥412 ⊥While appellant does not question the sufficiency of the evidence to support the jury's verdict, the following resumé reveals the nature of the offense and the clear showing of Green's identity as a perpetrator of the robbery. On April 4, 1961, around 7:30 a. m. Green and codefendant Rowe entered the Esquire Cafe in Bell Gardens, sat at the bar and ordered beer; there were 8 or 9 other customers in the cafe who left around 8 a. m. Shortly thereafter, the bartender reached behind him for a cigarette and as he turned around he faced two guns pointed at him by defendants; Green held a .44 caliber magnum revolver (Ex. 1), and Rowe, a .38 caliber revolver (Ex. 2). (These weapons were later found in a car Green was driving when arrested.) Green walked behind the bar and emptied the drawers of the cash register, then ordered the bartender to open the safe. From it Green took a bag of money. After taking $10 or $20 from the bartender, defendants ordered him and a customer, who had entered the bar in the meantime, into the restroom.

Ten days later, on April 14, Green was arrested while driving a car in San Jose. With him were Rowe and two other men, Toney and Thomaston. In the car were a .44 magnum revolver, fully loaded, (concealed on the floorboards in the rear) a .38 caliber revolver (under a rag on the floor near the throttle in front), and a tan suede jacket. Green told officers either he or his girl had access to the car at all times and neither he nor the car had been in Los Angeles County in 1961; and without being advised of the date of the Esquire Cafe robbery (April 4), he proceeded to provide an alibi for April 4.

Positive identification of Green and Rowe was made by the bartender, and Roweberry and Teer, two customers who observed them in the bar prior to the robbery. The bartender noticed their profile, the color of their hair and the way it was combed, and their clothing and jewelry; upon their arrest, he identified Green in a line-up; he also identified the tan suede jacket as that worn by Green, the .44 magnum revolver as similar to that held by Green during the robbery, and the .38 caliber revolver as similar to that used by Rowe. Roweberry and Teer, seated at the bar in the Esquire Cafe, identified Green and Rowe as being there just prior to the robbery.

Green offered an alibi defense. Numerous witnesses, including a bar owner, bartender, several employees, various customers, Green's wife and one Toney, placed Green in a bar in Winterhaven, California, from 7:30 to 8 a. m. on April 4. Green did not take the witness stand.

⊥413 ⊥A Mr. Thomaston, who was arrested on April 14 in the car with Green, Rowe and Toney, testified that the 3 pistols found in the car were his (Toney testified the .38 (Ex. 2) belonged to him) and that on April 4 he was in Santa Cruz. On Green's motion for new trial Thomaston testified that he had committed perjury at the trial and that he and Rowe really committed the robbery and Green was not involved. Green then took the stand for the first time and denied his participation.

Appellant likens his case to People v. Quinn, 111 Cal.App. 614, 295 P. 1042. Therein the identification testimony of two witnesses was weak, and a third person confessed to the robbery; however, defendant's unusual alibi is the element that distinguishes the Quinn case from the one at bar—at the time of the commission of the offense defendant was confined in an honor jail. The court said that the time factor and circumstances relating to the security of the facility were such that it would have been next to impossible for defendant to have escaped from the jail, made the necessary preparations to commit the crime, gone to Pasadena, committed the robbery there, returned to the jail and taken his place as a prisoner, all without the knowledge of the guards. It was only these "remarkable facts" that prompted a reversal: "Such an *extraordinary situation* as regards the evidence in a criminal action should demand a corresponding attention by a reviewing court to the reasons assigned by the appellants for a reversal of the judgment against them." (Emphasis added.) (People v. Quinn, 111 Cal.App. 614, 617, 295 P. 1042, 1043.) We have quite a different situation here—positive identification of Green, his wearing apparel and the guns used, and no facts presented in his defense "that one may realize the possibility, if not the probability, that an injustice to the defendant(s) may have resulted from the judgment of the court." (p. 616, 295 P. p. 1042.) No unique or remarkable circumstances here exist; this is the all too common case of alibi witnesses the jury did not choose to believe, and on a motion for new trial, a confession by one the trial judge did not consider credible.

[1,2] Appellant contends first that the trial court erred in admitting evidence of Green's arrest on April 14; that "the fact of defendant's arrest was immaterial and prejudicial." (A.O.B., p. 16.) His claim that he was not arrested for the crime charged herein and that the admission of evidence of his arrest for another offense was error is without merit, for⊥ ⊥414 there is nothing in the record to show that he was arrested on April 14 on any charge other than the one on which he was convicted. This situation bears no similarity to People v. Vidal, 121 Cal. 221, 53 P. 558, relied on by appellant, wherein defendant was being sought for arrest upon another separate and distinct charge and, in fact, was arrested upon it and not for the one upon which he was convicted. Green was arrested with Rowe and several others in an automobile in San Jose by a Santa Clara Deputy Sheriff on April 14, 10 days after the commission of the within robbery. Nothing in the evidence, including testimony of both prosecution and defense witnesses, discloses the offense or reason for which he was arrested. In the absence of such showing it must be presumed that the charge for which Green was placed under arrest was the one at bar. "It is settled, however, that error will not be presumed on appeal, (citations), and in the absence of evidence to the contrary it must also be presumed that the officers regularly and lawfully performed their duties. (Citations.)" (People v. Farrara, 46 Cal.2d 265, 268–269, 294 P.2d 21, 23.) See also People v. Stice, 165 Cal.App.2d 287, 331 P.2d 468. We find neither error nor prejudice in the admission of evidence of the fact of Green's arrest.

Appellant claims that it was error to inquire of the arresting officer whether Mr. Toney was one of those arrested with defendant in San Jose; that the purpose of the question was to discredit and impune his character. Toney was one of four passengers in the car Green was driving when he was arrested. Deputy Ohlsen thereafter had conversations with Green who insisted he had not been in Los Angeles County in 1961; on cross examination Ohlsen was asked if Green told him that on April 3 he was registered in a hotel in Yuma with Toney; he could recall no such statement but did recall that Green said he left Winterhaven, California, with Toney on April 4. Ohlsen said he also talked to Toney at that time, but an objection precluded testimony concerning what was said. On redirect examination Ohlsen was then asked: "This Mr. Tony [*sic*] was one of the 4 people arrested with defendant in San Jose?"; he then answered, "Yes sir." Neither objection nor motion to strike was made by Green.

Later Green called Toney as a defense witness. He testified that the .38 caliber revolver (Ex. 2) found in Green's car belonged to him and that he was with Green in Winterhaven on April 4; he also testified extensively concerning the trip ⊥415 from Salinas to Winterhaven and back between April 1 and 5. Further reference to Toney's arrest on April 14 was not objected to and Toney on both *direct* and cross examination gave detailed and lengthy testimony relative to the events leading up to the arrest; in fact, on *redirect* examination of Toney, defense counsel specifically established the fact of his arrest and the date, fully exploring the subject.

[3, 4] It is true, as urged by respondent, that it is proper to present to the trier of fact, on the issue of his bias or prejudice, a defense witness's connection with the accused and his association with him—its nature, length of time and place—even though such testimony might disclose a prior arrest or jail sentence. (People v. Buzzell, 15 Cal.2d 654, 104 P.2d 503.) However, such matters are generally raised on cross examination of the witness, at least, after he has testified. "Such cross-examination was relevant to the interest and credibility of the witness and was not rendered improper merely because an answer required disclosure of their prior association in prison." (People v. Buzzell, 15 Cal.2d 654, 660, 104 P.2d 503.) But the question relative to Toney's arrest was asked and answered on the People's case, long before Toney ever testified for defendant. While it appears that the purpose of the question was then not to discredit Toney or impune his character but to complete the circumstances and events surrounding the arrest of Green and his statement to Ohlsen, a better question might have been, "Was Toney present when Green was arrested?" However, in view of Toney's subsequent lengthy defense testimony relative to his presence in Green's car at the time of his arrest, his possession and intended use of the guns, and his activities sometime prior to his apprehension; and defense counsel's redirect examination of Toney relative to his arrest and the date and circumstances thereof, we find no basis for prejudice. We do not here have the unusual circumstances or close case found in People v. Quinn, 111 Cal.App. 614, 295 P. 1042, and what might have been prejudicial there is certainly not here.

[5] Appellant claims that the cross examination of codefendant Rowe and Toney concerning events immediately prior to Green's arrest on April 14, show an "attempt by district attorney to show defendants were contemplating a robbery of a market on April 14." (A.O.B., p. 18.) The cross examination of Rowe and Toney shows nothing of the kind; at most it reveals that they went from a bar to the market to get some beer and that Toney went in and bought a 6 pack of beer, ⊥416 Rowe bought a quart of chocolate milk and Green went in to look for them; and that thereafter, they pulled up around the corner to open the beer but decided against it and drove on. There is a complete absence of anything in the record from which it could be inferred that they intended to, or tried to commit another robbery or even went into the market for such purpose.

The evidence simply does not support appellant's claim of error.

He also complains that reference to other weapons, not connected with the crime, found in Green's car at the time of his arrest was error; he refers specifically to exhibit 9 for identification, a .22 caliber revolver; a shotgun was also mentioned. Neither gun was used in the robbery. What evidence concerning these firearms was received was offered by the defense; if error was committed in this regard defendant was responsible for it.

[6] Three guns were found in Green's automobile when he was arrested; two of them, a loaded .44 magnum revolver and a .38 caliber revolver, were identified by the bartender as similar to those used by Green and Rowe in the robbery. The People relying upon these weapons accordingly offered them as exhibits 1 and 2 respectively. The prosecution offered no evidence relative to the other guns; thus we do not find People v. Richardson, 74 Cal.App.2d 528, 169 P.2d 44, and other similar cases in point. All evidence concerning the guns not used in the robbery but found in Green's car was offered by the defense through extensive direct examination of Toney and Thomaston. The examination of these witnesses by defense counsel relative to the guns, how many there were, who owned them, and what they intended to do with them was an obvious attempt to confuse the ownership of the guns and minimize the identification of the two firearms (Exs. 1 and 2) as similar to those used in the robbery. Lengthy testimony ensued with Thomaston claiming there were three hand guns in the car all belonging to him, and that Ex. 2 (.38 caliber revolver) was not in the vehicle; and with Toney claiming, at variance, that *he* owned Ex. 2 which *was* in the car with a shotgun owned by Green. Whatever the true facts, it is clear that it was the defendant, not the People, who created the situation about which he now complains; and it was only after the defense offered evidence relative to the other guns found in the automobile and in particular, to the .22, that the People on cross examination of Toney had the .22 caliber ⌊417 revolver marked as Ex. 9 for identification. It was neither offered nor received in evidence. The defense having offered and relied upon the evidence in question, we find no error and certainly no prejudice.

[7] The fifth alleged error, and which appellant claims caused an unfavorable atmosphere to exist at the trial, was the adjudication of contempt of Green's counsel in the presence of the jury. The record reveals a shameless course of careless conduct toward the trial court's orders throughout the trial, until the judge finally could do nothing but find counsel in contempt in order to ensure his timely presence in court. This he did with decorum, reserve and complete propriety and in such a way that it alone could not possibly have caused prejudice to the defendant. After the noon recess on the first day of trial appellant's counsel was 15 minutes late; after the afternoon recess, he was again late 15 minutes. The court admonished him by saying, "One of the prime requisites in this department is promptness, is getting here on time and attending to your business with dispatch and that is what we will expect of you during the course of this trial." The next day counsel was tardy again and on September 1, after the noon recess he again failed to appear when court reconvened. The trial judge called this to counsel's attention when he finally came in; he said: "It isn't necessary for the court to go any further in the matter. I think you have been sufficiently warned in the matter and the court cites you for contempt at this time. We will take up the matter of punishment for this contempt after the disposal of this case. That is all." The mere citing of counsel for contempt in the presence of the jury is not prejudicial (People v. Beitzel, 207 Cal. 73, 276 P. 1006), and we see nothing about the surrounding circumstances or the manner in which the court adjudged him guilty to create any prejudice in the mind of the jury. This was

not a doubtful case as claimed by appellant; and whatever prejudice may have existed was created by counsel's own course of conduct long before the court found it necessary to take action. No complaint of misconduct of the court was made by defendant at the time, and we find none in the record before us.

[8] Appellant's final claim of error relates to the admission of exhibit 7, a receipt from a service station in Covina dated April 4, 1961, the date of the robbery. He complains that it constituted hearsay and was a most damaging piece of evidence for it purported to show that he lied to the arresting officer about not being in Los Angeles County in 1961. In the ⊥418 glove compartment of the car which Green was driving when arrested in San Jose, deputies found a receipt dated 4–4–61 from a Flying A service station in Covina for the sale of a tire. It bears the same number as the automobile license of Green's car. It was offered by the People as exhibit 7. Green had denied to the arresting officer that he or the car, to which only he and his girl friend had access, had been in Los Angeles County in 1961. Green never explained, either to the officers or to the jury, how this receipt came into his possession. The receipt was not offered for the purpose of proving the truth of what it contained—that Green in fact bought a tire from a Flying A station in Covina April 4, 1961, but for a limited purpose—to show a circumstance from which it could be inferred, contrary to Green's statement to the officers, that the car had been in the Los Angeles area in April, 1961. Further, the positive identification of Green, the gun he used and the clothing he wore, and other circumstances of his association with Rowe, possession of the gun and the manner of his statement to the deputies, reflect clear-cut evidence of his participation in the robbery; we find nothing to support his claim of prejudice.

For the foregoing reasons the judgment and order are affirmed.

WOOD, P. J., and FOURT, J., concur.

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208 Cal.App.2d 620

⊥620 **The PEOPLE, Plaintiff and Respondent,**

v.

Nash Armenta JARAMILLO, Defendant and Appellant.

Cr. 8115.

District Court of Appeal, Second District, Division 3, California.

Oct. 17, 1962.

As Modified Nov. 15, 1962.

Defendant was convicted in the Superior Court, Ventura County, Louis C. Drapeau, J., of burglary and grand larceny, and he appealed. The District Court of Appeal, Files, J., held that justice required that judgment of conviction be vacated with directions to hear and determine defendant's motion for new trial where a colloquy between defendant and the court indicated a mutual intention that motion for new trial would be prepared, made, and ruled upon in a week, and through inadvertence court failed to vacate oral judgment prior to its entry by clerk, and at time motion was brought on for hearing court had no authority to rule thereon.

Judgment vacated and action remanded with directions.

1. Burglary 🔑41(1)
Larceny 🔑65

Evidence was sufficient to sustain conviction for burglary and grand theft. West's Ann.Pen.Code, §§ 459, 487.

2. Criminal Law 🔑1159(2, 4)

Weight of the evidence and credibility of the witnesses were matters to be determined in the trial court, and verdict of the jury as to such matters was binding on appeal where record contained substantial evidence of guilt.

3. Criminal Law 🔑1186(4)

Error in directing argumentative questions to defense witnesses during cross-examination did not, under the circumstances, result in a miscarriage of justice. West's Ann.Const. art. 6, § 4½.

4. Criminal Law 🔑949(1), 951(1), 954(1)

A motion for new trial must be made orally and before judgment and grounds relied upon must be specified, and the court is not empowered to grant such a motion after judgment. West's Ann.Pen.Code, § 1182.

5. Criminal Law 🔑935(1)

If a motion for new trial is made on ground verdict is contrary to the evidence, it becomes duty of trial judge to determine whether there was sufficient credible evidence to support the verdict, and in performing such function trial judge has a broad discretion and is not bound by conflicts in the evidence.

6. Criminal Law 🔑998

Justice required that judgment of conviction be vacated with directions to hear and determine defendant's motion for new trial where a colloquy between defendant and the court indicated a mutual intention that motion for new trial would be prepared, made, and ruled upon in a week, and through inadvertence court failed to vacate oral judgment prior to its entry by clerk, and at time motion was brought on for hearing court had no authority to rule thereon.

7. Criminal Law 🔑949(1)

Statement that defendant intended to make a motion for new trial in the future, without indication of grounds, was not sufficient to require judicial action.

8. Criminal Law 🔑1134(3)

Question of whether a defendant's constitutional rights were infringed when court allowed defendant to discharge his attorney and substitute himself in propria persona without first ascertaining that waiver of right to counsel was both intelligent and voluntary was moot, where proceedings which occurred after withdrawal of counsel were held on appeal to have had no legal effect.

9. Criminal Law 🔑1209

If all offenses committed by an accused were incident to one objective, defendant, under statute providing that an act or omission may not be punished under more than one provision of the Penal Code, could be punished for any one of such offenses, but not for more than one.

10. Criminal Law 🔑1209

Where a person enters a house to commit theft, and does commit theft, he may be guilty of both burglary and larceny, but he may be punished for only one offense. West's Ann.Pen.Code, § 654.

11. Criminal Law 🔑1177

Judgment wherein defendant was sentenced both for burglary and for grand theft was erroneous, and the two sentences could not stand even though they were made to run concurrently, where they were based on action of defendant in entering a house to commit theft and committing theft therein. West's Ann.Pen.Code § 654.

James O. Warner, Los Angeles, under appointment by the District Court of Appeal, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Woodruff J. Deem, Dist. Atty., Ventura, and E. E. Clabaugh, Jr., Deputy Dist. Atty., for respondent.

⊥FILES, Justice.

⊥622 This is an appeal from a judgment whereby appellant was convicted of burglary and grand larceny. (Pen.⊥Code, §§ 459, ⊥623 487.) The crimes involved four men. One of them, Martinez, pleaded guilty. The other three, Montanez, Baca, and appellant, pleaded not guilty and were tried together before a jury. All three were convicted. This appeal is on behalf of one only.

Sufficiency of the Evidence

The record contains evidence of the following circumstances:

On the morning of May 17, 1961, Mr. and Mrs. Hawley left their home in Moorpark in Ventura County to go to Los Angeles. They returned about 7:30 p. m. to find that their residence had been entered, and a large quantity of clothes, glassware, silverware, liquor and other household items had been taken.

On this same day Baca, Martinez, Montanez and appellant, all of whom lived in

Los Angeles County, drove to the Moorpark area in Baca's black 1957 Ford. The Ford was distinctively marked in that the words "mi negra" were painted on the right side and "mi negro" were painted on the left side. Martinez was appellant's half-brother, and Montanez was appellant's nephew. The four men were supplied with whisky, wine and beer, which they consumed as they drove. They had with them a 22-caliber pistol and a pellet gun. On one occasion they stopped to do some target shooting and hunt rabbits. At about 4:45 or 4:50 p. m. three witnesses saw the Ford parked in the middle of Sand Canyon Road about a mile from the Hawley home. Four "Mexican men" were standing near the car on this occasion. At about 6:20 p. m. two of these witnesses, on their way home from work, saw the same Ford standing in front of the Hawley home. One man was at the wheel then. About 6:30 p. m. these witnesses saw a black 1957 Ford go by, traveling fast, with a man in the back seat who seemed to be sitting on something. One of the witnesses became suspicious and notified Mr. Hawley's son-in-law, William Corley, who lived a quarter of a mile away. Mr. Corley went immediately to the Hawley residence and discovered that the front door was open and that clothes hangers and other articles from the house were spread across the front yard. Mr. Corley had driven past the Hawley home between 5 and 5:15 that day and had observed that the door was closed and no car was parked in front at that time.

Before dark that evening Baca, Martinez, Montanez and appellant arrived in 624 Baca's Ford at the home of appellant's sister, Louisa Hernandez, in Fillmore. (Sundown was at 7:52 p. m.) Appellant was driving. The things taken from the Hawley home were stacked high in the back seat. They stayed about half an hour. Martinez took a clock and a wine glass from the car and gave them to Louisa Hernandez' daughter Rosie. These were articles taken from the Hawley home.

One of the men became involved in a fight with a neighbor boy. Baca waved the pistol and someone called the police. This was a few minutes after 8:30. Before the police arrived the four men left in the Ford, with appellant driving. Thereafter Montanez and appellant separated from the other two. Shortly after 9 p. m. Baca and Martinez drove the Ford into a sheriff's roadblock in Fillmore and were captured. The goods taken from the Hawley home were recovered from the back seat and identified. A fingerprint examination disclosed that appellant's prints were on a tray, a broken wine glass, and an unopened bottle of whisky, all of which were identified as articles taken from the Hawley home. The tray was found about halfway down in the pile of clothing in the rear seat. The glass was found close to the floor level back of the front seat.

The People put into evidence a tape recording of a statement made by appellant shortly after his arrest. In that statement appellant admitted that during the afternoon he had been with the other three in Baca's Ford. He said that when they stopped to hunt rabbits, he and Baca had wandered off from the other two. When they returned to the road they found that Martinez and Montanez had taken the car. When the latter two returned, the car was loaded with the articles taken from the Hawley home. Martinez and Montanez had said that the articles belonged to Louisa Hernandez, and that she had asked them to transport the goods to Los Angeles.

Appellant did not testify at the trial. Neither did Montanez.

Martinez, who had pleaded guilty, testified that he and Montanez had committed the burglary while Baca and appellant were hunting. Baca also testified to the hunting alibi. The testimony of Martinez and Baca was impeached in several important respects, both by their own prior statements and by the testimony of other witnesses.

Under the evidence here, where appellant was in company with the burglars just before the crime, and was with the group immediately afterwards, in fact driving the ⊥625 car which carried the loot, and where his fingerprints were found on stolen articles buried in the back seat, the evidence is sufficient to support the inference that appellant was a participant in the burglary and the larceny. The jury certainly was not required to believe the discredited testimony of the defendant Baca, who was trying to exculpate himself, nor the testimony of appellant's brother, Martinez, who had pleaded guilty and had little to lose by trying to save appellant.

[1, 2] Since the record contains substantial evidence of guilt, the weight of the evidence and the credibility of the witnesses were matters to be determined in the trial court, and the verdict of the jury as to such matters is binding on this appellate court. (See People v. Daugherty, 40 Cal.2d 876, 885, 256 P.2d 911.)

Misconduct by the District Attorney

[3] Appellant complains of the tactics of the district attorney in cross-examining the defense witnesses. Some of the questions were argumentative and should not have been tolerated. No objection was made at the trial and no admonition to the jury was requested. This court cannot say, from a reading of the record, that the error complained of has resulted in a miscarriage of justice. (Cal.Const. art. VI, § 4½.)

The Motion for New Trial

On August 29, 1961, appellant was arraigned for sentence. He was in court with the attorney who had represented him at the trial, Mr Boyes. No motion for a new trial had been made. After the court asked whether there was any legal cause why judgment should not be pronounced, the record is as follows: "MR. BOYES: No legal cause, your Honor. THE COURT: There is none. If there were, I would give you the benefit of it. It is the judgment of this Court that you be committed to the Adult Authority of the State of California to serve the sentence prescribed by law for both of these offenses, that the sentences and each of them run concurrently and not consecutively. It is the judgment and sentence of this Court that you be delivered to the Director of Corrections at Chino, California, that you serve the sentence prescribed by law. I hope you will do your time easily. DEFENDANT JARAMILLO: Your Honor, if there is any possible way I can make a motion for a new trial? THE COURT: Sure, you can make a motion. You have got an absolute right to make a ⊥626 motion. It must be in writing and you make one out before they send you and file it here and that will lay the foundation for an appeal."

Counsel for appellant requested a stay of execution for a week so that appellant might prepare a motion for a new trial and an appeal. The court explained that this week's delay would be "dead time," but appellant said that wouldn't make any difference to him. The stay of execution for one week was granted.

On September 6, 1961, a six-page handwritten motion for new trial, with citation of authorities, signed by appellant, was filed with the clerk. On September 7 appellant again appeared in court with his counsel, Mr. Boyes. Counsel handed to the court a formal substitution of attorneys, signed by appellant, substituting himself *in propria persona*. The court inquired of appellant if this was his wish, and appellant answered, "Yes." Then the following occurred: "THE COURT: And you presently have a motion for new trial. Do you want to argue it? DEFENDANT JARAMILLO: Well, I don't know. I am not guilty of what I am charged with that I was found guilty—THE COURT: Well, on the motion for new trial: I heard the testimony and I know all about it. I have no authority to grant the motion for new trial. That is simply one of the proceedings in perfecting your appeal. So the motion for a new trial is denied."

[4] Penal Code, section 1182, provides that the application for a new trial must be made before judgment. The motion must be made orally. The grounds relied upon must be specified. Otherwise the

right to make the motion is waived. (People v. Dillard, 168 Cal.App.2d 158, 167, 335 P.2d 702; People v. Skoff, 131 Cal.App. 235, 239, 21 P.2d 118; People v. Fry, 137 Cal.App. 525, 529, 31 P.2d 204.) The code does not empower the court to grant a motion for new trial after judgment. (See People v. Fry, 137 Cal.App. at 530, 31 P.2d at 206.)

[5] The motion for a new trial may be an important safeguard to a defendant in a case involving a conflict in the evidence. Where the motion is made on the ground that the verdict is contrary to the evidence (Pen.Code, § 1181, subd. 6), it becomes the duty of the trial judge to determine whether, in his opinion, there is sufficient credible evidence to support the verdict. In performing this function the trial judge (unlike an appellate court) has a broad discretion and is not bound by conflicts in the evidence. (See People v. Robarge, 27 ⊥41 Cal.2d 628, 633, 262 P.2d 14.) Thus in waiving the right to make a motion for a new trial, a defendant passes up an opportunity for a kind of review which cannot be obtained at any other stage of the proceedings, in either the trial or appellate courts.

In this case it appears that, at the time sentence was pronounced, appellant expressed his desire to make a motion for a new trial and the judge expressed willingness to give him a week's time within which to prepare. The fact that judgment had been pronounced orally was not a bar because the judgment would not be effective until entered by the clerk. Thus when appellant spoke up promptly, as he did, the trial court could have vacated the judgment prior to its entry. (People v. McAllister, 15 Cal.2d 519, 102 P.2d 1072.) The trial court's failure to take that step was apparently an inadvertence, for the colloquy between appellant and the court on August 29 indicates a mutual intention that the motion would be prepared, made, and ruled upon a week hence.

[6] When appellant came back into court on September 7 with his motion prepared, it was too late because the judgment had been entered. The court was then obliged to inform appellant that "I have no authority." It appears that appellant has been deprived of a substantial right because of the inadvertent failure of the trial court to vacate the judgment prior to entry, so as to keep alive his power to rule upon the motion which he apparently intended to hear upon its merits. Justice requires that the judgment be vacated with directions to hear and determine the motion for a new trial. (See People v. Robarge, 41 Cal.2d 628, 635, 262 P.2d 14.)

Appellant has argued that he is entitled to a new trial under Penal Code, section 1202, which (prior to the 1961 amendment) read: "If the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion within the time fixed for pronouncing judgment, or within the time to which the same is continued under the provisions of section 1191 of this code then the defendant shall be entitled to a new trial."

[7] This section does not apply here. Appellant was regularly sentenced on August 29, 1961. No motion for new trial was made or pending on that day, either before or after the pronouncement of sentence. A statement that a party intends to make a motion in the future, but without indicating any⊥grounds, is not sufficient to require 628 judicial action. (People v. Dillard, 168 Cal.App.2d 158, 167, 335 P.2d 702.) The record is clear that on August 29 neither appellant nor his counsel was prepared to make the motion. Under the authorities cited above, the right to make the motion was waived when counsel stated that no legal cause existed, and the court thereupon pronounced sentence. The court committed no error in this respect. It was afterwards—when the trial court expressed willingness to relieve appellant of this waiver, but failed to take the procedural step which was indispensable to make such relief effective—that an error occurred which entitles appellant to relief in this court.

Withdrawal of Counsel

[8] Appellant argues that his constitutional rights were infringed on September 7, 1961, when the court allowed him to discharge his attorney and substitute himself *in propria persona* without first ascertaining that the waiver of the right to counsel was both intelligent and voluntary. The point is moot because it now appears that the proceedings which occurred in the trial court after the withdrawal of counsel had no legal effect. The record shows that the trial judge was most careful to see that appellant's right to appeal was preserved. The court ascertained that a notice of appeal had been prepared by the withdrawing attorney, and that the notice was filed before the appellant left the courtroom on September 7.

We assume that when further proceedings occur in the superior court after remand, that court, mindful of In re Turrieta, 54 Cal.2d 816, 8 Cal.Rptr. 737, 356 P.2d 681, will see that appellant is then represented by counsel unless there is a voluntary and intelligent waiver at that time.

Double Punishment

[9] Penal Code, section 654, provides that "an act or omission" may not be punished under more than one provision of the code. As this section was construed by the Supreme Court in Neal v. State of California, 55 Cal.2d 11, 19, 9 Cal.Rptr. 607, 612, 357 P.2d 839, 844: "If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."

[10, 11] Where a person enters a house to commit theft, and does commit theft, he may be guilty of both burglary and larceny, but under the "one objective" test he may be punished for only one offense. The judgment here is erroneous ⊥629 in that appellant was sentenced both for burglary and for grand theft. (People v. Collins, 203 A.C.A. 684, 21 Cal.Rptr. 783; People v. Dykes, 198 Cal.App.2d 75, 81, 17 Cal.Rptr. 564.) The two sentences cannot stand even though they are made to run concurrently. (People v. Kehoe, 33 Cal.2d 711, 716, 204 P.2d 321, People v. Branch, 119 Cal.App.2d 490, 496, 260 P.2d 27.)

The judgment is vacated and the action is remanded to the superior court with directions to hear and determine appellant's motion for a new trial, and, if such motion be denied, to pronounce such judgment as is proper.

SHINN, P. J., and FORD, J., concur.

208 Cal.App.2d 267

⊥267 **M & M HOUSE MOVING COMPANY, Plaintiff and Respondent,**

v.

S. Roger JANIS, Defendant and Appellant.

Civ. 25797.

District Court of Appeal, Second District, Division 3, California.

Oct. 8, 1962.

Action to recover amounts allegedly due to plaintiff as the result of ten transactions involving moving of buildings for defendants. The Superior Court of Los Angeles County, Benjamin Landis, J., rendered a judgment for plaintiff and a defendant appealed. The District Court of Appeal, Ford, J., held, inter alia, that absent any denial in answer of allegations of complaint that plaintiff was corporation and that, at all times mentioned in complaint, it was contractor engaged in business for which recovery was sought, it could not be urged on appeal that it was erroneous to allow recovery by plaintiff as services were actually rendered by partnership which preceded it, but that recovery could not be allowed for one item.

Judgment modified and affirmed.

1. Appeal and Error 🔑110

Order denying new trial is not appealable.

2. Appeal and Error 🔑173(5)

Absent any denial in answer of allegations of complaint that plaintiff was corporation and that, at all times mentioned in complaint, it was contractor engaged in business for which recovery was sought, it could not be urged on appeal that it was erroneous to allow recovery by plaintiff as services were actually rendered by partnership which preceded it.

3. Joint Adventures 🔑5(2)

Plaintiff was not required to plead existence of joint venture between defendants from whom recovery was sought to recover on basis of finding of existence of joint venture.

4. Appeal and Error 🔑882(8)

A defendant was not in a position to claim prejudice from reception of evidence relating to joint venture between such defendant and another defendant where pretrial statements stated that plaintiff contended defendants were engaged in joint venture.

5. Principal and Agent 🔑123(1)

Evidence authorized determination that one defendant was authorized to incur obligations in connection with plaintiff's moving of buildings on behalf of other defendant while he was away, for which such other defendant agreed to be responsible.

6. Frauds, Statute of 🔑17

Oral undertaking to guarantee payment by another was of no legal effect because of statute of frauds.

7. Frauds, Statute of 🔑158(4)

Evidence warranted finding that promise of one defendant to guarantee that plaintiff house moving company would be paid for time which would elapse while plaintiff's men were waiting for underpinning to be completed at new location before moving house for defendants was original and not collateral in nature. West's Ann.Civ.Code, § 1624(2); West's Ann.Code Civ.Proc. § 1973(2).

8. Appeal and Error 🔑991

Whether reference on check that "by endorsement this check when paid is accepted in full payment of the following account" embraced all items for which charge was made by plaintiff in connection with moving houses was for trial court.

9. Evidence 🔑408(1)

Receipt stating that payment had been made in full could be explained by parol evidence showing purpose for which it was given.

◆

Gordon Stater, Santa Monica, for appellant.

Alden F. Houck and Alfred J. Borstein, Los Angeles, for respondent.

⊥FORD, Justice. ⊥269

[1] The plaintiff, a corporation, brought an action against the defendants Janis and Zeff to recover amounts alleged to be due to the plaintiff as the result of ten transactions involving the moving of buildings. The trial court rendered judgment against both defendants and the defendant Janis has appealed therefrom.[1]

[2] The first contention made is that the evidence showed that the obligation, if any, was owed not to the plaintiff corporation but to a partnership which preceded it. The only basis for such assertion is the following testimony of Mr. Mitchell: "Q. Now, in 1958, what was your position with ⊥M & M House Moving Company? A. ⊥270 1958 I was—well, I was just partnership owner. Q. Well, now, '58 would be only two years ago. Was it a corporation or a partnership? A. If I recall, it's just a partnership at that time. Q. And you were a partner in the company? A. That's correct." Aside from the fact that Mr. Mitchell's statement was obviously not made with certainty, there is no merit to the point because there was no denial in the defend-

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[1] In the notice of appeal it is stated that the appeal is also from the order denying the defendant Janis' motion for a new trial. But that order is not appealable. (Rodriguez v. Barnett, 52 Cal.2d 154, 156, 338 P.2d 907.)

ant Janis' answer of the allegations of the complaint that the plaintiff was a corporation and that at all times mentioned in the complaint it was a contractor engaged in the business of moving buildings and was licensed as such contractor by the State of California. Consequently, there was no issue raised as to whether the transactions occurred before the corporation began to engage in business and while its predecessor, the partnership, was active. As stated in Fuentes v. Tucker, 31 Cal.2d 1, at page 4, 187 P.2d 752, at page 754: "One of the functions of pleadings is to limit the issues and narrow the proofs. If facts alleged in the complaint are not controverted by the answer, they are not in issue, and no evidence need be offered to prove their existence. [Citations.] Evidence which is not pertinent to the issues raised by the pleadings is immaterial, and it is error to allow the introduction of such evidence. [Citations.]" (See also County of Los Angeles v. Beverley, 126 Cal.App.2d 89, 92, 271 P.2d 965.)

[3, 4] The trial court found as follows: "To the extent that defendant Ray Zeff ordered, directed or controlled said moving services, he acted as agent for defendant S. Roger Janis and in a joint venture in which both of said defendants were engaged." The defendant Janis asserts that since the existence of a joint venture was not pleaded, admission of evidence with respect thereto was error. The contention is devoid of merit. (Hansen v. Burford, 212 Cal. 100, 108–109, 297 P. 908.) Moreover, the defendant Janis is not in a position to claim prejudice since in his pretrial statement he said in part: "Plaintiff contends that the defendant Janis was engaged in a joint venture enterprise with Ray Zeff, and defendant Janis denies that there ever was a joint venture arrangement with Ray Zeff."

[5] The defendant Janis argues that there is insufficient support in the record for the determination made by the trial court as to his liability with respect to the various transactions. As to some of the transactions it is asserted that the defendant Janis could not be liable because he was on a 271 European trip when the obligations were incurred. Overlooked is the testimony of Mr. Mitchell, one of the men in charge of the operations of the plaintiff, that the defendant Janis told him that he was going to Europe and that Ray Zeff would be handling his business. Janis told him, "If you get short of money Ray will have my address and contact me, and I will send you money any time that you get short and need it." Mr. Zeff testified that he had worked as a salesman and was paid a commission of $300 for every building sold by him which was to be moved to a new location. But before Mr. Janis went to Europe, he and Mr. Janis talked about a different arrangement. Part of his testimony was: "A. At that time he suggested when he went to Europe we worked [sic] on a different basis entirely, that I would become manager and could handle the buildings on a 50% of the profit, providing, of course, I took care of the detail work that went along with it." The defendant Janis and Mr. Zeff talked to Mr. Mitchell. As to that conversation Mr. Zeff testified in part as follows: "* * * he [Janis] said that I was the manager and would operate in the handling of all his buildings, in the moving and anything that I said would go, * * * and that Bill Mitchell to go [sic] along with whatever I felt was necessary." The evidence gave substantial support to the determination that Mr. Zeff was authorized to incur obligations in connection with the moving of buildings, while Mr. Janis was away, for which the latter would be responsible. (See Lindner v. Friednash, 160 Cal.App.2d 511, 517, 325 P.2d 612.)

[6] One transaction (designated as item 1) related to extra work after the building involved had reached its new location. A charge of $168 was made. Mr. Zeff testified that he had no discussion with Mr. Mitchell with respect to payment for that work but that the work was requested of the plaintiff by the new owner, Mr. Long. There was evidence that after the work had been done, Mr. Janis said that he would

collect the additional costs that Mr. Long had incurred and that, "in fact, he would guarantee payment on that." This was after Mr. Janis had returned from Europe. But that oral undertaking was of no legal effect because of the statute of frauds. (See Swim v. Juhl, 72 Cal.App. 363, 366, 237 P. 552.) The record fails to disclose a basis for liability on the part of the defendant Janis.

[7] Another transaction (item 2) involved a charge for "waiting time." Mr. Nesbit, the buyer of the structure being 72 ⊥moved, said that he would pay for the extra time which would elapse while the plaintiff's men were waiting for the underpinning to be completed at the new location. Shortly after that conversation, Mr. Mitchell communicated with Mr. Zeff and Mr. Zeff "guaranteed" that the plaintiff would be paid for the waiting time. It was a reasonable inference from the record that the plaintiff's decision to stand by was based on Mr. Zeff's statement. As stated in First Securities Co., Ltd. v. Story, 9 Cal.App.2d 270, at page 273, 49 P.2d 862, at page 863: "The word 'guarantee' does not necessarily import a contract of guaranty, but may import an original obligation or promise. Meyer v. Moore, 72 Cal.App. 367, 237 P. 550. The nature of the obligation, whether primary or secondary, is the determining feature." (See also Yankelewitch v. Beach, 115 Cal.App. 629, 632, 2 P.2d 498; Ackley v. Prime, 99 Cal.App. 534, 540, 278 P. 932; 3 Williston on Contracts (3rd ed. 1960), § 465, p. 405.) The applicable law with respect to whether such a promise is within the statute of frauds (Code Civ.Proc. § 1973(2); Civ.Code, § 1624(2)) is set forth in Schumm v. Berg, 37 Cal.2d 174, at page 187, 231 P. 2d 39, at page 46, 21 A.L.R.2d 1051, as follows: "The rule is stated: 'Whenever a promise to answer an antecedent obligation of another is made upon a fresh consideration beneficial to the promisor, no matter from what source it may move, the promise is an original one and valid though oral; or, as was said in an early case, whenever the leading and main object of the promisor is not to become surety or guarantor of another, but to subserve some purpose or interest of his own, his promise is not within the statute, although the effect of the promise may be to pay the debt or discharge the obligation of another.' 12 Cal.Jur. 869. See Greenfield v. Sudden Lumber Co., 18 Cal.App.2d 709, 64 P.2d 1007." Under the evidence the trial court was warranted in determining that the promise of Zeff was original and not collateral in nature, and with that finding of fact this court is not free to interfere. (See Sanders v. Riviera Realty Co., 104 Cal.App.2d 70, 75, 230 P.2d 856; Madera Sugar Pine Co. v. Weakley, 127 Cal.App. 733, 737, 16 P.2d 321; note, 20 A.L.R.2d 246, 248, 251.)

[8] With respect to item 3, as to which a balance of $392 was claimed, the defendant Janis contends that no liability on his part could exist because the plaintiff cashed his check upon which, following the printed statement that "by endorsement this check when paid is accepted in full payment of⊥the ⊥273 following account," a notation was written as follows: "Move & lower 531 W. Santa Barbara to 95th & Avalon & 640 E. Imperial." However, under the evidence the trial court was not compelled to reach the conclusion that the written notation on the check embraced the items for which the charge of $392 was made. Mr. Mitchell testified that he gave a bid to Mr. Janis with respect to moving the buildings and that Mr. Janis accepted the bid. But the buildings had to be cut into sections before they were moved. Mr. Long, the person acquiring the structures, requested that they be cut. Mr. Mitchell testified that that was done pursuant to the request of both Mr. Long and Mr. Janis. Originally Mr. Long had said that he would do his own "cutting" but found that he was too busy to do so and he asked the plaintiff to do the work, to which the plaintiff agreed in the expectation of being paid by Mr. Long. However, Mr. Mitchell further testified as follows: "Q. Do you remember what the conversation was about the cost of cutting, this conversation with Mr. Janis? A. I told him that

house had to be cut, and then closed up with plywood so the children can't get in there and tear it up 'cause it would be open. He told me definitely, 'you go ahead, cut the house, close it up, taken care of it,' he says, 'I have got the money in escrow and you will get your money before Mr. Long gets his money.' * * * Q. * * * Then when you negotiated with Mr. Long, did you negotiate a particular price for the cutting? A. Yes. Q. And was that price mentioned to Mr. Janis? A. Yes, Mr. Janis knows [sic] what the price was. Q. Was that done before he made this arrangement to pay you out of escrow? A. Yes."[2] The charge for that work was $168. The remaining part of the item of $392 was for "$224 extra labor on the lot." There is no merit in the defendant Janis' contention on appeal that the notation on his check precluded recovery against him. (See Southern Cal. Disinfecting Co. v. Lomkin, 183 Cal.App.2d 431, 442–443, 7 Cal. Rptr. 43.) Since that is the only contention that he makes in his brief as to item 3, it is not necessary to undertake a discussion with respect thereto of the nature of that set forth hereinabove as to item 2.

On this appeal, the defendant Janis contends that he is not 274 liable for items 4 and 6 because he was in Europe when the amounts claimed were incurred. There was evidence that in each instance Mr. Zeff ordered the work done. The contention is without merit for reasons heretofore noted.

No substantial argument is offered as to items 5, 7 and 8. As to the latter item, Mr. Mitchell testified that the order was given either by Mr. Zeff or Mr. Janis.

[9] With respect to item 9, it is true that a receipt was signed in which it was stated that payment had been made in full. But a receipt of that nature may be explained by parol evidence showing the purpose for which it was given. (Carpenter v. Markham, 172 Cal. 112, 115, 155 P. 644; Brown v. Crown Gold Milling Co., 150 Cal. 376, 389, 89 P. 86; Coats v. General Motors Corp., 3 Cal.App.2d 340, 352, 39 P.2d 838; 9 Wigmore on Evidence (3rd ed. 1940), § 2432, pp. 104–105.) Such evidence was before the trial court. Mr. Mitchell testified that Mr. Janis and Mr. Zeff asked for the receipt so that it could be used to facilitate the release of money in an escrow and stated that they would thereafter return with the money and pay the plaintiff what was due to it. Mr. Zeff corroborated the testimony of Mr. Mitchell. On December 27, 1958, the defendant Janis paid $4,000 to the plaintiff, but the rest of the bill was not paid.

With respect to the last transaction involved in this case, item 10, Mr. Mitchell testified that he negotiated the price for the work with the defendant Janis personally. The argument made by the defendant Janis is that the "record is in dispute on this item" and "that he did not order this work and insists that he is not liable." The argument is devoid of merit.

The trial court determined that the plaintiff was entitled to judgment in the principal sum of $11,181.51, together with interest in the sum of $1,497.84. Judgment was rendered for $12,679.75. For the reasons herein stated, the judgment must be reduced by the amount involved in item 1, $168, together with interest thereon from July 21, 1958, to February 15, 1961, the date of the judgment, in the amount of $30.22. The judgment is accordingly modified so that the amount thereof is $12,481.13. As so modified, the judgment is affirmed. The attempted appeal from the order denying the motion for a new trial is dismissed. Each party shall bear his or its own costs on this appeal.

SHINN, P. J., and FILES, J., concur.

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[2] It was, of course, for the trial court to resolve any inconsistencies in the testimony of Mr. Mitchell. (Sukiasian v. Shakarian, 115 Cal.App.2d 798, 801, 252 P.2d 956; Peterson v. Peterson, 74 Cal. App.2d 312, 319, 168 P.2d 474.)

208 Cal.App.2d 562

562 ⊥**SURE-GRIP SKATE WHEEL CO., Inc., a corporation, Plaintiff and Respondent,**

v.

Fred BERGIN, Appellant,

George Bergin and Fred Bergin, doing business as Central Skate Co., and Bergin Skate Co., Defendants.

Civ. 26075.

District Court of Appeal, Second District, Division 1, California.

Oct. 16, 1962.

Action by seller against buyer. From an order of the Superior Court, Los Angeles County, Frank C. Charvat, J., denying buyer's motion for change of venue, the buyer appealed. The District Court of Appeal, Wood, P. J., held that venue of action by seller against buyer for balance due for goods sold and delivered in Los Angeles County, for balance due under an account stated allegedly made in Los Angeles County for goods sold and delivered, and upon open book account for due and unpaid amount owing by defendant, who stated that he was a resident of Santa Barbara County, was in Los Angeles County.

Order affirmed.

1. Venue ⚷36

If a defendant is entitled to a change of venue as to one contractual cause of action, a motion for change of venue should be granted even though there are other causes of action as to which he is not entitled to a transfer. West's Ann.Code Civ.Proc. § 395.

2. Venue ⚷68

There is a presumption that county in which action is commenced is prima facie the proper county for trial, and burden of overcoming the prima facie venue showing rests upon the defendant.

3. Venue ⚷68

Defendant's declaration that he was a resident of Santa Barbara County was not sufficient to overcome presumption that Los Angeles County in which action was commenced was prima facie proper county for trial of causes of action involving sale of goods to defendant. West's Ann.Code Civ. Proc. § 395.

4. Account Stated ⚷5

An action on an account stated is not founded upon the original items, but upon balance ascertained by mutual consent of parties.

5. Account Stated ⚷7

An "account stated" constitutes a new contract, either express or implied, for which a previous indebtedness furnishes the consideration.

See publication Words and Phrases for other judicial constructions and definitions.

6. Venue ⚷72

Averments of complaint are to be deemed true upon a motion for change of venue, at least to extent that they are not controverted.

7. Venue ⚷7

Venue of action by seller against buyer for balance due for goods sold and delivered in Los Angeles County, for balance due under account stated allegedly made in Los Angeles County for goods sold and delivered, and upon open book account for due and unpaid amount owing by defendant, who stated that he was a resident of Santa Barbara County, was in Los Angeles County. West's Ann.Code Civ.Proc. § 395.

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Gerald B. Parent, Santa Barbara, for appellant.

Bear, Ruby & Greber and Forest Greber, Lynwood, for respondent.

⊥WOOD, Presiding Justice. ⊥563

Defendant Fred Bergin appeals from an order denying his motion for a change of venue from Los Angeles County to Santa Barbara County.

The verified complaint was filed in Los Angeles County on April 7, 1961. (New section 400 of the Code of Civil Procedure, providing for remedy by mandamus, had not been enacted when this appeal was taken.)

In the first cause of action it was alleged that defendant Fred Bergin is now and at times herein mentioned was doing business as Bergin Skate Co., and Central Skate Co.; that within two years last past, at Lynwood, California, plaintiff sold and delivered goods, wares, and merchandise of the reasonable value of $17,179.09 to defendants, for which they agreed to pay; there is now due and unpaid, on said amount, the sum of $10,556.28.

The second cause of action alleged that within four years last past, an account was stated by and between plaintiffs and defendants, whereby it was agreed that defendants were indebted to plaintiff in the sum of $17,179.09; there is now due and unpaid, on said amount, the sum of $10,556.28.

The third cause of action alleged that within four years last past, plaintiff furnished to defendants at their special instance and request, upon an open book account, goods, wares, and merchandise of the reasonable value of $17,179.09; there is now due and unpaid, on said amount, the sum of $10,556.28.

Notice of motion for change of venue was filed on June 22, 1961.[1] That notice stated that the motion would be made upon the ground that the proper county for the trial of said action is the county in which the defendant Fred Bergin resides, to wit: Santa Barbara County.

One declaration of Fred Bergin (filed June 22, 1961), in 564 support of the motion, stated: He is a resident of Santa Barbara County, and has resided in said county for the past ten months. He served the summons in Santa Barbara County (presumably this was intended to state that he was served with summons in that county). He denies that plaintiff ever sold or delivered goods, wares, or merchandise to him at Lynwood, California, or that he ever entered into any type of contract, implied or otherwise, with plaintiff in Los Angeles County.

Also on June 22, 1961, defendant Fred Bergin filed an answer in which he denied the material allegations of the complaint.

Another declaration of Fred Bergin (filed July 13, 1961), in support of the motion, stated: That to the best of his knowledge he is the only defendant named in the complaint who has been served with a summons and complaint; that the other defendant named in the suit, George Bergin, is not now and never has been a resident of Los Angeles County, and is presently a resident of the State of Michigan; that he (declarant) has never stated an account for any amount of money with the plaintiff in Los Angeles County.

On July 18, 1961, Fred Bergin filed a declaration of merits.

Mr. Ball, vice-president of plaintiff corporation, made a declaration in opposition to the motion, wherein he stated: The first cause of action was founded, in part, upon a written agreement of October 2, 1959, a copy of which is attached to this declaration.[2] That agreement and all other agreements, oral or written, between the parties upon the obligation upon which the action is founded, were entered into, consummated, concluded to be performed, and made payable in Los Angeles County, under the following circumstances: The agreement originated in conversation in Lynwood, Los Angeles County, California, about January 15, 1959; the conversations were between George Bergin and John Wintz, who is an officer of plaintiff, and were held in the presence of Mr. Oldfield and Mr. Brown; later there were conversations between George ⊥565 Bergin and John Wintz in Chicago; the letter of October 2, 1959, was prepared by plaintiff and was sent to Central Skate Company in Ypsilanti, Michigan, to be signed by George Bergin and Fred Bergin; the letter was not signed by plaintiff when it was sent; the letter was signed by the Bergins and returned to plaintiff, and then was executed by Ball in Lynwood; since the last act to complete the contract was performed in Los Angeles County, the contract was made in that county, which is the proper place for the trial.

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[1] The clerk's transcript does not include the notice of motion, or the first declaration of Fred Bergin. There are references in the briefs to a supplemental clerk's transcript, but such transcript is not on file herein. This court has obtained the original file of the superior court.

[2] The letter was as follows: "October 2, 1959 Central Skate Company * * * Ypsilanti, Michigan. Consigned Stock Agreement. This agreement made between Sure-Grip Skate Wheel Co., Inc., and George Bergin, Fred Bergin DBA Central Skate Company. Sure-Grip Skate Wheel Co., Inc., agrees to ship their products to Central Skate Company on a consigned stock basis. Consigned stock not to exceed an amount of $15,000.00 based on regular distributors discounts. Excess amounts over the $15,000.00 limit will be paid for on a cash basis. It is also agreed that after six months of operation by Central Skate Company effort will then be made to arrange the paying off of the consigned stock."

Appellant concedes that the first and third causes of action (for agreed price of goods; and upon open book account) are triable in Los Angeles County. He contends that the court erred in denying his motion, for the reason that the second cause of action (account stated) was triable in Santa Barbara County, where he resides.

[1–7] Where a defendant is entitled to a change of venue as to one contractual cause of action, a motion for a change of venue should be granted even though there are other causes of action as to which he is not entitled to a transfer. (Ward Mfg Co. v. Miley, 131 Cal.App.2d 603, 605, 281 P.2d 343.) Section 395 of the Code of Civil Procedure provides in effect that actions arising on contract may be tried in the county in which the defendant resides, or in the county in which the contract was made or is to be performed. There is a presumption that the county in which the action is commenced is prima facie the proper county for the trial. (Pacific Bal Industries v. Northern Timber, Inc., 118 Cal.App.2d 815, 826, 259 P.2d 465; Ward Mfg. Co. v. Miley, supra, 131 Cal.App.2d p. 606, 281 P.2d 343.) The burden of overcoming the prima facie venue showing rested upon the defendant. (Ibid.) His declaration that he is a resident of Santa Barbara County was not sufficient to overcome that presumption. (Ibid.) "'An Action on an account stated is not founded upon the original items, but upon the balance ascertained by the mutual consent of the parties.'" (Crofts & Anderson v. Johnson, 101 Cal.App.2d 418, 225 P.2d 594.) "An account stated constitutes a new contract, either express or implied, for which a previous indebtedness furnishes the consideration." (Ward Mfg. Co. v. Miley, supra, 131 Cal.App.2d p. 607, 281 P.2d p. 346.) "The averments of the complaint are to be deemed true upon a motion for change of venue, at least to the extent that they are not controverted." (Ward Mfg. Co. v. Miley, supra, p. 606, 281 P.2d p. 345.) Respondent stated in its declaration that the letter agreement and all other agreements, oral or written made between the parties, upon ⊥566 the obligation upon which the action is founded, were entered into, consummated, concluded to be performed, and made payable in Los Angeles County. Appellant stated in one of his declarations that he denies that he ever entered into any type of contract, implied or otherwise, with the plaintiff in Los Angeles County. In appellant's other declaration he stated that he has never stated an account for any amount of money with the plaintiff in Los Angeles County. It is apparent that the allegations of both parties, with respect to an account stated, are general and involve conclusions. The trial court was confronted with the matter of determining the fact, for the purpose of the motion, as to whether an account stated was made in Los Angeles County. As above shown, one of appellant's allegations was that he had never entered into any type of contract with plaintiff in Los Angeles County. The court might well have determined, from the declaration of respondent, that appellant did enter into the letter contract of October 2 with respondent in Los Angeles County. Although the making of that letter contract would not be determinative of the fact regarding the alleged making of an account stated, the court might have considered the matter of making that contract in determining the accuracy of appellant's allegation that he had never entered into any type of contract with plaintiff (respondent) in Los Angeles County. Furthermore, in determining such factual question as to the alleged account stated, the presumption above referred to (that the county where the action is commenced is prima facie the proper place for trial) was in favor of respondent, and the court could have found that appellant had not overcome the presumption. Under the circumstances here this court cannot disturb the findings of the trial court.

The order is affirmed.

FOURT and LILLIE, JJ., concur.

208 Cal.App.2d 613

613 **In the Matter of the ESTATE of Lillian GLOW, deceased.**

Louis GLOW, Petitioner, Contestant and Appellant,

v.

Dorothy B. DUBOFF et al., Respondents.

Civ. 25831.

District Court of Appeal, Second District, Division 3, California.

Oct. 17, 1962.

Proceeding wherein the Superior Court of Los Angeles County, Clyde C. Triplett, J., rendered a decree determining interests in an estate, and appeal was taken. The District Court of Appeal, Shinn, P. J., held that widow's holographic will stating that all her cash and holdings were to be placed in trust fund bearing her maiden surname, with her brothers and sisters as executors, except one sister who was to share but not as an executor, from which a provision stating that balance of husband's share was to be given to his family was obliterated, supported construction of disclosing intention to give nothing to husband's heirs and everything to testatrix' brothers and sisters where there was no such trust fund in existence but there was evidence she had referred to brothers and sisters as such trust and she had no surviving spouse, issue or parent.

Affirmed.

1. Wills 🔑448, 449

Cardinal rule in interpretation of wills is that when it is possible, in reason, to find in will an effective disposition of property and avoid intestacy in whole or in part, such intention controls and must be given effect. West's Ann.Prob.Code, §§ 101, 102.

2. Wills 🔑494

Widow's holographic will stating that all her cash and holdings were to be placed in trust fund bearing her maiden surname, with her brothers and sisters as executors, except one sister who was to share but not as an executor, from which a provision stating that balance of husband's share was to be given to his family was obliterated, supported construction of disclosing intention to give nothing to husband's heirs and everything to testatrix' brothers and sisters where there was no such trust fund in existence but there was evidence she had referred to brothers and sisters as such trust and she had no surviving spouse, issue or parent.

3. Wills 🔑489(1)

Brother of testatrix who made holographic will stating that cash and holdings should be placed in trust bearing her maiden surname, where there was no such trust in existence, was properly permitted to testify that she had referred to all of her siblings as such trust. West's Ann.Prob.Code, §§ 228, 229.

4. Wills 🔑489(4)

Declarations of testator may be shown to make certain identity of beneficiary who was imperfectly or inexactly described. West's Ann.Prob.Code, § 105.

5. Wills ⟹489(2)

Evidence to resolve ambiguity as to identity does not fall within rule barring evidence of declarations within statute. West's Ann.Prob.Code, § 105.

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Levy, Russell, DeRoy & Glow, Long Beach, for appellant.

Gilbert, Nissen & Irvin, Beverly Hills, Weisman & Dreisen, Los Angeles, for respondents.

⊥614 ⊥SHINN, Presiding Justice.

This is an appeal from a decree determining interests in an estate. The decedent, Mrs. Lillian Glow (nee Broude), died on December 25, 1959. Her husband, Fred Glow, predeceased her on or about July 2, 1958. There was no issue of their marriage and Lillian Glow never remarried after the death of Fred Glow. As of the date of her death, neither Lillian nor Fred Glow had left any surviving spouse, issue, or parent. On March 22, 1960, Lillian's will, as obliterated (see below), was admitted to probate. On December 2, 1960, appellant Louis Glow, a brother of the decedent's predeceased husband, filed a petition to determine heirship alleging, in substance, that the will was non-dispositive, that decedent's estate was either community property of Lillian and Fred or the separate property of Fred to which Lillian succeeded upon his death and should, therefore, pass by intestate succession, and that he should share therein by virtue of sections 228 and 229 of the Probate Code to the extent that either or both were applicable.

⊥615 ⊥The holographic will, as altered by obliteration, was admitted to probate and reads:

"Wednesday
10 A M
I, Lillian Glow, my last will, If I pass on before 4 P M to-day July 2 (24 hours after my husband) wish all my cash and holdings to be placed in 'Broude Trust Fund—(*the balance my husbands share to be given to his family.*)
Lillian Glow
PS 7/4/58
At the reading of the will he took care of his family Everything goes to the Broude Trust Fund My brothers and sisters as executors except my sister Sophie—(*no*) to (*be*) share but not as a executor
Lillian Glow

7/17/58
My group insurance change in benef 36,500.00—blanks requested & Met Life 2000.00
beneficiaries
Broude Trust Fund"

The italicized words were crossed out.

Petitioner and appellant took the position in the trial court that the presence of the words "Broude Trust Fund" necessarily disclosed an intent to set up a testamentary trust, which failed. It was stipulated that as of the date of Lillian's death there was no existing formal trust labeled as "the Broude Trust" or "Broude Trust Fund," and that in fact there never had been.

Respondents opposed this position contending (1) that the will upon its face disclosed an intention to leave the estate to ⊥them outright; ⊥616 (2) that the use of the technical term "Trust Fund" by testatrix, who was a lay person, did not require the court to conclude that she was using the term in its strictly technical legal sense, so as to defeat her will and result in intestacy; and (3) that there being no such trust as the "Broude Trust Fund" or "Broude Trust," if such terms gave rise to an uncertainty it was to be resolved by resort to extrinsic evidence.

The court construed the will in accordance with the contentions of respondents and determined that Lillian Glow died testate "* * * and that by the terms of said Will the whole of the said Estate is devised and bequeathed to the twelve (12) brothers and sisters of Lillian Glow, deceased, outright, to be shared equally by them. * * *"

The first question on appeal is: whether the court properly applied the rules of construction in finding that decedent "* * * meant her brothers and sisters when she used the words 'Broude Trust Fund' in her Will."

[1] The cardinal rule in the interpretation of wills is that when it is possible, in reason, to find in the will an effective disposition of property of the maker and avoid intestacy in whole or in part, such intention is controlling and must be given effect. (Prob.Code §§ 101, 102; Estate of Akeley, 35 Cal.2d 26, 215 P.2d 921, 17 A.L.R.2d 648n; In re Brunet's Estate, 34 Cal.2d 105, 207 P.2d 567; Estate of Del Val, 159 Cal.App.2d 600, 323 P.2d 1011.

[2] Our conclusion is that the will on its face supports the construction that it discloses an intention to give nothing to the husband's heirs and everything to Lillian's brothers and sisters. Appellant does not contend there is any wording in the will indicating an intent to leave the estate to any one else. He is contending only that Lillian had an intention to create a trust and that her efforts failed.

Lillian had heard the words "trust" and "executors" used and evidently thought that if she left everything to the brothers and sisters the estate would be called a trust and the beneficiaries executors. While she wanted Sophie to have her share she did not wish her to have a part in the management. Since no one except the brothers and sisters would share in the estate, "Broude Trust Fund" could have meant to Lillian the group consisting of the brothers and sisters and no one else.

Over objection of appellant the court received evidence that the testatrix had referred to her brothers and sisters as the "Broude Trust."

[3] Albert Broude, a brother of Lillian's, testified to conversations with her, namely: "She merely said that she had taken care of her brothers and sisters in the Broude Trust Fund and they were all to share equally," and that he had heard Lillian refer to all her brothers and sisters as the "Broude Trust" on several occasions—five or six times, but never before Fred Glow's death, and that sometimes "brothers and sisters" were used instead of the terms "Broude Trust" or "Broude Trust Fund."

It is contended by appellant that it was error to receive the extrinsic evidence and to consider it in interpreting the will. There was no error.

[4] The rule of interpretation which the court held applicable is stated in section 105 of the Probate Code.[1] Appellant contends that the extrinsic evidence was inadmissible since the declarations of decedent merely indicated her intentions. Such, however, was not the purpose or the effect of the evidence. There was an imperfect description of the beneficiaries. It is well settled that the declarations of a testator may be shown to make certain the identity of a beneficiary who is imperfectly or inexactly described or named in the will. (53 Cal.Jur.2d 711; Estate of Nessel, 164 Cal.App.2d 798, 331 P.2d 205; Taylor v. McCowen, 154 Cal. 798, 99 P. 351; Estate of Nunes, 123 Cal.App.2d 150, 266 P.2d 574; Estate of Donnellan, 164 Cal. 14, 127 P. 166.)

[5] The contention of appellant that the extrinsic evidence should have been excluded upon the ground that it merely disclosed

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[1] "When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intentions; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations."

the intentions of Mrs. Glow, is not valid. Evidence to resolve an ambiguity as to identity does not fall within the rule barring evidence of declarations within the meaning of section 105. (Estate of Nessel, supra; Estate of Dominici, 151 Cal. 181, 90 P. 448; Estate of Brisacher, 27 Cal.App.2d 327, 80 P.2d 1033.)

The judgment is affirmed.

FORD and FILES, JJ., concur.

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208 Cal.App.2d 465

⊥465 ⊥**Hobbs SHORE, Plaintiff and Appellant,**

v.

CENTRAL CONTRA COSTA SANITARY DISTRICT, a public corporation; Richard J. Mitchell, Irving C. Roemer, Frank W. Salfinger, Ernest I. Spiegl and Arthur W. Bowman, Individually and as Directors of said District; G. A. Horstkotte, Jr., Individually and as Engineer of said District; Claude M. McPhee, Individually and as Secretary of said District; and McGuire & Hester, a corporation, Defendants and Respondents.

Civ. 20257.

District Court of Appeal, First District,
Division 2, California.

Oct. 15, 1962.

Rehearing Denied Oct. 29, 1962.

Hearing Denied Dec. 12, 1962.

Suit by taxpayer and property owner against sanitary district and others to recover all sums paid out under district's contract with a certain company and to restrain payment of any further sums. From an adverse judgment of the Superior Court, Contra Costa County, Norman A. Gregg, J., the taxpayer appealed. The District Court of Appeal, Shoemaker, J., held that sanitary district, which terminated contract for performance of certain work because of contractor's default under the contract which authorized district to terminate employment of contractor and to finish the work by whatever method it deemed expedient, was not required to republish notice requesting bids or to revise its specifications and estimates, and district could contract with another company to complete the work.

Judgment affirmed.

1. Health ⚷16(1)

Sanitary district, which terminated contract for performance of certain work because of contractor's default under contract which authorized district to terminate employment of contractor and to finish work by whatever method it deemed expedient, was not required to republish notice requesting bids or to revise its specifications and estimates, and district could contract with another company to complete the work. West's Ann.Gov.Code, § 4004.

2. Municipal Corporations ⚷235

Generally, a statute requiring a public agency to let contracts by competitive bidding and by advertising for bids is mandatory for contracts coming within terms of statute, and a contract made without compliance with the statute is void and enforceable as being in excess of the agency's power.

Tinning & DeLap, Robert Eshleman, Martinez, for appellant.

John A. Bohn, Charles J. Williams, Benicia, Carlson, Collins, Gordon & Bold, Martinez, for respondents Central Contra Costa Sanitary Dist., Richard J. Mitchell, Irving C. Roemer, Frank W. Salfinger, Ernest I. Spiegl and Arthur W. Bowman, Indiv. and as Directors of said District, G. A. Horstkotte, Jr., Indiv. and as Engr. of said Dist., Claude M. McPhee, Indiv. and as Secy. of said District.

Johnson & Stanton, Gardiner Johnson, Charles J. Heyler, San Francisco, for respondent McGuire & Hester.

⊥SHOEMAKER, Justice. ⊥466

Plaintiff Hobbs Shore, a taxpayer and property owner in the Central Contra Costa

Sanitary District, brought this action against it, its engineer, secretary and directors, individually and as officers, and McGuire & Hester, a construction firm employed to perform certain work for the district, to recover all sums paid out under the district's contract with McGuire & Hester and to restrain the payment of any further sums. As grounds for this relief, plaintiff alleged that the district had awarded the contract without meeting the requirements of Government Code, section 4004, and Health and Safety Code, section 6515.5.

[1] The relevant facts are as follows: On May 8, 1958, defendant district entered into a contract with the M. Miller Company for the construction of 5230 feet of outfall sewer line. Prior to awarding this contract, the district had fully complied with the requirements of Government Code, section 4004, and Health and Safety Code, section 6515.5. Section 7–10 of the written contract provided in part as follows: "If the contractor * * * be guilty of a substantial violation of any provision of this contract, then the District, upon the certificate of the engineer that sufficient cause exists to justify such ⊥467 action, may * * * after giving the contractor seven (7) days written notice, terminate the employment of the contractor * * * and finish the work by whatever method the District may deem expedient. In such case, the contractor shall not be entitled to receive any further payment until the work is finished. If the unpaid balance of the contract price shall exceed the expense of finishing the work, * * * such excess shall be paid to the contractor. If such expense shall exceed such unpaid balance, the contractor shall pay the difference to the District." On December 3, 1959, the board of directors of defendant district adopted a resolution "declaring the default of the M. Miller Company * * * and fixing conditions under which contractor may be permitted to continue the work." Subsequently, on February 17, 1960, the consulting engineers of the district certified to the board of directors that sufficient cause existed to terminate further performance of the contract by M. Miller Company. On March 3, 1960, defendant district elected to terminate the performance of the M. Miller Company pursuant to section 7–10 of the contract. On March 25, 1960, the district made demand upon M. Miller Company's surety to comply with its obligation of faithful performance. The surety refused to do so.

Thereafter, on April 7, 1960, the board of directors of defendant district adopted a resolution determining that an emergency existed and electing to proceed with the work remaining uncompleted under the contract with M. Miller Company. The district then solicited sealed proposals from a selected list of contractors for the completion of the work. The district did not publish notice in accordance with Health and Safety Code, section 6515.5, nor prepare new plans, specifications, and cost estimates in accordance with Government Code, section 4004. On April 21, 1960, the district entered into a contract with defendant McGuire & Hester, the lowest bidder, for the completion of the work originally undertaken by the M. Miller Company. The contract obligated the district to pay costs plus a fixed fee.

Upon this evidence, the trial court found that the district's original contract with the M. Miller Company had been let in strict compliance with Health and Safety Code, section 6515.5, and Government Code, section 4004. It further found that the district, in employing McGuire & Hester, was not letting a new and separate contract but was merely exercising its rights under section 7–10 of its existing contract with the ⊥468 M. Miller Company. Under such circumstances, the court concluded that Health and Safety Code, section 6515.5, and Government Code, section 4004, were not applicable to the McGuire & Hester contract and the district was under no duty to republish notice requesting bids or to revise its specifications and cost estimates. The court accordingly held the McGuire & Hester contract to be valid and subsisting and all acts performed under it to be lawful. Judgment was rendered in favor of defendants. Plaintiff now appeals.

[2] It is the general rule that a statute requiring a public agency to let contracts by competitive bidding and by advertising for bids is mandatory for contracts coming within the terms of the statute, and that a contract made without compliance with the statute is void and unenforceable as being in excess of the agency's power. (Miller v. McKinnon (1942) 20 Cal.2d 83, 87–88, 124 P.2d 34, 140 A.L.R. 570; East Bay Garbage Co. v. Washington Township Sanitation Co. (1959) 52 Cal.2d 708, 714, 344 P.2d 289.) In the case at bar, respondent district does not deny that the work covered by the McGuire & Hester contract was of a type which would normally fall within the purview of both sections 4004 of the Government Code and 6515.5 of the Health and Safety Code (as it read at all times here relevant). Indeed, there appears to be no question that a sanitary district such as respondent is subject to both sections. In addition, the lower court expressly found that the cost of the work covered by the McGuire & Hester contract was in excess of the $2,500 minimum specified in section 6515.5.

Respondent asserts, however, that the applicability of both statutes is subject to certain exceptions. It is respondent's position that the case at bar falls squarely within the continuing contract exception on which the lower court apparently based its decision. In support of this contention, respondent relies upon Garvey School Dist. v. Paul (1920) 50 Cal.App. 75, 194 P. 711. In that case, a school district, after publishing notice calling for bids in accordance with the applicable statute (Pol.Code, § 1617, subd. 20) awarded a contract to erect a school building to the lowest responsible bidder. The contract, as in the case at bar, contained a clause providing that in the event the contractor refused or neglected to supply sufficient materials or workmen, the district, after giving notice, could finish the work and deduct its reasonable expenses from the contract price. The faithful performance ⊥469 bond incorporated the terms of the contract. The contractor thereafter ceased work and failed to furnish the necessary labor and material. After due notice to both the contractor and surety to perform or that the district would take over and finish the contract, no action was taken, so the district took charge of the work with the knowledge and consent of the contractor, and let labor and material contracts in its own name. The district did not publish the required notice calling for bids and describing the work to be performed. The district then brought suit on the bond given to insure faithful performance of the contract. The trial court found for the defendants, but the judgment was reversed on appeal, with the court stating: "In the present action the contract was not abandoned by the contractor, nor was it abandoned by the school district. The contractor had failed to complete the work. The school district insisted upon its completion in accordance with its terms. In proceeding to do the work * * * the school district was proceeding in accordance with the terms of a contract still in existence, which had been let according to law, and which by its terms provided for the then existing emergency. The provision thus made was a part of the contract of suretyship. The public interests which were intended to be guarded by the provisions of section 1617, subdivision 20, of the Political Code, were fully protected by this procedure." (Pp. 79–80.) Respondent district contends that its contract with McGuire & Hester was similarly a mere continuation of its existing, and admittedly legal, contract with the M. Miller Company. Under such circumstances, respondent asserts that the trial court was correct in holding the competitive bidding statutes inapplicable to the McGuire & Hester contract.

Appellant, on the other hand, contends that the earlier California case of Foxen v. City of Santa Barbara (1913) 166 Cal. 77, 134 P. 1142, ought to be deemed controlling. In that case, the city had employed a contractor to build certain tunnels to develop water for its inhabitants. Subsequently, with the consent of the city, the contractor abandoned the work, and the city water commissioners thereafter employed others to complete the work. In so doing, the commissioners failed to comply with a charter provision requiring contracts over a certain sum to be let to the lowest responsible bidder. The court held that the city had no power to let contracts without meeting this requirement. Its action of employing ⊥470 ⊥others to complete the tunnels was therefore ultra vires, and the contracts were absolutely void.

In the Garvey decision, the court took pains to distinguish the Foxen case, and noted that the contractor had there *abandoned* its contract with the consent of the city. (See Garvey School Dist. v. Paul, supra, 50 Cal.App. p. 79, 194 P. 711.) Since the original contractual relationship was thus terminated, the city could not ignore the competitive bidding requirement in securing a new contract to complete the work. The Garvey court then went on to distinguish the facts before it by pointing out that the contract had *not* been abandoned by either party, but that the contractor had failed to complete the work; that the school district had insisted upon the performance of the original contract; and that by taking over the work the district had acted in accordance with the terms of the contract and the suretyship clause. Under such circumstances, there was clearly no possibility of loss to the taxpayers of the district. Since the original contractor was still required to bear the costs, public interests were fully protected.

In the case at bar, the record is devoid of any evidence that respondent district abandoned its contract with the M. Miller Company. To the contrary, the lower court expressly found that the district, in employing McGuire & Hester, was not letting a new and separate contract, but was merely exercising its rights under section 7–10 of its existing contract with the M. Miller Company. Under such circumstances, the present case would appear to fall squarely within the rationale of the Garvey decision. Since the McGuire & Hester contract constituted a mere step in completion of respondent's original, and admittedly legal, contract with the M. Miller Company, the lower court was clearly correct in concluding that respondent was under no obligation to republish notice requesting bids or to revise its specifications and cost estimates.

Judgment affirmed.

KAUFMAN, P. J., and AGEE, J., concur.

208 Cal.App.2d 618

⊥YESHIVA TORATH EMETH ACADEMY, ⊥618
a California corporation, Plaintiff and Appellant,

v.

UNIVERSITY OF SOUTHERN CALIFORNIA, a California corporation, et al., Defendant and Respondent.

Civ. 25910.

District Court of Appeal, Second District, Division 3, California.

Oct. 17, 1962.

Rehearing Denied Oct. 26, 1962.

Hearing Denied Dec. 12, 1962.

Condemnation proceeding. From a judgment in favor of defendant entered upon an order sustaining a demurrer without leave to amend in the Superior Court of Los Angeles County, Frank Balthis, J., the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that a private elementary school did not have the right to condemn property.

Judgment affirmed.

1. Eminent Domain ⟹10(1)

Private educational institution operating an elementary school with facilities available to the general public could not maintain an action to condemn property for use as an elementary school on the theory that if a school district has the right of eminent domain for an elementary school, the plaintiff under the statute had the same right. West's Ann.Civ.Code, § 1001; West's Ann.Code Civ.Proc. § 1238; West's Ann.Const. art. 13, § 1a.

2. Eminent Domain 🔑10(1)

The right to condemn property has not been extended to private elementary school.

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Joseph W. Fairfield and Ethelyn F. Black, Los Angeles, for appellant.

Musick, Peeler & Garrett, Bruce A. Bevan, Jr., Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal by the plaintiff, Yeshiva Torath Emeth Academy, from a judgment in favor of the defendant, University of Southern California, entered upon an order sustaining a demurrer without leave to amend in a condemnation action. The essence of the ground of general demurrer is that the complaint fails to state a cause of action in that the proposed condemnation is not for a public use as authorized by the Legislature.

The complaint alleges that plaintiff, a private corporation, is an educational institution, having a student body of approximately 150 elementary grade students; it operates an elementary school with facilities available to the general ⊥619 public; it seeks to condemn property it is using under lease from defendant so that it may continue to so utilize the property.

The sole question is whether a private institution, not of collegiate grade level, may maintain an action to condemn property for use as an elementary school.

[1] The court answered the question correctly when it granted judgment for defendant on demurrer. Plaintiff is attempting to exercise a right it does not possess. In the opening brief plaintiff says: "Briefly it is the position of the appellant that if a school district has the right of eminent domain to condemn land for an elementary school, plaintiff under the provisions of Civil Code § 1001 has the same right."

Section 1001 reads: "Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of Title 7, Part 3, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such Title is 'an agent of the State,' or a 'person in charge of such use,' within the meaning of those terms as used in such Title" etc.

Section 1238, Code of Civil Procedure, reads in part: "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: * * * 2. * * * any institution within the State of California which is exempt from taxation under the provisions of Section 1a, of Article XIII of the Constitution of the State of California,[1] and all other public uses authorized by the Legislature of the State of California. * * 3. Any public utility, and public buildings and grounds, for the use of any county, incorporated city, * * * school district," etc.

[2] In its opening brief plaintiff appears to contend that since it makes the same use of its property as a school district makes of the facilities of an elementary school it should have rights equal to those of a school district. In its closing brief plaintiff says: "But appellant's claim to condemnation arises not from similarity of use, but with the standards recited in C.C.P. 1238, subd. 3 and its rights allowed to it under the provisions of Civil Code § 1001." No attempt is made to define the ⊥620 "standards" or "rights" upon which plaintiff relies. The right to

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[1] ("Any educational institution of collegiate grade within the State of California, not conducted for profit" etc.).

condemn property has not been extended to private elementary schools.

As authority for its claim plaintiff says: "The situation in the case at bar is not unlike that of Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15." There is no similarity. In that case the plaintiff was permitted to maintain an action to acquire an easement for the extension of a sewer line, which was a right expressly granted by subdivision 8 of the Code of Civil Procedure, section 1238.

The facts alleged in the complaint were clearly insufficient to state a cause of action for condemnation of defendant's property.

The judgment is affirmed.

FORD and FILES, JJ., concur.

208 Cal.App.2d 478

478 ⊥**Yvonne J. EVANS and John Evans,**
Plaintiffs and Appellants,
v.
Jean Albert SARRAIL, Defendant
and Respondent.
Civ. 20353.

District Court of Appeal, First District,
Division 2, California.
Oct. 15, 1962.
Rehearing Denied Nov. 1, 1962.

Action by patient and her husband against physician for malpractice. The Superior Court, County of San Francisco, Walter Carpeneti, J., entered a judgment against the patient and her husband, and they appealed. The District Court of Appeal, Kaufman, P. J., held that evidence was insufficient to indicate any negligence on part of defendant-physician in either diagnosing patient's condition as simple glaucoma or in treating the same for a period of 5½ years.

Affirmed.

1. Trial 🔑180

Rule as to granting motions for directed verdict after incorrect denial thereof is same as that applicable to nonsuits. West's Ann.Code Civ.Proc. § 630.

2. Appeal and Error 🔑927(7)

On appeal from order granting motion for directed verdict, appellate court need only consider evidence most favorable to appellants and must resolve every conflict in favor of appellants and consider any inference which can be reasonably deduced, as well as any presumption which can be fairly deemed to arise in favor of appellants.

3. Physicians and Surgeons 🔑18(6)

Negligence of physician will not be presumed but must be affirmatively proved by patient who is suing for malpractice.

4. Physicians and Surgeons 🔑14(4)

Where diagnosis and treatment forming basis of patient's malpractice suit were clearly a matter outside realm of layman's experience and matter for expert testimony only, question was whether defendant-physician had reasonable degree of skill and learning possessed by others of profession in same locality and exercised reasonable and ordinary skill in application thereof.

5. Physicians and Surgeons 🔑18(8)

Evidence in patient's malpractice action was insufficient to indicate any negligence of defendant-physician in either diagnosing patient's condition as simple glaucoma or in treating same for a period of 5½ years. West's Ann.Code Civ.Proc. § 630.

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Jack H. Werchick, San Francisco, for appellants.

Lamb, Hoge & Glynn, San Francisco, Peart, Baraty & Hassard, San Francisco, for respondent.

⊥KAUFMAN, Presiding Justice. 479

Plaintiffs, Yvonne J. Evans and her husband, John, appeal from an adverse judgment in their action for malpractice, entered on an order granting a motion for a directed verdict made after the jury failed to agree on a verdict, pursuant to section 630 of the Code of Civil Procedure. Their complaint alleged negligent diagnosis and treatment by the defendant physician, Dr. J. A. Sarrail, an ophthalmologist, of Mrs. Evans' eye condition as glaucoma, and proximately ensuing damage, including the mental suffering and fear resulting from the faulty advice to avoid pregnancy.

[1] The rule as to motions under section 630 is the same as that applicable to nonsuits (Carpenter v. Atchison, T. & S. F. Ry. Co., 109 Cal.App.2d 18–23, 240 P.2d 5). Thus, the only question before us is whether there is any evidence from which the jury could have found for the appellants.

The circumstances of Mrs. Evans' treatment were as follows: In May, 1952, when she was 32 years old, Mrs. Evans had suffered severe frontal headaches for several months. Her family physician, Dr. Stuehler, upon finding no reason for the headaches after extensive examinations, suspected glaucoma, and referred her to the respondent, an experienced ophthalmologist. She first saw the respondent on June 7, 1952, at which time, he made extensive eye examinations and took her intra-ocular pressure, which was 30mm. While a reading of 29 is within normal limits, 30 is considered ⊥480 "borderline." She returned for further tests on June 10; the subsequent pressure readings on that date were 35, 37 and 40, 40. Respondent then diagnosed her condition as chronic simple glaucoma, and prescribed drops to lower the pressure. He saw her about once a month thereafter until August, 1957, and repeatedly tested her intra-ocular pressure and changed the prescription of the drops when she developed allergic reactions. In June, 1956, respondent felt that Mrs. Evans' condition had responded well to the treatment and attempted to see if the intra-ocular pressure could be controlled without the drops. After three weeks without drops, the pressure returned to the borderline, and the respondent again prescribed the drops. By 1957, due to new developments in the field of ophthalmology, he concluded that Mrs. Evans had intermittent glaucoma.

Mrs. Evans testified that the respondent told her she had glaucoma and warned her not to become pregnant because of the eye condition. Respondent denied making this statement. In the fall of 1957, Mrs. Evans consulted Dr. Stuehler again, who confirmed her suspicions of pregnancy. Mrs. Evans testified that she wanted another child but Dr. Stuehler's records indicated that she had told him that she did not want another child as she was too old. Because of his concern about her eye condition, Dr. Stuehler called the respondent, who indicated that Mrs. Evans' condition was not severe enough to warrant an interruption of the pregnancy. Mrs. Evans further testified that she consulted Dr. Shaffer, another ophthalmologist, who told her that she had never had glaucoma and that Dr. Sarrail had made a mistake; that since 1957, she had not used the drops or had any eye treatment except by an optometrist.

Dr. Shaffer, who testified for the appellants at the trial, denied these statements and further testified that he first saw Mrs. Evans in September, 1957, and could find no increased intra-ocular pressure at that time; the results of his test were exactly the same as Dr. Sarrail's the last time he saw Mrs. Evans in August, 1957. He did, however, find an enlarged blind spot in one eye which was consistent with the existence of glaucoma at one time. He further testified glaucoma was not one but a series of forty to fifty diseases, all producing increased pressure; that chronic simple glaucoma was difficult to diagnose, as there were few symptoms, if any, as well as individual and diurnal variations of pressure; that progress in the classification of the disease had been made in ⊥481 recent years. Dr. Shaffer examined Mrs. Evans on two occasions but she did not come back for additional tests. He further stated that it was possible that she had glaucoma before he saw her but he would have had to see Mrs. Evans over a long period of time to be certain that no glaucoma was present; that on the basis of his records, he was not able to say whether or not Mrs. Evans had ever had glaucoma.

In 1959, at the request of counsel, Mrs. Evans consulted another ophthalmologist, Dr. Bettmann. He testified that he was unable to complete his examination as she would not let him put drops in her eyes and measure the intra-ocular pressure; that in his limited examination, he found a symptom indicative of glaucoma, but could not say that she had ever had it.

The theory of appellants' complaint was that Dr. Sarrail had erroneously diagnosed Mrs. Evans' increased intra-ocular pressure as glaucoma, had erroneously treated her therefor for a period of five and one-half years, and had thus subjected her to the unnecessary expense and discomfort of the treatment, as well as the mental suffering and fear of avoiding further pregnancy, which was contrary to her religious beliefs.

[2-4] On this appeal, we need consider only the evidence most favorable to the appellants (Wickoff v. James, 159 Cal.App.2d 664, 324 P.2d 661) and must resolve every conflict in the testimony in favor of the appellants and consider any inference which can reasonably be deduced, as well as every presumption which can fairly be deemed to arise in favor of the appellants (Lashley v. Koerber, 26 Cal.2d 83, 156 P.2d 441). Other general principles applicable to a case of this kind are that the negligence on the part of the physician will not be presumed but must be affirmatively proved (Lashley v. Koerber, supra). Here, the diagnosis and treatment were clearly a matter outside the realm of a layman's experience and a matter for expert testimony only so the question is whether Dr. Sarrail had the reasonable degree of skill and learning possessed by others of his profession in the same locality and exercised reasonable and ordinary skill in the application thereof (Stephenson v. Kaiser Foundation Hospitals, 203 A.C.A. 712, 21 Cal.Rptr. 646).

The uncontroverted expert evidence here indicated that simple glaucoma is a condition not easy to diagnose and that extensive tests are necessary for a diagnosis; that simple glaucoma has few symptoms and none which would reveal ⊥482 themselves readily to a layman, as the condition is a gradual one, in which the increasing intra-ocular pressure damages the optical nerve, resulting in the blurring of peripheral fields of vision and finally blindness; that it was good practice to treat a borderline case such as Mrs. Evans' immediately, as once a loss of vision occurs, it cannot be regained; that the condition could not be cured but only controlled by means of drugs whch lowered the pressure; that there was only a tenuous connection between pregnancy and glaucoma; that between 1952 and 1957, new tests and theories about glaucoma were being developed and that while earlier, it had been believed that the disease was permanent, the authorities now recognized an incipient or intermittent type of glaucoma, which has no effect on fields of vision.

[5] As there is no evidence in the record to indicate that there was any negligence on the part of Dr. Sarrail, we can only conclude that the trial court properly granted the motion for a directed verdict under section 630 of the Code of Civil Procedure.

Judgment affirmed.

SHOEMAKER and AGEE, JJ., concur.

208 Cal.App.2d 635

|635 |The PEOPLE, Plaintiff and Appellant,
v.
George Richard KANAN, Defendant and Respondent.

Cr. 8324.

District Court of Appeal, Second District, Division 4, California.

Oct. 17, 1962.

Prosecution for filing a false insurance claim. From an order of the Superior Court, Los Angeles County, J. Howard Ziemann, J., setting aside the information, the state appealed. The District Court of Appeal, Burke, P. J., held that evidence was sufficient to support finding of probable cause as basis for information charging defendant with filing a false or fraudulent claim for $10,000 for destruction of run-down wooden building which had no plumbing or electricity and which leaked and had no regular foundation and was about 50 years old.

Order reversed.

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1. Insurance ⚿31

Fraud is the gravamen of offense of making a false or fraudulent claim for payment of a loss under a contract of insurance. West's Ann.Ins.Code, § 556.

2. Criminal Law ⚿238

Evidence was sufficient to support finding of probable cause as basis for information charging defendant with filing a false or fraudulent claim for $10,000 for destruction of run-down wooden building which had no plumbing or electricity and which leaked and had no regular foundation and was about 50 years old. West's Ann.Ins. Code, § 556; West's Ann.Pen.Code, § 995.

3. Indictment and Information ⚿140(1)

Magistrate's finding of probable cause for information should not be reweighed by superior court in deciding a motion to set aside the information. West's Ann.Pen. Code, § 995.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., William B. McKesson, Dist. Atty. (Los Angeles), Harry Wood and Robert J. Lord, Deputy Dist. Attys., for plaintiff and appellant.

Lawton, Neff & Boyack and Bryce H. Neff, Van Nuys, for defendant and respondent.

BURKE, Presiding Justice.

Defendant was charged with a violation of Insurance Code § 556 (presenting a false and fraudulent claim). His motion under Penal Code section 995 to|set aside the information upon the ground that he had been committed without reasonable or probable cause was granted. It is the People's position on appeal that the court erroneously granted the motion under Penal Code, § 995. |636

Defendant claimed a $10,000 loss from his insurance company for the destruction of an insured building by fire. In his claim he alleged that the building had a cash value of $10,000, was totally destroyed by the fire about 1:00 a. m. on June 13, 1961, and that the loss was $10,000.

Defendant had telephoned an insurance agent on June 6, 1961, for purposes of securing insurance on the building and described it as being a frame dwelling with a shingle roof. He advised the agent that the dwelling had been vacant but that he had been storing some saddles, trunks and dresses on the property. On June 10 the agent went out to look at the property because it was located in Agoura and there was some question as to whether he could secure an insurance company to cover the property in that location. He found that the windows were all boarded up, the door had a padlock on it, the building was in a very run-down condition, there was no plumbing or electricity in the building, there were no plastered walls, only one room had a ceiling, the internal structure had been weakened from rain, and the total size was approximately 20 feet by 20 feet or, roughly, the size of a double garage. After inspecting the property the agent telephoned and talked to a person who identified herself as the wife of defendant and he told her he didn't know who gave her the value of the property "* * * but they were very much in the wrong as to the value, and that in the meantime we would have the appraiser come out and appraise it for the present value."

The testimony showed that the building in question was a mere shack about 50 years old; that its only value was for the wood it contained which witnesses variously described as being worth anywhere from perhaps $50 to "not over a couple of hundred"; that the rain came through the roof of the building; and that there was no regular foundation.

[1] Insurance Code, § 556 makes it unlawful to present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance. The courts have held that fraud is the gravamen of the offense. (People v. Turley, 119 Cal.App.2d 632, 636, 259 P.2d 724; People v. Grossman, 28 Cal.App.2d 193, 202–203, 82 P.2d 76.)

⊥637 ⊥[2, 3] In People v. Dufur, 34 Cal.App. 644, 648–651, 168 P. 590, a claim based upon values much in excess of what was shown to be the actual value of the damaged property was held sufficient to sustain a prosecution under the section. The evidence was ample to support the magistrate's finding of probable cause. It should not be reweighed by the superior court in deciding a motion pursuant to Penal Code, § 995. (People v. Reed, 190 Cal.App.2d 344, 353, 11 Cal.Rptr. 780.)

Defendant seeks to distinguish the facts in the instant case from those before the court in People v. Turley, supra, 119 Cal. App.2d 632, 259 P.2d 724. In the latter case the defendant presented an itemized list of furniture stating that the same had been in the fire which produced the loss. This list was proven to be false and consequently supported the inference that there was an intent on the part of the defendant to defraud. In the instant case the defendant points out that the property which he claimed was destroyed by the fire was in fact destroyed and that the only basis for showing an intent to defraud is the testimony of certain witnesses as to valuation which indicated that the property was worth less than the amount of the insurance and the amount of his claim.

Defendant asserts that section 556, Insurance Code, does not comply with the basic requirement that "A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it." (Citing People v. McCaughan, 49 Cal. 2d 409, 414, 317 P.2d 974, 977.) As pointed out in People v. Building Maintenance etc. Assn., 41 Cal.2d 719, 724, 264 P.2d 31, statutes have been upheld even though the prohibited acts were defined in vague terms as they required the presence of an adequately defined specific intent. Thus, the person who undertakes to evade income taxes by padding his expenses has fair warning that he may violate the law even though he may not be sure where the jury may draw the line between reasonable and unreasonable expenses. (U. S. v. Ragen, 314 U.S. 513, 524, 62 S.Ct. 374, 86 L.Ed. 383.)

Defendant asserts that he does not argue that the statute in question is in and of itself void but that its particular application to the set of facts presented is void, citing In re Blaney, 30 Cal.2d 643, 184 P.2d 892. Defendant asserts that even experts will differ in the valuation that might be attached to a given structure and that the statute does not establish standards so that in its application to the present case a claimant ⊥638 is informed as to what his opinion of his loss must be so as to render that opinion free from criminal consequences.

However, as pointed out in People v. Grossman, supra, 28 Cal.App.2d 193, 202, 82 P.2d 76, the gravamen of the offense alleged is the defendant's intent to defraud. If the valuation set forth in the claim filed by the defendant is so grossly disproportionate to what is shown to have been the actual value of the property destroyed, as was indicated in the evidence adduced before the magistrate in the instant case, then clearly there was a showing of an intent to defraud sufficient to warrant the magistrate, acting as a man of ordinary caution or prudence, to conscientiously entertain a reasonable suspicion that a violation of section 556, Insurance Code, had been committed by defendant. Such having been the evidence, the order of the superior court setting aside the information was erroneous (People v. Reed, supra, 190 Cal.App.2d 344, 353, 11 Cal.Rptr. 780), and such order is therefore reversed.

JEFFERSON and FORD,* JJ., concur.

208 Cal.App.2d 609

⌊609⌋ **Richard T. TANDY, as Executor of the Estate of Ina M. Tandy, Deceased, John N. Tandy; Frances E. Tandy and Richard T. Tandy, Individually, Plaintiffs and Appellants,**

v.

The CITY OF OAKLAND, a municipal corporation, and Felix F. Chialvo, Glenn E. Hoover, John Charles Houlihan, Fred Maggiora, Dan Marovich, Robert L. Osborne, Howard E. Rilea, Frank J. Youell and Clifford E. Rishell, as Members of the City Council of the said City of Oakland, Defendants and Respondents.

Civ. 20150.

District Court of Appeal, First District, Division 3, California.

Oct. 17, 1962.

Hearing Denied Dec. 12, 1962.

Suit for writ of mandate to compel city to rezone property of owners from "C" multiple dwelling to "E" commercial and for declaratory relief. The Superior Court, Alameda County, Lewis E. Lercara, J., sustained a demurrer to an amended complaint without leave to amend further, and the owners appealed. The District Court of Appeal, Salsman, J., held that court was without power to compel city council to pass ordinance rezoning owners' property from "C" multiple dwelling to "E" commercial, and that court would not interfere with city council's legislative determination not to rezone owners' single parcel while maintaining the remainder of the area in a multiple dwelling zone, where there was room for difference of opinion on the subject.

Affirmed.

1. Zoning 🔑2, 431, 531

Enactment of zoning ordinance is purely legislative act and governmental function and is to be distinguished from granting or denial of variance, conditional use permit, or exception to use, all of which call for administrative action.

2. Mandamus 🔑73(1)

Court was without power to compel city council to pass ordinance rezoning owners' property from "C" multiple dwelling to "E" commercial.

3. Zoning 🔑617

Court would not interfere with city council's legislative determination not to rezone owners' single parcel from "C" multiple dwelling to "E" commercial while maintaining the remainder of area in a multiple dwelling zone, where there was room for difference of opinion on the subject.

4. Zoning 🔑109

Ordinance zoning owners' property as "C" multiple dwelling rather than "E" commercial was not unreasonable or arbitrary in its effect, where owners' property was in no different situation from other property in the multiple dwelling zone, although cost of maintenance of owners' multiple dwelling was in excess of rental income, and it was not financially practicable to repair or reconstruct the building because no reasonable income could be obtained on cost of reconstruction.

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* Assigned by Chairman of Judicial Council.

Charles Reagh, San Francisco, for appellants.

Hilton J. Melby, City Atty., George M. Cahalan, Asst. City Atty., Oakland, for respondents.

⊥611 ⊥SALSMAN, Justice.

Plaintiffs appeal from a judgment entered after the court sustained a demurrer to an amended complaint without leave to amend further.

In their complaint plaintiffs asked for a writ of mandate to compel the defendant city to rezone their property from "C" multiple dwelling to "E" commercial. They also sought declaratory relief, contending that the zoning ordinances of the City of Oakland are unconstitutional as applied to their property.

The complaint alleged in substance that plaintiffs owned a lot improved with a two flat building built about 1910; that the building had deteriorated with age and had become obsolete; that it was located in a neighborhood composed of like structures in varying degrees of obsolescence; that the cost of maintenance of the building is in excess of rental income; that it is not financially practicable to repair or reconstruct the building because no reasonable income could be obtained on the cost of reconstruction; that the only practical use to which the property can be devoted is a commercial use, which would harm no one and would be a benefit to the neighborhood; that plaintiffs made application to the City Council to have the property rezoned, but such application was denied.

[1, 2] We consider first plaintiffs' request for the writ of mandate to compel the City Council to rezone their property. It is long settled law that the enactment of a zoning ordinance is purely a legislative act and a governmental function. It is to be distinguished from the granting or denial of a variance, a conditional use permit or an exception to use, all of which call for administrative action, and none of which is involved here because the complaint alleges and the demurrer admits that plaintiffs have exhausted their administrative remedies. Thus, the complaint simply asks the court to issue the writ to compel the City Council of the defendant city to perform a legislative act, namely, to pass an ordinance according to plaintiffs' plan, rezoning their property from "C" multiple dwelling to "E" commercial. It is elementary that the courts have no such power. "The determination of whether or not to enact a zoning ordinance and the determination of its provisions and terms are entirely⊥within ⊥612 the discretion of the municipal legislative body or other zoning legislative authority, subject to such requirements as may exist relative to study and recommendation by zoning commissions, notices, hearings and initiative and referendum. Such municipal discretion will not be interfered with by the courts except for clear abuse of the discretion or excess of power, and in case of doubt or if the question is fairly debatable, a court cannot substitute its judgment for that of the municipality. In other words, a municipal corporation has a right to determine whether conditions or the public interests demand an exercise of the power to pass a zoning ordinance and to select the measures that are necessary for that purpose. A fortiori, the wisdom or good policy of a zoning ordinance is for a municipality to determine and the courts have nothing to do with it." (McQuillin, Municipal Corporations, 3rd ed. Rev., Vol. 8, pp. 119–122.) (Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; Day v. City of Los Angeles, 189 Cal.App.2d 415, 11 Cal.Rptr. 325; Banville v. County of Los Angeles, 180 Cal.App.2d 563, 4 Cal.Rptr. 458; Consolidated Rock Products Co. v. City of Los Angeles, 57 A.C. 557, 20 Cal. Rptr. 638, 370 P.2d 342.)

[3] It appears from plaintiffs' amended complaint "that the area which surrounds the said realty of plaintiffs is what is commonly called a 'low rent area', that is to say, almost all of the multiple dwelling buildings thereabouts are of approximately the same age as that on plaintiffs' property, * * *." Thus, although the entire area in which plaintiffs' property is located suffers from the same condition of blight and deterioration, it is only the plaintiffs' property which the defendant city is requested to rezone. The propriety of rezoning plaintiffs' single parcel from multiple dwelling to commercial while maintaining the remainder of the area in a multiple dwelling zone is a matter of legislative determination, and where, as here, there is room for difference of opinion on the subject, the courts will not interfere with the legislative determination. (Johnston v. City of Claremont, 49 Cal.2d 826, 323 P.2d 71; Zahn v. Board of Public Works, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074; Miller v. Board of Public Works, supra; Consolidated Rock Products Co. v. City of Los Angeles, supra; Euclid Ohio, v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303.)

[4] Plaintiffs further contend that their property is being destroyed by the effect of 613 the present zoning ordinance and hence the ordinance is invalid as applied to them. This presents the question whether or not the ordinance in question is unreasonable or arbitrary in its effect as shown by the allegations of the complaint. We have heretofore set out the material allegations of the pleading from which it appears that plaintiffs' property is in no different situation than other property in the multiple dwelling zone. All are being treated alike, and have been for many years. We cannot say from the facts alleged in the complaint that the ordinance as applied to plaintiffs' property is unreasonable or arbitrary. The propriety of maintaining the present zoning scheme of the defendant city is, at least under the allegations of the complaint, a debatable matter. Where such is the case it is not the function of the court to substitute its determination for that of the legislative body, nor will the court declare the ordinance invalid where its application to the property in question is a subject upon which reasonable minds may differ. (Wilkins v. City of San Bernardino, 29 Cal.2d 332, 175 P.2d 542; Lockard v. City of Los Angeles, 33 Cal.2d 453, 202 P.2d 38, 7 A.L.R.2d 990.)

Judgment affirmed.

DRAPER, P. J., and DEVINE, J., concur.

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208 Cal.App.2d 313

The PEOPLE of the State of California, Plaintiff and Respondent, 313

v.

Vincent Lujan ORTIZ, Defendant and Appellant.

Cr. 8315.

District Court of Appeal, Second District, Division 4, California.

Oct. 9, 1962.

Rehearing Denied Oct. 24, 1962.

Hearing Denied Dec. 5, 1962.

Defendant was convicted in the Superior Court, Los Angeles County, LeRoy Dawson, J., of possessing heroin and he appealed from judgment and order denying his motion for new trial. The District Court of Appeal, Jefferson, J., held that preliminary hearing magistrate did not exceed jurisdiction to commit defendant to stand trial even though defendant was not confronted with a chemist at time of his preliminary hearing, where defendant's attorney stipulated to the chemist's testimony at the preliminary hearing, and defendant did not complain at the time and did not give court an opportunity to correct the situation.

Judgment of conviction affirmed; purported appeal from order denying motion for new trial dismissed.

1. Criminal Law 🔑230

Preliminary hearing magistrate did not exceed jurisdiction to commit defendant to stand trial even though defendant was not confronted with a chemist at time of his preliminary hearing, where defendant's attorney stipulated to the chemist's testimony at the preliminary hearing, and defendant did not complain at the time and did not give court an opportunity to correct the situation. West's Ann.Cal.Const. art. 1, § 8.

2. Attorney and Client 🔑86

In absence of complaint by defendant of fact his counsel made a stipulation as to what testimony of a witness would have been if he appeared at preliminary hearing, acts of counsel would be imputed to defendant.

3. Criminal Law 🔑662(8)

Right of an accused to confront witnesses at his trial may be waived.

4. Criminal Law 🔑1035(2), 1044

Failure to move to set aside the information on ground of illegality of commitment, or to raise the question at trial, constituted waiver of any objection to insufficiency of evidence at preliminary hearing. West's Ann.Pen.Code, §§ 995, 996.

◆

Vincent Lujan Ortiz, defendant and appellant, in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Jack K. Weber, Deputy Atty. Gen., for plaintiff and respondent.

⊥JEFFERSON, Justice.

In an information filed by the District Attorney of Los Angeles County, defendant and his wife (not appealing here) were jointly charged with a violation of section 11500 of the Health and Safety Code, possession of heroin. Three prior felony convictions were alleged as to defendant which were initially denied but later, out of the presence of the jury, admitted to be true. Defendant entered a plea of not guilty. After a jury trial defendant was found guilty as charged. Motion for a new trial and probation were denied, and defendant was sentenced to state prison for the term prescribed by law.

Defendant applied to this court for appointment of counsel to assist him on appeal. This court, having made an independent investigation of the record and having determined that it would be neither advantageous to defendant nor helpful to this court to have counsel appointed, denied the application, whereupon defendant prosecutes this appeal in propria persona. This is an appeal from the judgment and order denying motion for new trial.

Harry E. Dorrell, a police officer assigned to the narcotics division, testified that he had known defendant for about a year before the arrest. During that time he had received information from various sources that defendant and his wife were selling and using narcotics. A day or two before the arrest he had received information that they had 22 ounces of heroin in their possession. Defendant and his wife were staying at a motel in the City of Los Angeles. Officer Dorrell, accompanied by a fellow officer, went to the motel and showed photographs of defendant and his wife to the motel manager who admitted that the same persons were occupying a room in the motel. Defendant and his wife were not in at the time, and the manager permitted the officers to use a vacant room next door to the unit occupied by defendant.

The officers were in the motel room looking out the window when they first observed defendant and his wife in the motel parking lot. As they were walking to their motel unit, defendant and his wife were stopped by the officers who identified themselves. Defendant's wife was asked if she was still using narcotics, and she replied that she was. Defendant was also asked if he was still using narcotics, and he answered that he was. The officers observed what appeared to be fresh hypodermic needle marks on defendant's arm, and on the hands and wrists of his wife. The officers asked defendant to show him where he was taking narcotics. Defendant began to take ⌊315 off his coat, and one of the officers said "Never mind, I will take your word for it." At the request of the officers, defendant's wife voluntarily gave the room key to the officers who then asked if there were any narcotics inside the room. Defendant replied, "No, you can go ahead and search it."

The officers asked if they could search defendant, and defendant said "Go ahead." Defendant stated he gave permission for the search because he was "pretty certain he didn't have anything on him against the law." He stated he didn't think there was any more "stuff" (which in narcotics jargon means heroin). They searched defendant's person and found a cigarette package with five rubber containers in it, each containing a quarter ounce of a whitish powder resembling heroin. The officers asked defendant what he was going to do with it and defendant said he was going to "burn somebody." Defendant stated he had picked it up just before he entered the room. The officers made a search of the spot which he pointed out and found two more rubber containers, each holding the whitish powder resembling heroin.

Defendant testified in his own behalf. He stated that he stopped before they went in the motel room to ask his wife for the key. She told him the house key was in the package of cigarettes in the plants outside the motel unit. She asked him to get it because she didn't want to get her shoes dirty. He picked up the package which, a few minutes later, the officers took away from him. Defendant denied to the officers that he was using narcotics.

At the preliminary hearing defendant's counsel stipulated to the qualifications of the prosecution's witness as an expert chemist and to the fact that if called he would testify that the substance contained in the cigarette package was heroin. Defendant was present when his counsel entered into this stipulation, and he remained completely silent in this regard. At the trial before the jury, a forensic chemist, employed by the police department as a criminologist, testified that in his opinion the powder was heroin.

[1] Defendant contends "the main and sole issue on appeal is whether the preliminary hearing magistrate exceeded his jurisdiction to commit him to stand trial pursuant to the California Constitution, Article I, section 8, subdivision 3, in that he was not confronted with the forensic chemist at the time of his preliminary hearing in that his attorney stipulated to the chemist's testimony at the preliminary hearing."

Substantially the same factual situation and contention was ⌊316 presented in People v. Prado, 190 Cal.App.2d 374, 376, 12 Cal.Rptr. 141, 142, which quoted from People v. Wilson, 78 Cal.App.2d 108, 119–120, 177 P.2d 567, in support of its decision: "Defendant was present and heard her attorney enter into the stipulations. She at no time objected thereto nor sought to be relieved therefrom, nor did her attorney make any such request in her behalf. No contention is advanced that the stipulations were not in accordance with the facts * * * defendant was not prejudiced thereby."

[2, 3] Defendant argues in his brief that by his attorney's stipulation he was denied the right to be confronted by the witnesses at his hearing. If defendant felt that his counsel should not have made the stipulation, he should have complained at that time and given the court an opportunity to correct the situation. In the absence of such complaint the acts of defendant's counsel are imputed to him. "The right of the accused to confront witnesses at his trial, whether reserved in the Constitution or in statutes, may be waived. [Citations.]" (People v. Wallin, 34 Cal.2d 777, 781, 215 P.2d 1, 3.)

[4] Defendant also argues in his brief that he and his wife were committed to stand trial for an offense not proven to exist. "[H]e does so despite the fact no motion was made under Section 995, Penal Code, nor did he raise the question at the trial. Section 995 provides that an informa-

tion may be set aside, if the defendant has been committed without probable cause; in Section 996, Penal Code, it is provided as follows: 'If the motion to set aside the indictment or information is not made, the defendant is precluded from afterwards taking the objections mentioned in the last section.'" (People v. Stone, 195 Cal.App.2d 282, 289–290, 15 Cal.Rptr. 737, 741.)

Judgment of conviction is affirmed. Purported appeal from order denying motion for a new trial is dismissed.

BURKE, P. J., and FORD, J.,* concur.

Hearing denied; WHITE, J., sitting pro tem.

208 Cal.App.2d 705

⌊705 ⌊**Iris Gaylene LOUDERMILK, Plaintiff and Respondent,**

v.

Robert James LOUDERMILK, Defendant and Appellant.

Civ. 6782.

District Court of Appeal, Fourth District, California.

Oct. 19, 1962.

Divorced wife made a motion for modification of child custody provision of divorce decree. The Superior Court of San Diego County, William A. Glen, J., rendered an order modifying the decree, and the divorced husband appealed. The District Court of Appeal, Coughlin, J., held that the Superior Court did not abuse its discretion in modifying the custody provision to give the divorced wife physical custody of the child.

Order affirmed.

1. Divorce ⚷303(2)

Rule that child custody provision of divorce decree will not be modified except on showing of change of circumstances after entry of decree is not ironclad and is not applicable where child custody provision was entered on stipulation of parties.

2. Divorce ⚷303(2)

Rule that child custody provision of divorce decree will not be modified except on showing of change in circumstances was not applicable where divorce decree provided that, in compliance with stipulation of parties, custody of child should be awarded jointly to both husband and wife and that husband should have physical custody of child until further order of court.

3. Divorce ⚷303(2)

There was "change of circumstances" which would justify modification of provision of divorce decree that husband should have physical custody of child until further order of court, where divorced wife's health had improved since divorce, she had remarried, divorced husband had remarried and had moved to another county, child was no longer being cared for by her paternal grandmother, but by stepmother, and child had started to school. West's Ann.Civ. Code, § 138.

See publication Words and Phrases for other judicial constructions and definitions.

4. Divorce ⚷312.6(6)

Trial judge is sole judge of credibility of witnesses and weight of evidence on motion to modify child custody provision of divorce decree, and its decision with respect thereto will not be disturbed on appeal.

5. Divorce ⚷303(3)

On motion to modify child custody provision of divorce decree, primary consideration must be given to child's welfare, and trial court is given wide discretion in such matter.

6. Divorce ⚷303(3)

Trial court did not abuse its discretion in modifying child custody provision of divorce decree to give divorced wife physical custody of child. West's Ann.Civ.Code, § 138.

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* Assigned by Chairman of Judicial Council.

7. Evidence 🔑121(1), 151(1)

On motion by divorced wife for modification of child custody provision of divorce decree, wherein divorced husband contended that court should consider fact that customs officers found amphetamine tablets in her purse when she returned to United States from Mexico, her testimony that she had purchased tablets to reduce her weight, and that customs officers asked her if she had bought anything in Mexico, and that she replied in affirmative and handed customs officers her purse, and that thereafter she was interrogated by them and then released was properly admitted over objection that testimony was hearsay, since her statements and those of customs officers were part of res gestae and were direct evidence of her intention.

◆

Newberry, Prante & Biggins, and Paul Newberry, San Diego, for defendant and appellant.

Fitzgerald & Fitzgerald and Clifford K. Fitzgerald, San Diego, for plaintiff and respondent.

⌊706 ⌊COUGHLIN, Justice.

This is an appeal from an order modifying the custody provisions of an interlocutory decree of divorce. The plaintiff, respondent herein, was awarded an interlocutory decree of divorce from the defendant, appellant herein, which contained the following provisions:

> "IT IS FURTHER ORDERED ADJUDGED AND DECREED, That in compliance with Stipulation on file herein that the care, custody and control of the minor child of these parties, to wit: SHERRI LYNN LOUDERMILK, born July 26, 1955, shall be awarded jointly to both of these parties and that the Defendant shall have the physical custody of said child until further order of this Court and the Plaintiff shall have the reasonable right of visitation with said child."

A year and a half later, the plaintiff requested that she be awarded custody of the minor, and moved that the interlocutory decree be amended accordingly. Her motion was granted. The defendant appeals.

At the time the interlocutory decree was entered the plaintiff was in ill health; the defendant was living with his mother who was caring for the child; and the child, a daughter, was four years of age and not attending school. Thereafter the defendant and his daughter moved to Los Angeles County; for a time lived with his sister in Anaheim; then lived in a motel; subsequently married and, with his second wife and⌊daughter, moved into a home at La ⌊707 Puente. In the meantime the daughter became of school age and was attending school. The evidence indicates that upon the mother's departure after visiting her daughter, the latter would get emotionally upset. At the time of the hearing on the motion for modification, the plaintiff was in good health; had married a second time; was residing in an apartment at Pacific Beach; and had made arrangements for her daughter's attendance at school.

In making its modification order, apparently the court was guided by the provisions of Section 138 of the Civil Code which directs that:

> "[O]ther things being equal, if the child is of tender years, custody should be given to the mother";

impliedly found that "other things" were equal; and awarded custody to the plaintiff, subject to visitation by the defendant. The defendant contends that the court erred in thus modifying its previous order because there was no showing of a change in circumstances since entry of the interlocutory decree awarding him custody, and cites the decisions in Prouty v. Prouty, 16 Cal.2d 190, 193, 105 P.2d 295, Stagliano v. Stagliano, 125 Cal.App.2d 343, 347, 270 P.2d 91, Johnson v. Johnson, 72 Cal.App.2d 721, 723, 165 P.2d 552, and similar cases, in support of this contention.

[1, 2] The rule which directs that a custody order will not be modified except upon a showing of a change in circumstances after entry of the original decree is not ironclad (Goto v. Goto, 52 Cal.2d 118, 123, 338 P.2d 450; Immerman v. Immerman, 176 Cal.App.2d 122, 126, 1 Cal.Rptr. 298; Ducharme v. Ducharme, 152 Cal.App.2d 189, 193, 313 P.2d 33; Newell v. Newell, 146 Cal.App.2d 166, 174, 303 P.2d 839; Disney v. Disney, 121 Cal.App.2d 602, 607, 263 P.2d 865; Bemis v. Bemis, 89 Cal.App.2d 80, 91, 200 P.2d 84); is one adopted by the courts to preclude the incessant re-examination, in custody matters, of questions previously determined (Foster v. Foster, 8 Cal.2d 719, 727, 68 P.2d 719; Peterson v. Peterson, 64 Cal.App.2d 631, 634, 149 P.2d 206; Olson v. Olson, 95 Cal.App. 594, 597, 272 P. 1113); and is not applicable to those situations, such as the one at bar, where the original order was entered upon a stipulation. (Bernstein v. Bernstein, 80 Cal.App.2d 921, 924, 183 P.2d 43; Peterson v. Peterson, supra, 64 Cal.App.2d 631, 633, 149 P.2d 206.) Where the custody of a minor has been awarded pursuant to an agreement between the parties, the placement has been made without court determination as to what would be for the best interests ⊥708 of the child; the primary question which a court must answer in such a proceeding has not been litigated; and, under these circumstances, as the reason for the rule does not exist, it should not be applied.

[3] Furthermore, in the instant case, there were facts indicating a change of circumstances. The mother's health had improved; she had remarried; the father also had remarried; he had removed his residence from San Diego County to Los Angeles County; as a practical matter, the change in residence would limit the opportunities which the little girl might have to visit with her mother; the child no longer was being cared for by her paternal grandmother, but instead, by her stepmother; she was approximately six years of age instead of four; and was attending school. The facts in Bernstein v. Bernstein, supra, 80 Cal.App.2d 921, 924, 183 P.2d 43, are strikingly similar to those in the instant case, and the decision therein is authority for the order under review.

[4–6] There is evidence which, if it had been accepted by the court, would have supported a denial of the mother's request for a modification. Relying upon this evidence, the father contends that the order made is error. However, the trial court is the sole judge of the credibility of the witnesses and the weight of the evidence, and its decision with respect thereto will not be disturbed on appeal. (Primm v. Primm, 46 Cal.2d 690, 693, 299 P.2d 231.)

> "In a divorce proceeding involving the custody of a minor, primary consideration must be given to the welfare of the child. The court is given a wide discretion in such matters, and its determination will not be disturbed upon appeal in the absence of a manifest showing of abuse." (Gudelj v. Gudelj, 41 Cal.2d 202, 208, 259 P.2d 656, 660.)

No abuse of discretion is shown in the instant case.

[7] The defendant also contends that the court erred in admitting testimony, over his objection, relating statements made by her to the customs officers when she returned to the United States after a visit to Tijuana, and amphetamine tablets were found in her purse. The defendant contended that the incident in question was a factor which should be considered by the court in determining custody. The plaintiff testified that she had purchase these tablets in Tijuana because she understood they could be used to reduce her weight; that when she came across the border she was asked if she had anything to declare, to which she replied: "No"; and that she then was asked if she had bought anything, and she said: ⊥709 "Yes", handing the officers her purse. Thereafter she was interrogated by the officers and released. The defendant claims that the testimony in question was hearsay. This is without merit. The statements by the plaintiff and by the

officers are proof of what was said at the time in question (Werner v. State Bar, 24 Cal.2d 611, 621, 150 P.2d 892); are a part of the res gestae of the incident under review (Orella v. Johnson, 38 Cal.2d 693, 696, 242 P.2d 5; Kyle v. Craig, 125 Cal. 107, 113–114, 57 P. 791); and are direct evidence of the plaintiff's intention in the premises. (Bridge v. Ruggles, 202 Cal. 326, 330, 260 P. 553.)

The order is affirmed.

GRIFFIN, P. J., and STONE, J.*, concur.

208 Cal.App.2d 629

⊥629 ⊥**The PEOPLE, Plaintiff and Respondent,**
v.
John Acosta ALVARADO, Defendant and Appellant.
Cr. 8141.

District Court of Appeal, Second District, Division 3, California.
Oct. 17, 1962.
Rehearing Denied Oct. 31, 1962.
Hearing Denied Dec. 12, 1962.

Defendant was convicted of the unlawful possession of heroin and marijuana and from a judgment of the Superior Court of Los Angeles County, Frederick W. Mahl, Jr., J., the defendant appealed. The District Court of Appeal, Files, J., held that the search by which the contraband was discovered was lawful.

Judgment affirmed.

1. Arrest ⇨66

An arrest by a city policeman outside his territorial jurisdiction is valid if made upon grounds which would authorize a lawful arrest by a private citizen. West's Ann.Pen.Code, § 836.

2. Arrest ⇨63(4), 71

Where officers met defendant as he stepped out of his room into a hall and officer asked defendant if he was a user of narcotics and defendant answered in the affirmative and there were fresh needle marks on both arms of defendant and officers then placed defendant under arrest and searched his room and found narcotics, arrest was lawful and search of the room was justified as an incident of the arrest, though the officers had no warrant either for arrest or for search. West's Ann. Health & Safety Code, §§ 11500, 11530; West's Ann.Pen.Code, §§ 836 and subd. 3, 837, subd. 3.

◆

William Bronsten, Los Angeles, under appointment by the District Court of Appeal, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Calvin W. Torrance, Deputy Atty. Gen., for repondent.

⊥FILES, Justice. ⊥630

This is an appeal from a conviction for unlawful possession of heroin and marijuana in violation of sections 11500 and 11530 of the Health and Safety Code. The sole question here is the legality of the search by which the contraband was discovered.

Appellant waived a jury trial and stipulated that the cause be submitted to the trial court on the evidence received at the preliminary hearing, but subject to objections as to admissibility. Appellant did not testify, and no evidence was offered on his behalf.

Los Angeles Police Officer Hill testified that at about 7:15 p. m. on January 10, 1961, he and his partner "staked out" to watch a particular dwelling house in Huntington Park in the course of a narcotics investigation. Approximately 30 minutes later an automobile stopped in front of the residence. One of the occupants of the car walked down the driveway to the rear of the residence and returned about three minutes later. Officer Hill approached the man and identified himself. The automobile drove off at high speed with its lights out. The man in the driveway told Officer Hill "that he had come over to score from Alvarado." He said he knew that Alvarado had scored heavily, that Alvarado was not at home and he was going to come back later that night. Officer Hill observed that this man was under the influence of narcotics and arrested him.

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* Assigned by Chairman of the Judicial Council.

At about 8:30 p. m. the officers observed the appellant drive up and park his car and enter a side door of the house. Officer Hill went to the front door and knocked. He was admitted by a woman who identified herself as the landlady. Officer Hill told her he was conducting a narcotics investigation of a person who was known as John Alvarado. She said she had ⊥631 a person renting a rear room under the name of Mendez. Hill described Alvarado, and she said that met the description of Mendez. She then took the officers back through a hallway, where they met appellant as he stepped out of his room into the hall. Appellant was wearing a pullover sweater. Officer Hill said, "Police officers conducting a narcotics investigation." Officer Hill then asked appellant if he was a user, and the appellant answered, "Yes." The officer then asked appellant, "Will you take your sweater off so I can see your marks?" Appellant complied. There were fresh needle marks on both arms.

The officers then placed appellant under arrest. Immediately afterwards they searched appellant's room and found both heroin and marijuana. Appellant admitted to the officers that the narcotics were his. The officers had no warrant either for the arrest or for the search.

In People v. Rios, 46 Cal.2d 297, 294 P.2d 39, an arrest was held to be justified by the defendant's statement to the officer that he had used heroin two weeks before. From the defendant's admission that he had used heroin it could be inferred that he had possessed heroin in violation of Health and Safety Code, section 11500. The Supreme Court pointed out that the officer was entitled to arrest the defendant for the offense committed earlier, even though the officer had no independent proof of the corpus delicti of the earlier offense. The Rios decision is controlling authority here unless a distinction can be made from the fact that the arresting officer was acting outside his city limits.

[1] We assume, without deciding, that a Los Angeles police officer lacks the authority of a peace officer to make an arrest under Penal Code, section 836, when he is outside the city limits unless he is engaged in fresh pursuit or is executing a warrant authorizing such arrest. (See 8 Ops.Cal.Atty.Gen. 149; 6 C.J.S. Arrest, § 12; 4 Am.Jur., Arrest, § 51.) An arrest by a city policeman outside his territorial jurisdiction is unquestionably valid if made upon grounds which would authorize a lawful arrest by a private citizen. (People v. Burgess, 170 Cal.App.2d 36, 40, 338 P.2d 524; People v. McCarty, 164 Cal.App.2d 322, 328, 330 P.2d 484; People v. Ball, 162 Cal.App.2d 465, 468, 328 P.2d 276.)

In the Rios case the facts there presented by the officer were held to constitute grounds for a valid arrest under Penal Code, section 836, subdivision 3. As it then read, that section authorized a peace officer to make an arrest "When a felony ⊥632 has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it." This identical language appears in Penal Code, section 837, subdivision 3, authorizing arrests by private persons. It necessarily follows that the reasoning of the Rios case applies here even though it be assumed that the arresting officer had only the powers of a private citizen.

[2] If the arrest was lawful, the search was justified as an incident of the arrest, the premises searched being immediately adjacent to the place of arrest and under the

appellant's control. (People v. Dixon, 46 Cal.2d 456, 459, 296 P.2d 557.)

We see no reason to hold that under the circumstances presented here the search was any less reasonable than if it had been made by an officer employed by the City of Huntington Park. The evidence therefore was lawfully obtained by the officers and properly received by the court.

The judgment is affirmed.

SHINN, P. J., and FORD, J., concur.

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208 Cal.App.2d 651

651 **J. R. FINDLETON, Plaintiff and Appellant,**

v.

E. R. TAYLOR, Defendant and Respondent.

Civ. 20037.

District Court of Appeal, First District, Division 3, California.

Oct. 18, 1962.

Rehearing Denied Oct. 30, 1962.

Action for a specific performance of an oral contract. Judgment for the defendant in the Superior Court, County of Alameda, Joseph A. Murphy, J., and the plaintiff appealed. The District Court of Appeal, Draper, P. J., held that no contract had been made between the parties.

Judgment affirmed.

1. Contracts 🔑15

A manifestation of mutual assent to terms of the agreement and by each promisor to the consideration for his promise is an essential element of the contract, and positive intention to create a legal obligation is not necessary.

2. Contracts 🔑14

Words which would be understood by a reasonable person as importing a promise may establish a contract despite the subjective intent of the party using them.

3. Contracts 🔑14

When both parties understand that no promise establishing a contract is intended as when both know that their words constitute only preliminary negotiations, no contract results.

4. Contracts 🔑28(3)

Evidence that both parties understood that they were engaged in mere negotiations to contract in a dispute between shareholders whereby patents of the corporation were to be divided in return for surrender of shares and that defendant's statement "it is a deal" was not believed by plaintiff to be a manifestation of assent to a contract and that plaintiff made prompt presentation of other offers established that no contract had been made.

George V. Walker, Lafayette, Henry Gifford Hardy, San Francisco, for appellant.

Brace & McDonald, Oakland, Cyril Viadro, San Francisco, of counsel, for respondent.

DRAPER, Presiding Justice.

This is an action for specific performance of an oral contract. The trial court held that no contract had been made by the parties, and entered judgment for defendant. Plaintiff appeals.

Plaintiff and defendant are the sole 652 shareholders of a corporation which owns a number of patents and patent applications. Plaintiff has 499 shares and defendant 501. Defendant had an exclusive license agreement covering certain of the patents. Disputes arose between the shareholders. After some negotiation for settlement, the parties and their attorneys met. Plaintiff's attorney said that his client would take one group of patents and in return would surrender his shares. Defendant said "it is a deal". Plaintiff promptly said his first act would be to cancel defendant's license agreement. Defendant said "it is no deal". Plaintiff then offered to "take the other side of the deal". Defendant refused and plaintiff offered not to cancel defendant's license.

Defendant refused to make any agreement and the meeting ended. There is contradictory testimony by plaintiff and his counsel, but the trial court resolved the conflict in favor of defendant. Under the often-enunciated rule, which is so often forgotten in the enthusiasm of advocacy, we look to the evidence accepted by the trial court.

[1–3] A manifestation of mutual assent to the terms of the agreement and by each promisor to the consideration for his promise, is an essential of a contract (1 Williston on Contracts [3rd ed.] 31). Positive intention to create a legal obligation is not necessary (id. p. 37), since words which would be understood by a reasonable person as importing a promise may establish a contract despite the subjective intent of the party using them (id. p. 42). But when both parties understand that no such promise is intended, as when both know that their words constitute only preliminary negotiation, no contract results (Van Hoosen v. Briscoe, 85 Cal.App. 746, 749, 259 P. 1115; Dillingham v. Dahlgren, 52 Cal.App. 322, 329, 198 P. 832).

[4] Here the evidence supports the inference that both parties understood that they were engaged in mere negotiations, and that defendant's stating "it is a deal" was not believed by plaintiff to be a manifestation of assent to a contract. Plaintiff's prompt presentation of other offers, shown by evidence believed by the trial court, negates any claim by him that he understood defendant's words to manifest assent to the claimed contract.

Judgment affirmed.

SALSMAN and DEVINE, JJ., concur.

58 Cal.2d 565, 375 P.2d 289

⊥565 ⊥**Owen STIGALL, Jr., Plaintiff and Appellant,**
v.
CITY OF TAFT et al., Defendants and Respondents.
S. F. 20906.

Supreme Court of California,
In Bank.
Oct. 23, 1962.

Action attacking validity of contract between city and plumbing company which had submitted low bid on plumbing contract for city construction project. The Superior Court, Kern County, Robert B. Lambert, J., entered a judgment of dismissal and the plaintiff appealed. The Supreme Court, White, J., held that even though city council member who held more than three per cent interest in plumbing company resigned just prior to acceptance of plumbing company's low bid, contract was invalid under conflict of interest statutes, where resigning councilman had participated in preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids prior to his resignation.

Reversed with directions.

Opinion, 21 Cal.Rptr. 885, vacated.

1. Pleading 🔑214(1)

For purposes of ruling on demurrers, allegations of complaints pleaded in proper form must be taken as true.

2. Officers 🔑110

Object of conflict of interest statutes is to remove or limit possibility of personal influence, either directly or indirectly, which might bear upon an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct. West's Ann.Gov.Code, §§ 1090, 1092, 36525, 36527.

3. Municipal Corporations 🔑231(3)

Even though city council member who held more than three per cent interest in plumbing company bidding on city construction project resigned just prior to acceptance of plumbing company's low bid on project, contract was invalid under conflict of interest statutes where resigning councilman had participated in preliminary discussions, planning, compromising, drawing of plans and specifications and solicitation of bids prior to his resignation. West's Ann.Gov.Code, §§ 1090, 1092, 36525, 36527.

4. Municipal Corporations 🔑231(3)

Within conflict of interest statutes contract with city by plumbing company bidding on city construction project was "made" while city council member holding objectionable interest in bidding company was a member of council even though he resigned prior to actual acceptance of bid by city, where member had been on council during preliminary discussion and solicitation of bids. West's Ann.Gov.Code, §§ 1090, 1092, 36525, 36527.

See publication Words and Phrases for other judicial constructions and definitions.

◆

Mack, Bianco, King & Eyherabide, Dominic Bianco and H. C. Mack, Jr., Bakersfield, for plaintiff and appellant.

Stanley Mosk, Atty. Gen., and Dan Kaufmann, Asst. Atty. Gen., amici curiæ on behalf of plaintiff and appellant.

Henry G. Baron, Taft, Borton, Petrini, Conron, Brown & Condley, James Petrini and J. Richard Thomas, Bakersfield, for defendants and respondents.

Henry B. Ely, Los Angeles, amicus curiæ on behalf of defendants and respondents.

⊥WHITE, Justice. ⊥566

This is an appeal by plaintiff from a judgment of dismissal entered upon demurrers to the complaint which were sustained without leave to amend. Plaintiff seeks a declaration of the invalidity of a certain contract for plumbing work to be performed by the defendant Taft Plumbing Company, Inc., for the defendant City of Taft.

Plaintiff, a taxpayer of the City of Taft, alleges in his complaint that Glenn D. Black was a member of the city⊥council and was ⊥567 in charge of the council's building committee of the City of Taft for several years prior to June 8, 1961; that the committee supervised the drawing of plans and specifications and the call for bids for the construction of a civic center; that during a portion of the times involved Councilman Black was also the owner of a plumbing business known as the Taft Plumbing Company and later the owner of more than three per cent of the shares of stock of the Taft Plumbing Company, Inc., after its incorporation; that in January 1961 bids were received and opened at a regular meeting of the city council; that the Taft Plumbing Company, Inc., was the low bidder for plumbing work; that several persons objected to the bids by the plumbing company on the ground that Glenn D. Black was a member of the council and its building committee; that the council thereupon elected to reject all bids and to readvertise for bids at a later date; that on June 5, 1961, new bids were received and opened at a regular meeting of the city council; that the Taft Plumbing Company, Inc., was again the low bidder for plumbing work; that a special meeting was called for June 8, 1961 for the purpose of awarding the contract for the civic center building; that on June 8, 1961, at said meeting, the resignation of Glenn D. Black as a member of the council was received and accepted, and that thereafter at said meeting the council voted to award the contract for construction of the civic center to the defendant Bakersfield Construction Company, which said contract included the sub-bid by the Taft Plumbing Company, Inc., for plumbing work.

The prayer asks that "* * * the contract of Taft Plumbing Company, Inc. * * * be declared void," and that the city officials be restrained "* * * from disbursing or paying over to defendant, Taft Plumbing Company, any funds of the City of Taft on account of plumbing work performed on said Civic Center building."

Demurrers to the complaint alleging that it failed to state facts sufficient to constitute a cause of action were filed by the various city officials named as defendants and the Taft Plumbing Company, Inc. The trial court, in sustaining the demurrers, stated: "It appearing that the complaint cannot be amended to state a cause of action the demurrers are sustained without leave to amend and the action ordered dismissed."

[1] For purposes of ruling on the demurrers, of course, the allegations of the complaint pleaded in proper form are ⊥568 to be taken as true. (Katenkamp v. Union Realty Co., 6 Cal.2d 765, 769, 59 P.2d 473; Terry v. Bender, 143 Cal.App.2d 198, 201, 300 P.2d 119.) Plaintiff's sole contention for the invalidity of the contract, insofar as the subcontractor for plumbing work is concerned, is that because Black was an official of the city a conflict of interest existed which, under statutory law, prohibited the making of a valid contract as between him or his plumbing company and the city. No claim is made that actual improprieties were practiced by Black, the city or the various city officials in the submission or acceptance of the plumbing company's bid during Black's actual tenure of office or thereafter. Nor is it claimed that the contract is unfair or unjust or not beneficial to the city.

The statutory provisions with which we are concerned are found in the Government Code, and it appears that there are two applications thereof either of which, it is urged, invalidate the instant contract. Section 1090 of article 4 (Prohibitions Applicable to Specified Officers) of chapter 1 of division 4 (Public Officers and Employees) in title 1 of the Government Code provides in part: "Members of the Legislature, state, county, special district, judicial district, and city officers shall not be interested in any contract made by them in their official capacity, or by any body or board of which they are members. * * *" Section 1092 provides that: "Every contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein. No such contract may be avoided because of the interest of an officer therein unless such contract is made in the official capacity of such officer, or by a board or body of which he is a member."

In section 36525 of chapter 1 (Officers in Sixth Class Cities) of division 3 of title 4 (Government of Cities) it is provided in part: "City officers shall not be interested in any contract made by them in their official capacity, or by any body or board of which they are members. * * *" Section 36527 then provides: "Any contract made in violation of Section 36525 may be avoided at the instance of any party except the officer interested in the contract. No such contract may be avoided because of the interest of an officer therein unless such contract is made in the official capacity of such officer, or by a board or body of which he is a member."

The issue presented by the statutory provisions and the contentions of the parties all relate to the timing of Black's resignation with respect to the "making" of the contract. It ⊥569 is contended by defendants, and amicus curiae in support thereof, that as Black's resignation was effective before an agreement was "made" in the strict contract sense Black was therefore no longer within the class of those who could not enter into a proper contract with the city at the time when the rights and duties of the parties came into being pursuant to the city's acceptance. We must agree with the contention that Black was no longer a city official at the time the city accepted the offer of Black's company for the performance of plumbing work. An agreement is made, in the contract sense, only upon the mutual assent of the parties thereto, and "an acceptance is as much a part of the contract as the proposal." (12 Cal.Jur.2d, Contracts, 208; see also Rest. Contracts, § 74.) Manifestly neither the city nor the plumbing company was bound to the conditions and covenants of the proposal submitted by the company until after Black's resignation. But if we were to hold that the purpose sought to be accomplished by the enactment of the statutory provisions could, by such strict construction, be so easily frustrated, we would necessarily close our eyes to the clear legislative intent.

[2] In the first place we are not here concerned with the technical terms and rules applicable to the making of contracts. The Legislature instead seeks to establish rules governing the conduct of governmental officials. In this sense, is an act done or an agreement "made" only when the final, objective affirmation is communicated? It is true that no rights and duties accrue and no contract is technically made until such time, but the negotiations, discussions, reasoning, planning and give and take which goes beforehand in the making of the decision to commit oneself must all be deemed to be a part of the making of an agreement in the broad sense. The instant statutes are concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the city. (See People v. Darby, 114 Cal.App.2d 412, 426, 250 P.2d 743; 15 Ops.Atty.Gen. 123, 128.) Conceding that no fraud or dishonesty is apparent in the instant case, the object of the enactments is to remove or limit the *possibility* of any personal influence, either directly or indirectly which might bear on an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct. (Terry v. Bender, supra, 143 Cal.App.2d 198, 300 P.2d 119; ⊥570 Hobbs, Wall & Co. v. Moran, 109 Cal.App. 316, 293 P. 145; Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal.App. 592, 229 P. 1020.)

In commenting on a federal penal statute under which a government contract was declared to be unenforceable by reason of a conflict of interest, the United States Supreme Court stated in U. S. v. Mississippi Valley Co., 364 U.S. 520, at pages 549–550, 81 S.Ct. 294, at page 309, 5 L.Ed.2d 268:

"The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, *the statute is more concerned with what might have happened in a given situation than with what actually happened.* It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation." (Emphasis added.)

The circumstances in the instant case present a most pertinent illustration of what might transpire with impunity at other times and places, should the construction insisted upon by defendants prevail. A council member could participate in all negotiations giving a contract its substance and meaning, be instrumental in establishing specifications and schedules most advantageous to his or his firm's particular mode of operation, participate in the selection of his or his firm's offer, resign just prior to formal acceptance of that offer and execute the contract as the other party thereto. While on the one hand there is no allegation or claim of self serving conduct in the instant case, on the other hand this is not a situation in which a councilman was only remotely connected with the making of the contract. On the contrary, Councilman Black was first forewarned, by the charges made at the time the original bids were submitted. that his continued presence on the council might invalidate a contract with his company. Nevertheless, he thereafter participated as a councilman, and the committee of which he had charge supervised the drawing of plans and specifications and the call for bids for the civic center. Manifestly the situation was one fraught with temptation and, as was said in the Mississippi Valley Company case (U. S. v. Mississippi Valley Co., supra, 364 U.S. 520, 550, 81 S.Ct. 294, 309), the legislation "is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation." As to whether the statute seeks to proscribe innocent, unknowing, insubstantial or remote conflicts of interests we offer no opinion, as the circumstances in the case now engaging our attention sufficiently isolate it from these considerations.

[3] The legislation with which we are here concerned seeks to prohibit a situation wherein a man purports to deal at arm's length with himself and any construction which condones such activity is to be avoided. "Effect must be given to a legislative act if by a reasonable interpretation the legislative intent can be ascertained. (Citation.) The statute must be construed with reference to the purpose intended by the lawmaking body. When the true intention of the Legislature is ascertained it must be given effect * * *." (Crawford v. Payne, 12 Cal.App.2d 485, 488, 55 P.2d 1240, 1241.)

[4] From the foregoing we are persuaded, if not compelled, to reject in the case at bar the narrow and technical interpretation of the word "made" and construe its statutory meaning to encompass the planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids, in all of which Councilman Black participated and which here were, in the broad sense, embodied in the making of the contract.

The judgment of dismissal is reversed with directions to the court below to overrule the demurrers and allow defendants a reasonable time within which to answer the complaint herein if they be so advised.

GIBSON, C. J., and TRAYNOR, SCHAUER, McCOMB, PETERS and TOBRINER, JJ., concur.

58 Cal.2d 572, 375 P.2d 293

⊥572 ⊥**David Henry DAVEE, Plaintiff and Appellant,**

v.

SOUTHERN PACIFIC COMPANY, Defendant and Respondent.

S. F. 21052.

Supreme Court of California,
In Bank.
Oct. 23, 1962.

Action under the Federal Employers' Liability Act brought by bridge carpenter against railroad for injuries sustained in a fall while doing repair work on a railroad trestle. From an adverse judgment of the Superior Court, City and County of San Francisco, Alvin E. Weinberger, J., the carpenter appealed. The Supreme Court, White, J., held that order of Division of Industrial Safety of State of California requiring employer to provide scaffold for all work that cannot be done safely by workmen standing on permanent or solid construction was not controlling on issue of railroad's negligence.

Judgment affirmed.

Opinion 20 Cal.Rptr. 302 vacated.

1. Commerce ⟹8(6)

Order of Division of Industrial Safety of State of California requiring employer to provide scaffold for all work that cannot be done safely by workmen standing on permanent or solid construction was not controlling on issue of railroad's negligence, in action brought by employee against railroad under Federal Employers' Liability Act for injuries sustained in fall from railroad trestle. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Commerce ⟹8(6)

Federal law governs on question of what constitutes negligence in action brought under Federal Employers' Liability Act, and state enactments may not be applied in a manner so as to significantly vary or determine result of the litigation. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

3. Commerce ⟹8(6)

Congress, by enactment of Federal Employers' Liability Act, took possession of field of employers' liability to employees in interstate transportation by rail, and all state laws upon that subject were superseded, and rights and obligations of an employee and employer depend upon that act and applicable principles of common law as interpreted by federal courts. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

McCarthy & Crow, Sacramento, Cornish & Cornish, Francis T. Cornish, Berkeley, Dodge, Evans, Reyes, Brorby & Driscoll, Oakland, Patrick J. McCarthy, Sacramento, and Robert P. Brorby, Oakland, for plaintiff and appellant.

G. Blandin Colburn, Jr., and Dunne, Dunne & Phelps, San Francisco, for defendant and respondent.

⊥WHITE, Justice. ⊥573

This is an appeal by plaintiff David Henry Davee from a judgment for his employer, defendant Southern Pacific Company, in an action prosecuted under the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.) for injuries sustained by Davee in the course of his employment.

[1] Plaintiff is an experienced bridge carpenter. He sustained injuries on January 7, 1958, when he fell approximately five feet from a pier on which he had been standing while doing repair work on a railroad trestle located near Biggs, California.

It was alleged in the complaint that defendant failed to provide plaintiff with "a reasonably safe place in which to perform his duties;" specifically, that "defendant carelessly and negligently failed to provide any staging or scaffold for plaintiff to stand upon while performing said work and defendant further carelessly and negligently maintained said surface on which plaintiff was standing in that there was mud, rock and gravel on said surface," proximately causing plaintiff's injuries.

Plaintiff contends that prejudicial error resulted when the trial court refused to allow a construction safety order of the Division of Industrial Safety of the State of California, dealing with scaffolds, to be admitted into evidence. The court also refused to instruct the jury concerning the scaffold safety order, and this was assigned as further error.

The record reveals that the following proceedings occurred at the bench, outside the hearing of the jury. Plaintiff's attorney stated: "I desire to make an offer of proof to offer into evidence * * * the Section of the California Administrative Code in regard to scaffolds; * * * may I read the section into the record?" The court inquired, "Did you prepare instructions on it?" Plaintiff's counsel responded affirmatively to the latter question. After reading the safety order to the court, counsel for plaintiff again stated: "Then I would like to offer first that into evidence. * * *" The court concluded: "[Y]our offer has been made and let the record show that the Court rejects the offer of proof."

The construction safety order of the Division of Industrial Safety which plaintiff attempted to introduce into evidence was a part of the article entitled, "General Requirements for Scaffolds." The particular portion sought to be introduced ⌊574 in aid of plaintiff's case read: "Scaffolds shall be provided for all work that can not be done safely by workmen standing on permanent or solid construction, except where such work can be safely done from ladders." (8 Cal.Admin.Code, § 1640, subd. (a)).

The instruction requested by plaintiff and refused by the court began: "You are instructed that § 1640 of the Division of Industrial Safety, Construction Safety Orders, provides as follows: * * *" The requested instruction then recited the text of the above set forth administrative regulation, and concluded: "The foregoing requirement was an obligation placed upon plaintiff's employer, SOUTHERN PACIFIC COMPANY."

At the outset appellant concedes "that the decisions of the United States Supreme Court interpret the Federal Employers' Liability Act [hereinafter referred to as F.E.L.A.] as setting a uniform rule for the determination of the liability of an employer engaged in inter-state commerce to his employee, and that the effect of the act is to divest the States of jurisdiction to legislate with respect to that liability." (See Garrett v. Moore-McCormack Co., 317 U.S. 239, 244, 63 S.Ct. 246, 87 L.Ed. 239.) But it is argued that state regulations are properly applied in certain situations which arise under the F.E.L.A., including the instant situation.

[2] It is apparent, however, that appellant's proffered instruction might well have given the jury the impression that the state regulation was controlling on the issue of defendant railroad's negligence, so that appellant counsel's apparent concession at oral argument that the instruction as proposed was properly refused was entirely correct. Clearly, the instruction was contrary to the often enunciated general principle that federal law governs on the question of what constitutes negligence in an F.E.L.A. action and that state enactments may not be applied in a manner so as to significantly vary or determine the result of the litigation. (See Urie v. Thompson, 337 U.S. 163, 174, 69 S.Ct. 1018, 93 L.Ed. 1282, 11 A.L.R.2d 252; Chicago, M. & St. P. Ry. v. Coogan, 271 U.S. 472, 474, 46 S.Ct. 564, 70 L.Ed. 1041.)

We are persuaded that the holding in Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449, 45 S.Ct. 157, 69 L.Ed. 372, is controlling in the case at bar. In the case just cited the action was prosecuted on the basis of federal maritime law in a court of the State of New York. The trial judge extensively instructed the jury on the provisions of the therein relied-upon state scaffold statute requiring employers to furnish ⌊575 their employees with safe scaffolding. The United States Supreme Court reversed a judgment for plaintiff employee on the ground that the trial court was guilty of material error in allowing the jury to consider the provisions of the local law in determining whether or not the employer was negligent, saying at page 457, 45 S.Ct. at page 158: "The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute. * * The jury were distinctly told that they might consider the provisions of the local law in deciding whether or not the employer was negligent. No such instruction would have been permissible in an admiralty court, and it was no less objectionable when given by the state court." (See also Chicago, M. & St. P. Ry. v. Coogan, supra, 271 U.S. 472, 474, 46 S.Ct. 564, 70 L.Ed. 1041.) Although the Robins case involved rights and liabilities arising under maritime law, there is no doubt that the substantive law of the states is equally inapplicable in litigation based upon the F.E.L.A.[1] (See Garrett v. Moore-McCormack Co., supra, 317 U.S. 239, 244, 63 S.Ct. 246, 87 L.Ed. 239.)

It is true as contended by appellant that there are cases which would seem to hold that the reference to state regulations merely as an aid to the ascertainment of due care on the part of defendant employer is proper; such evidence apparently being regarded and viewed as an expression of an informed and experienced state body as to what constitutes safe precautions or conduct in given potentially hazardous employment situations. (See Pennsylvania R. Co. v. Johnson, 91 Ind.App. 412, 169 N.E. 358, 361–362; Luton Mining Co. v. Louisville & N. R. Co., 276 Ky. 321, 333–334, 123 S.W.2d 1055 [both F.E.L.A. actions].) But appellant has not brought himself within the alleged exceptions of these cases. (See Note 79 A.L.R.2d 553, 559.) Nor do we deem the case at bar to be within the apparent exceptions to the principle of uniformity of F.E.L.A. negligence law created by Atlantic Coast Line R. Co. v. Powe, 283 U.S. 401, 402–403, 51 S.Ct. 498, 75 L.Ed. 1142, and Frese v. Chicago, B. & Q. R. R., 263 U.S. 1, 2–3, 44 S.Ct. 1, 68 L.Ed. 131, especially in view of the subsequent pronouncements by the United States Supreme Court enunciating ⌊576 the guiding rule of federal uniformity. (See Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 507 fn. 13, 77 S.Ct. 443, 1 L.Ed.2d 493; Urie v. Thompson, supra, 337 U.S. 163, 174, 63 S.Ct. 246, 87 L.Ed. 239.)

[3] In the case now engaging our attention it cannot reasonably be urged that appellant offered the safety order into evidence for a purpose other than affecting if not altering the substantive rights of the parties under federal law. (See Note 96 L. Ed. 408, 409–411.) Indeed, such an assumption finds support in the concluding statement in appellant's proffered instruction which read: "The foregoing requirement (the construction safety order of the Division of Industrial Safety of the State of California, dealing with scaffolds) was an obligation placed upon plaintiff's employer. * * *" It therefore necessarily follows that the state regulation poses the very issue upon which the jury was required to pass, and therefore its use as evidence would have been in violation of the oft repeated and established rule that, "By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail, and all state laws upon that subject were superseded. [Citations.] The rights and obligations of the petitioner depend upon that act and applicable principles of common law as interpreted by the federal courts. The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states." (Chicago, M. & St. P. Ry. Co. v. Coogan, supra, 271 U.S. 472, 474, 46 S.Ct. 564, 70 L.Ed. 1041; accord Urie v. Thompson, supra, 337 U.S. 163, 174, 63 S.Ct. 246, 87 L.Ed. 239.)

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER, McCOMB, PETERS and TOBRINER, JJ., concur.

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[1] The Division of Industrial Safety was authorized by section 6500 of the Labor Code to enact the instant safety order, and such an administrative regulation is the equivalent for present purposes of "a statute of the State." (See Hamilton v. Regents, 293 U.S. 245, 258, 55 S.Ct. 197, 79 L.Ed. 343.)

58 Cal.2d 630, 375 P.2d 296

⊥630 ⊥**The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Nathaniel GAINES, Defendant and Appellant.

Cr. 7007.

Supreme Court of California, In Bank.

Oct. 25, 1962.

As Modified on Denial of Rehearing Nov. 21, 1962.

Prosecution for homicide. The Superior Court of Los Angeles County, J. Howard Ziemann, J., entered a judgment of conviction of guilty of murder in the first degree and after jury fixed punishment at death there was an automatic appeal. The Supreme Court, McComb, J., held that there was no prejudicial error in allowing defense counsel to withdraw plea of not guilty by reason of insanity where there was no claim by defendant that his attorney lacked authority to withdraw the plea.

Affirmed.

Traynor, Peters and Tobriner, JJ., dissented.

1. Criminal Law 🔑641(1)

Actions of defense counsel, member of public defender's office, in withdrawing plea of not guilty by reason of insanity after psychiatric tests, in saving doctor's testimony on defendant's ability to perform specific intent until penalty trial, in cross examination, in waiver of final argument on main trial and in other matters of trial strategy did not deny defendant, accused of first degree murder, of effective assistance of counsel. West's Ann.Pen.Code, §§ 1027, 1239(b); West's Ann.Code Civ.Proc. § 1871.

2. Criminal Law 🔑286

Plea of not guilty by reason of insanity must be made by defendant himself in open court. West's Ann.Pen.Code, §§ 1016–1018.

3. Criminal Law 🔑1167(5)

Allowing defense counsel to withdraw plea of not guilty by reason of insanity was not reversible error where there was no claim that attorney lacked authority to withdraw the plea and statutes did not require that withdrawal of plea be made by defendant personally. West's Ann.Pen. Code, §§ 1016–1018.

4. Criminal Law 🔑717

Prosecutor was not guilty of any misconduct in final argument relative to legal effect of life imprisonment for accused who had been found guilty of first degree murder. West's Ann.Const. art. 6, § 4½.

5. Criminal Law 🔑1171(1)

Questions addressed to defendant and codefendant, during penalty trial following verdict of guilty of first degree murder, relative to whether defendant's wife was present at meetings of accused and his codefendants were not prejudicial error where no conversations between defendant and his wife were ever elicited.

6. Witnesses 🔑193

Presence of wife at meeting with husband and other persons would void any possible confidentiality which might have existed had husband and wife been alone together.

7. Criminal Law 🔑645

Permitting prosecution to give opening and closing arguments to jury on penalty phase of trial was not error.

8. Criminal Law 🔑889, 894

Where jury had actually agreed on verdict as to two of three defendants in penalty phase of trial it was proper for court to formally take verdict and send jurors back to deliberate on penalty for third defendant, and third defendant then had right to waive further deliberations and leave penalty up to trial judge. West's Ann.Pen.Code, § 1160.

* * *

William B. Wolfson, Sausalito, under appointment by Supreme Court, for defendant and appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., George J. Roth and Jack E. Goertzen, Deputy Attys. Gen., for plaintiff and respondent.

⊥McCOMB, Justice. ⊥632

This is an automatic appeal from a judgment of guilty of murder in the first degree, pursuant to the provisions of section 1239, subdivision (b), of the Penal Code. The jury fixed the punishment at death.

Viewed in the light most favorable to the People, the record discloses the following facts:

Mr. and Mrs. Broxton operated a neighborhood grocery store. Between 7:30 and 8 p. m. on November 26, 1960, Mrs. Broxton was in the storage room when she heard a voice say, "This is a stick-up." She looked out into the main part of the store, where she saw defendant with a gun in his hand, another man wearing a blond wig and a mask, her husband, and Miss Withers, an employee of the store.

Defendant commanded Mrs. Broxton to come out, and after inquiring, "What is back there?" ordered her, Miss Withers and Mr. Broxton back to the storage room, saying "No funny business." Defendant followed them, and the other man went to the cash register.

When they reached the back room, defendant told them to sit down. He then told Mr. Broxton to lie down on the floor. Mr. Broxton went down on his knees, and defendant directed him to lie in a certain way. Mr. Broxton started to say something, and Mrs. Broxton said, "Don't, Honey. Do what he says." Defendant told them he was worried about Mr. Broxton, and Mr. Broxton lay down.

Defendant then told Mrs. Broxton to lie down. She said: "I can't. I have arthritis in my knee. I can't lie down." He said: "All right, I am not afraid of you. I want this big boy."

Mr. Broxton then straightened out on the floor. Defendant walked over, placed a gun two or three inches from his head,⊥633 and shot him, with the result that Mr. Broxton died. Defendant removed a billfold from Mr. Broxton's hip pocket and walked out.

Defendant was identified by Mrs. Broxton and Miss Withers. The gun which had been used had been taken out of pawn by defendant a few days previously and was later discovered under a water heater in his home.

Defendant presents these questions:

First. *Was defendant ably defended by a deputy public defender of the Los Angeles County Public Defender's Office?*

[1] *Yes.* Defendant contends that Mr. John Moore, a member of the staff of the Los Angeles County Public Defender's Office, ineptly handled the trial defense, with the result that he was denied the right of effective aid of counsel, and such aid as was rendered prejudiced the jury against him.

An examination of the record discloses that this contention is devoid of merit. The lawyer representing defendant was experienced and well qualified. (See People v. Hughes, 57 A.C. 91, 101 [10], 17 Cal.Rptr. 617, 367 P.2d 33.) In the present case the record shows that there was no misconduct upon the part of defendant's attorney and that he ably represented defendant.

Defendant's specific contentions are:

(a) *That his attorney erred in withdrawing his plea of not guilty by reason of insanity.*

Originally defendant entered pleas of not guilty and not guilty by reason of insanity. Two doctors were appointed, pursuant to section 1027 of the Penal Code, to examine defendant as to his mental status. One of the doctors was further appointed under section 1871 of the Code of Civil Procedure, with electroencephalogram testing authorized. On motion of defendant's counsel, a third doctor was appointed under section 1871 of the Code of Civil Procedure "to conduct examination of the defendant as to his sanity at the time of the commission and presently." A fourth doctor was appointed "to conduct electroencephalogram tests * * * sleep recording and Metronal activation tests."

The record reveals that "the electroencephalogram was normal, before, during and after sleep and during, and after metrazol activation" and that no abnormality was recorded.

Apparently two of the three appointed psychiatrists concluded that defendant was legally sane when the crime was committed, for the third expert (Dr. McGinnis), in his report filed with the court, refers to their

634 examination and inferentially their conclusions, and states that he disagrees. However, he concluded in his report that he was "unable to determine with any degree of certainty, what the defendant's mental status then * * * really was." When cross-examined on the witness stand, he testified: "Q. In other words, what you are saying is that now he doesn't remember? You are not saying at the time he didn't know what he was doing? You are not saying that, is that right? A. That is quite right, yes."

With this information, defendant's counsel withdrew the previous plea of not guilty by reason of insanity.

Clearly, under the record there was no reasonable probability of any jury's concluding that insanity existed in defendant at the time of the commission of the crime, and therefore defense trial counsel properly exercised his discretion in withdrawing the plea.

(b) *That defendant's counsel erred in not bringing before the jury on the main trial the testimony of Dr. McGinnis to negate defendant's ability to form specific intent.*

This contention is obviously not well founded, for defendant's counsel was presented with a strategic problem in this regard: Knowing that the main trial would be followed by a trial on the penalty by the same jury, should he take the chance of antagonizing them by trying to force an extremely weak theory of lack of intent, with the probable result that they would show no sympathy for his client when the penalty trial occurred, or should he save this point and then exert it as forcefully as possible (as the record indicates he actually did) on the penalty trial, where it might have some possible impact to sway the jury to leniency in their verdict on the penalty?

Competent lawyers in the same situation would disagree on which course to take, depending on who they were, what their over-all defense was, what their discussions with their client had elicited, and many other factors. Taking one view or the other would not deny the client the effective aid of counsel.

(c) *That defendant's trial counsel was guilty of an almost total resignation from his responsibility to conduct a defense for defendant, in that he failed to (1) properly cross-examine the prosecution's witnesses, (2) call any witnesses in behalf of defendant, and (3) make an argument to the jury on the main trial.*

This contention is clearly without merit. Defendant's counsel on appeal has not suggested any additional questions which could have been asked or any witnesses who could 635
have been called in defendant's behalf. An examination of the record shows an adequate examination by defendant's trial counsel of the witnesses called by the prosecution.

Likewise, it would have been futile for defendant's counsel to have argued to the jury on the main trial of the case. Defendant's identification was positive, the description of the commission of the crime was clear, and the murder weapon was traced to defendant and was discovered hidden in his home. Defendant's trial counsel, aware of the impending penalty trial, properly reached a decision that to make an argument with no reasonable possibility of success on the main trial would lessen the impact of his argument on the penalty phase. He therefore waived argument on the main trial and argued the matter fully and completely on the penalty phase of the case.

(d) *That defendant's counsel should have offered specific evidence and instructions relating to the meaning and effect of a sentence of life imprisonment.*

This subject was adequately covered during the trial on the penalty phase of the case. Defendant's counsel presented his case as expertly as did counsel for each of the other two defendants, and the trial techniques utilized by him gave defendant much more than the minimum requirements for a fair defense.

Second. *Was defendant's plea of not guilty by reason of insanity properly withdrawn?*

Yes. The record discloses that defendant did not personally withdraw the plea of not guilty by reason of insanity, but that the plea was withdrawn by his counsel. When the transcript on appeal was being prepared, the trial court's attention was directed to a discrepancy between the reporter's transcript and the clerk's transcript relating to the personal waiver of the plea of not guilty by reason of insanity. The following occurred: "THE COURT: In that connection I would like the record to show that there were several doctors who had been appointed to examine the defendant and to advise the Court. There was Dr. Crahan and Dr. Abe, and as late as May 5th, Dr. McGinnis and Dr. Alberto Mariacci had examined the defendant and reported to both counsel and to the Court. I think it was on the basis of those reports which were made a part of the record here, that counsel withdrew the plea of not guilty by reason of insanity. MR. LENOIR: I am not disputing with the Court in that regard. The only thing I am asking is that the Clerk's transcript should be the ⊥636 same as the reporters' transcript, which I think correctly reflects the proceedings had on this matter. THE COURT: Very well. I will order the Clerk's transcript to be corrected to show that the defendant did not personally withdraw the plea of not guilty by reason of insanity, but that that was done by his counsel."

[2] It is clear that a criminal defendant's plea of not guilty by reason of insanity must be made by the defendant *himself* in open court. Section 1016 of the Penal Code provides that there are "five kinds of pleas" to an indictment, information, or complaint, and the fifth enumerated plea is "Not guilty by reason of insanity." Section 1017 sets forth the proper form for each of these five pleas, and the immediately following section, 1018, flatly directs that unless otherwise provided by law, "every plea" must be put in by "the defendant himself in open court."

[3] The code sections, however, relate only to the *making* of the plea; they do not require that a *withdrawal* of it be made by the defendant personally, and we should not read such a requirement into the statutes. In the absence of a statute requiring that the withdrawal of a plea of "not guilty by reason of insanity" be made by a defendant himself, or the presence of some compelling circumstance not shown here, we should not depart from the customary practice by which an attorney acts for his client throughout the trial.

The fact that section 1018 refers only to the making of pleas may have led many attorneys and judges to believe that pleas could properly be withdrawn by the attorney, and under these circumstances it would seem improper to reverse convictions merely because such a procedure had been followed, and in the present case no claim is made by defendant that his attorney lacked authority to withdraw the plea.

The case of People v. Rogers, 56 Cal.2d 301, 14 Cal.Rptr. 660, 363 P.2d 892, is distinguishable on its facts. There the defendant pleaded not guilty and waived trial by jury, and thereafter his attorney and the prosecutor entered into a stipulation before the trial judge "that Your Honor will be restricted to either a finding of second degree murder or a finding of voluntary or involuntary manslaughter and that Your Honor would be precluded from a finding of first degree murder or a finding of not guilty under the circumstances." Since the quoted language specifically precluded the trial judge from finding the defendant not guilty, the stipulation necessarily amounted to a plea of guilty, in the alternative, to ⊥637 one of the specific crimes referred to, the choice to be made by the judge after hearing the evidence. The stipulation, of course, involved the withdrawal of the prior plea of not guilty, but it also constituted the making of a plea of guilty, and this fact brought it directly within the language of section 1018. Since the guilty plea was not made by the defendant *himself*, we reversed the judgment.

In the present case it was not necessary for defendant himself to request a withdrawal of the plea of "not guilty by reason of insanity" in order to remove that issue from the case, and the trial court did not err in permitting the withdrawal of the plea to be made by defendant's attorney.

Third. *Did the prosecution commit prejudicial error in the trial of the case?*

[4] *No.* Defendant contends that "the prosecutor blatantly misstated the law"; that it "would appear the prosecutor is going to ease the difficult path ahead of appellant if he is paroled after receiving sentence of life imprisonment by the simple expedient of executing him now"; and that the prosecutor's remarks relating to the effect of a sentence of life imprisonment gave the jury the impression that defendant, if so sentenced, "would be out in seven years."

On the contrary, the record indicates that the prosecution displayed rather unusual restraint in the presentation of its case in view of the brutal nature of the crime.

Relative to the contention that the prosecuting attorney misled the jury as to the effect of life imprisonment, the record discloses that in his closing argument he stated: "* * * when and if these persons come before them [the Adult Authority], they have the verdict of the jury that life is an appropriate penalty—and life in California means they can be paroled and nobody says we are going to keep them for a thousand years any more than I would concede they are going to let them go after seven years. I never intended by my expressions to infer that as soon as the seventh year fell they automatically throw the gates wide open. All I mean to say is that is a fact that they may be paroled from prison, and I ask you to take that in mind in determining * * * the penalty."

An examination of the record discloses that various other remarks of the prosecution which defendant admits are not individually prejudicial were not collectively so, and therefore under article VI, section 4½, of the Constitution would not warrant a reversal of the judgment.

638 Fourth. *Did questions addressed to defendant and his codefendants relative to whether defendant's wife was present at a meeting with them constitute prejudicial error?*

[5] *No.* Defendant complains of certain questioning by the prosecution on the penalty phase of the trial relating to whether or not his wife was present when he and his codefendants had certain conversations concerning the robbery of the Broxtons' store.

[6] No conversation between defendant and his wife was ever elicited. In addition, the presence of the wife at a meeting with the husband and other persons would void any possible confidentiality which might have existed had the husband and the wife been alone together. (McCormick, Evidence (1954), § 84, p. 172.)

Fifth. *Did the trial court commit prejudicial error in permitting the prosecution to give the opening and closing arguments to the jury on the penalty phase?*

[7] *No.* (People v. Corwin, 52 Cal.2d 404, 407 [2], 340 P.2d 626; cf. People v. Purvis, 52 Cal.2d 871, 884, 346 P.2d 22.)

Sixth. *Did the trial court err by taking verdicts in regard to only two of the defendants on the penalty phase?*

[8] *No.* Defendant contends that the court committed error in taking the case from the jury on the penalty phase of their deliberations. The record shows that the jury retired for deliberations on this phase of the case on Wednesday, May 24, 1961. On Friday morning, May 26, 1961, they returned to the courtroom at 11:10 a. m. to have read to them the testimony of defendant Rollins (a codefendant) and his wife. At 11:55 a. m. the jury retired for further deliberations.

At 3:43 p. m. the court called the jury back into the courtroom, and the following proceedings occurred: "THE COURT: Let the record show that the three defendants and their respective counsel are present, and that the members of the jury and the alternates are in their proper places in the jury box. Mr. Foreman, my inquiry is not in the nature of one trying to hasten or push you, but it is simply one of inquiry. Have you been able to reach any verdicts yet? MR. SCURR: Yes, your Honor. THE COURT: As to one or all of the defendants? MR. SCURR: As to two of the defendants. THE COURT: Would you hand those verdicts to the bailiff, please? MR. SCURR: I did not bring those verdicts with me. As yet, they are not signed. THE COURT: Well, they are not verdicts then. MR. SCURR: We reached our final decision on them, but they were not signed because it was our understanding we sign

639 them all at once. THE COURT: Let me inquire as to the remaining defendant, do you think you can reach a verdict? MR. SCURR: Yes, your Honor, I personally do. THE COURT: Shortly, or over the weekend? MR. SCURR: Well, I think we can have a verdict tomorrow, if you want it done. MR. LENOIR: May we approach the bench, your Honor? THE COURT: Yes, will counsel approach the bench, please."

The following proceedings were then had at the bench, outside the hearing of the jury: "MR. LENOIR: I don't know what the procedure is, but when the foreman said he thought they could reach a verdict as to the other defendant, one juror in the back—I believe she is Number 10—she shook her head in a negative fashion. THE COURT: Mrs. Tisherman. MR. LENOIR: Yes, your Honor, I made that observation, and I don't know what the procedure is. THE COURT: I would suggest we send them back and let them sign the two verdicts, and then let them see what they can do about the remaining one. MR. HOWARD: That is perfectly agreeable to the People. THE COURT: Any objections? MR. MOORE: No objections. MR. LENOIR: No objections, your Honor. MR. JENSEN: No objections. THE COURT: All right, I will so instruct them."

The following proceedings then took place in open court, in the presence and hearing of the jury: "THE COURT: Would the jury please retire to the jury room and sign the verdicts on which you have agreed and then return to the Courtroom? All defendants and counsel may wait in the Courtroom until the jury returns."

The jury left the courtroom at 3:50 p. m. for further deliberations and returned at 3:55 p. m.

The jury fixed defendant's penalty at death and codefendant Barnes' penalty at life imprisonment. After the jury was polled and these verdicts were recorded, the following occurred: "THE COURT: Now, as to your verdict on the third defendant, Clifford Milton Rollins, do you still think you can reach a verdict after more deliberations? MR. SCURR: Yes, your Honor. THE COURT: All right, the jury may retire for further deliberations."

The jury retired to the jury room at 4:10 p. m. for further deliberations. Subsequently, the following transpired: "MR. JENSEN [Attorney for codefendant Rollins]: If it please the Court, the Court inquired whether we desired further deliberations by the jury. THE COURT: That is correct. MR. JENSEN: I would like to ask the Court, does the Court mean that the jury can be stopped from further deliberations? 640 THE COURT: At this time, there are two choices available to you. You can allow the jury to continue with their deliberations until they reach a verdict, or you can ask that it be taken from the jury on the ground that the jury has not been able to reach a verdict. MR. JENSEN: I would like the Court to declare the jury unable to reach a verdict. THE COURT: Then do you want another jury to fix the penalty, or do you want the Court to fix the penalty? MR. JENSEN: I want the Court to fix the penalty. THE COURT: You want me to fix it, then? MR. JENSEN: Yes, that is our desire, your Honor. THE COURT: Is that what you want me to do, Mr. Rollins? DEFENDANT ROLLINS: Yes. THE COURT: Is there any opposition? MR. JACOBSON: No, your Honor, the People have no objection. THE COURT: Very well. Mr. Bailiff, bring the jury back in."

At 4:40 p. m., the members of the jury and the alternates returned to the courtroom, and the following proceedings were had in the presence and hearing of the jury: "THE COURT: Let the record show the defendant Rollins is present with his counsel, the Deputy District Attorneys are present, and the members of the jury and the alternates are all in their proper places in the jury box. On motion of defendant's counsel, I am going to dismiss the jury. I feel you have done a very good job up to now, and I doubt whether you will reach a decision within a convenient time, so I will dismiss the jury. I want to thank you for your verdicts, and as a matter of fact, you have arrived at exactly the same place I have arrived at." The court then fixed the penalty of defendant Rollins at life imprisonment.

Section 1160 of the Penal Code provides, in part: "On a charge against two or more defendants jointly, if the jury cannot agree upon a verdict as to all, they may render a verdict as to the defendant or defendants in regard to whom they do agree, on which a judgment must be entered accordingly, and the case as to the other may be tried again."

Since the jury actually had agreed upon a verdict as to defendant, it was proper for the court to formally take the verdict and then send the jurors back to deliberate on the penalty for his codefendant Rollins. Likewise, defendant Rollins had the right to waive further deliberations and leave his fate up to the trial judge.

An examination of the record discloses that it is free from prejudicial error and ⌊641 that defendant had a fair trial, well represented by a competent attorney before an able and impartial trial judge.

The judgment is affirmed.

GIBSON, C. J., and SCHAUER and WHITE, JJ., concur.

TRAYNOR, Justice.

I dissent.

Defendant's plea of not guilty by reason of insanity was improperly withdrawn. Penal Code, section 1018 unequivocally provides that "Unless otherwise provided by law every plea must be put in by the defendant himself in open court." Penal Code, section 1016 enumerates the five pleas that may be entered, including "5. Not guilty by reason of insanity." Read together these sections set forth a clear statutory procedure: unless otherwise provided by law, the pleas enumerated in section 1016 must be put in by the defendant himself in open court. The purpose of section 1018 is to ensure that the defendant in a criminal action personally puts in issue the issues raised under any of the pleas included in section 1016. Since the withdrawal of a plea removes from litigation an issue that the defendant has personally put in issue, the withdrawal must also be by the defendant personally. Otherwise the issues to be litigated would not include those raised by defendant personally. Defendant had personally put his sanity in issue by his plea in open court of not guilty by reason of insanity. That issue remained in the case, for it was not personally withdrawn by defendant. Counsel's withdrawal of the plea of not guilty by reason of insanity removed a legal excuse for the crime and was in effect a plea that "whereas before I pleaded that I did not do this act, but if I did, I am to be excused, now I plead that I did not do this act, but if I did, I have no excuse." Such a plea was not defendant's own as section 1018 requires.

In People v. Rogers, 56 Cal.2d 301, 14 Cal.Rptr. 660, 363 P.2d 892, we reversed a judgment of conviction of murder in the second degree where, after defendant had personally pleaded not guilty pursuant to section 1018, counsel stipulated that the trial court be restricted to finding the defendant guilty of murder in the second degree or of manslaughter and precluded from a finding of first degree murder or a finding of not guilty. We held that the stipulation violated section 1018 "since it purported to eliminate from the trial the question of defendant's innocence." (56 Cal.2d at 306, 14 Cal.Rptr. at 660, 363 P.2d at 894.) Similarly, the withdrawal of defendant's plea of not guilty by reason of insanity eliminated from the trial the question of his sanity ⌊642 at the time of the commission of the offense. If counsel may remove from litigation issues that the Legislature has directed must be personally put in issue by the defendant and that have been personally put in issue by him, the purpose of the statute is frustrated.

There is no merit in the contention that the plea of not guilty by reason of insanity is not one that section 1018 requires the defendant to make himself in open court since "such plea is only an admission of commission of the acts charged, coupled with a denial of guilt * * * resting upon the remaining defense of insanity." (People v. Pincus, 131 Cal.App. 607, 610, 21 P.2d 964, 965). That contention is contrary to the plain mandate of section 1018; nor does the Pincus case support it. That case involved the entry by the defendant's counsel of a plea of not guilty by reason of insanity after the defendant had entered and withdrawn his plea of not guilty. Thus the defendant was not deprived of a trial on any issue that he had personally put in issue. Moreover, he personally waived a jury trial on the issue of insanity. On the facts of that case, the court correctly held that the plea "was really a plea by defendant himself, and that it did not result, by reason of the form in which it was made, in a miscarriage of justice, nor did it deprive defendant of any right * *." (131 Cal.App. at 610, 21 P.2d at 965.)

It is immaterial that the plea of not guilty by reason of insanity has been characterized as procedural rather than substantive for the purpose of determining whether the issue of sanity could be constitutionally determined in a separate trial. (See People v. Troche, 206 Cal. 35, 44, 273 P. 767; People v. Leong Fook, 206 Cal. 64, 74–75, 273 P. 779.) The question in the present case is whether that issue is to be determined at all, for the withdrawal of defendant's plea deprived him of the right to a jury trial on the issue of his sanity as guaranteed by Penal Code, section 1026. Error that results in the deprivation of a basic right necessarily requires reversal to preclude prejudice to the judicial process and to the procedural rights of a litigant even though there might be equally fair alternatives consonant with due process. (People v. Rogers, 56 Cal. 2d 301, 307, 14 Cal.Rptr. 660, 363 P.2d 892; People v. Holmes, 54 Cal.2d 442, 5 Cal. Rptr. 871, 353 P.2d 583; In re Brain, 70 Cal.App. 334, 335, 233 P. 390.)

In People v. Rogers, supra, we reversed the judgment even though counsel's improper withdrawal of the plea of not guilty was designed to benefit the defendant. In ⊥643 People v. Holmes, supra, we reversed the judgment on the ground that the defendant had not personally waived his right to a jury trial. "Experience has shown that there is sound reason for this requirement. If the waiver were left to implication from conduct, there would be a danger of misinterpretation with respect to a right the importance of which requires there be certainty. Moreover, appellate courts would be faced with the burdensome task of determining whether the facts of the particular case warrant such an implication, whereas trial courts, without any difficulty, can eliminate doubt and safeguard the rights of both the defendant and the People by obtaining express statements from the defendant, from his attorney, and from the prosecuting attorney not merely as to whether a trial by jury is desired but specifically that a jury is or is not waived." (54 Cal.2d at p. 444, 5 Cal.Rptr. at p. 872, 353 P.2d at p. 584.) "Manifestly the entry of a plea in a prosecution for a felony cannot be said to be less important than the waiver of trial by jury." (People v. Rogers, 56 Cal.2d 301, 307, 14 Cal.Rptr. 660, 363 P.2d 892.)

It is immaterial that until the opinion in this case was filed, defendant made no claim "that his attorney lacked authority to withdraw the plea." In presenting his appeal, he was entitled to rely on the settled rule that a failure to comply with section 1018 requires reversal on appeal, for the very purpose of that section is to avoid uncertainties as to a defendant's intent in entering or withdrawing his plea. Moreover, now that the court has stated that such a claim is relevant, defendant has filed an affidavit that he did not authorize the withdrawal of his plea of not guilty by reason of insanity and that he believed at the time of the trial that the issue of sanity was being litigated during the trial on the issue of penalty.[1] His

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[1] "I, NATHANIEL GAINES, being first sworn, depose and say:

"That in the trial of the above-entitled action, at no time was there any discussion whatsoever had between myself and my attorney, JOHN MOORE, regarding the withdrawal of my plea of 'Not Guilty By Reason of Insanity'; that at no time, either before, during or for some period of time after the conclusion of said trial was I ever aware that I was not to have and did not have a trial on the issue of my sanity at the time of the commission of the offense alleged as a result of said plea of 'Not Guilty By Reason of Insanity'; that at no time ever, did I or have I authorized, instructed, suggested or acquiesced in the withdrawal of said plea of 'Not Guilty By Reason of Insanity'; but that I, at all times until the certification of the transcript on appeal, was under the impression that I was to and did receive a trial on the issue of sanity at the time of the offense charged; that I was under the impression at all times until said certification that the penalty phase of my trial was in truth and fact the trial on the issue of sanity as raised by my plea of 'Not Guilty By Reason of Insanity' as well as the penalty phase should it be determined therein that I was sane at the time of the offense charged; that such belief on my part was affirmed and justified by the presentation of med-

⊥644 trial⊥counsel has also filed an affidavit that he does not recall discussing the withdrawal of the plea with defendant. If defendant did not authorize the withdrawal of the plea, he has been denied the right to a jury trial on a vital issue in his case, and habeas corpus will lie to determine whether the withdrawal of the plea was in fact authorized. (In re Martinez, 52 Cal.2d 808, 815, 345 P.2d 449.) The error in permitting defendant's counsel to withdraw his plea should be corrected on appeal, however, and the problem of collateral attack on the judgment thereby obviated.

There is no merit in the contention that the error was not prejudicial. In In re Brain, supra, the defendant's attorney had improperly entered a plea of guilty to a charge of burglary. The court held that "[s]ection 4½ of article 6 of the Constitution could not be applied in the instant case even though we considered the error a procedural one, because of the absence of any record upon which we might judge of the guilt or innocence of the petitioner." (70 Cal.App. at p. 335, 233 P. at p. 390.) Similarly, the improper withdrawal of defendant's plea of not guilty by reason of insanity in the present case has deprived this court of a record as to defendant's sanity from which to determine the effect of the error. How then can it reasonably be said that an examination of the entire record discloses that there has not been a miscarriage of justice, when a record on the crucial issue does not exist because of the withdrawal of defendant's plea? The only evidence bearing upon defendant's competency at the time the offense was committed is that introduced in mitigation of the penalty under Penal Code, section 190.1. To conclude from a review of this evidence that⊥defendant could not ⊥645 sustain the burden of proving his insanity assumes that the evidence offered in mitigation of the penalty was necessarily identical with the evidence that would have been offered on a sanity hearing. Even if defendant would have introduced the same evidence, his right to a jury determination of his sanity precludes this court from determining that issue for the first time on appeal.

PETERS and TOBRINER, JJ., concur.

Rehearing denied; TRAYNOR, PETERS and TOBRINER, JJ., dissenting.

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58 Cal.2d 552, 375 P.2d 304

⊥552 **Bette Davis MERRILL, Plaintiff and Respondent,**

v.

Ronald L. BUCK, Ann M. Buck, Lelah T. Pierson, Jeanette M. Clark, and Lelah T. Pierson, Inc., Defendants and Appellants.

L. A. 26830.

Supreme Court of California,
In Bank.
Oct. 23, 1962.
Rehearing Denied Nov. 21, 1962.

Action for personal injuries sustained by plaintiff as the result of a fall down a

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ical testimony concerning my sanity during the penalty hearing.

"I further declare that until I received a copy of the transcript on appeal did I realize that I had not yet had a trial on my plea of 'Not Guilty By Reason of Insanity'; that I am a layman and completely unfamiliar with the proceedings leading up to and including trial, but that since my only defense to the crime charged was my complete inability to remember the acts with which I was charged, my only excuse would be insanity; that had I been informed that my plea of 'Not Guilty By Reason of Insanity' was to have been withdrawn, I would not have acquiesced in or approved of such withdrawal under any circumstances whatsoever.

"That this affidavit is executed for the purpose of setting out the true facts surrounding the withdrawal of the insanity plea in my case as I know them, is true and correct and is made in support of a petition for rehearing following the decision in the above-entitled case.

/s/ NATHANIEL GAINES
NATHANIEL GAINES"

flight of basement stairs. The Superior Court, Los Angeles County, Carlos M. Teran, J., entered judgment for plaintiff and defendants appealed. The Supreme Court, Dooling, J. pro tem., held that negligence of landlords in failing to warn tenant and in allowing a dangerous condition of the premises to continue did not relieve realtors of liability for their negligence in failing to warn tenant of the dangerous condition at time they showed house to tenant, on theory of an intervening force, in view of fact that negligence of realtors and negligence of landlords could be found to be concurring proximate causes of tenant's injury.

Judgment and order denying judgment notwithstanding the verdict affirmed.

McComb and Schauer, JJ., dissented.

Opinion 19 Cal.Rptr. 621 vacated.

1. Landlord and Tenant ⚷164(7)

If, at time of making the lease, there is some hidden defect in the premises or danger thereon known to the landlord but not apparent to the tenant, the landlord is bound to inform the tenant and if he fails to do so he is liable for injuries to the tenant arising therefrom.

2. Landlord and Tenant ⚷164(7)

Danger inhering in precipitous basement stairs without landing or handrail, lying immediately behind an inward swinging basement door, was a concealed hazard, and even though basement door was a visible object, jury could have found danger of the stairway was not visible and created in leased house not a patent but a latent defect which landlord had a duty to warn tenant of.

3. Appeal and Error ⚷1068(3)

Even though court erroneously instructed jury in regard to certain building code ordinances, giving of such instructions was not prejudicial where verdict was returned against realtors based on negligent failure to disclose a hazard, and in view of fact no greater duty of disclosure rested upon realtors than upon landlords, verdict would have gone against landlords even if alleged violation of building ordinance had not been submitted.

4. Landlord and Tenant ⚷169(11)

Evidence presented question for jury as to whether tenant who fell down basement stairway in landlord's residence after opening an inward swinging door over the stairway was contributorially negligent.

5. Negligence ⚷14

Privity of contract is not necessary to establish existence of a duty to exercise ordinary care not to injure another, but such duty may arise out of a voluntarily assumed relationship if public policy dictates existence of such a duty.

6. Negligence ⚷1, 10, 56(1.1)

Determination of whether a defendant will be held liable to a third person not in privity is a matter of policy and involves balancing of various factors, among which are extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff would suffer injury, closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct and policy of preventing future harm.

7. Brokers ⚷101

Realtors, having affirmatively undertaken to show landlord's house to plaintiff in the regular course of their business with the purpose of earning a commission if plaintiff decided to rent it, were under a duty of care to warn plaintiff of a concealed danger on the premises of which they were aware and from which her injury might have been reasonably foreseen if she did become a tenant, and realtors could be held liable if jury found they did not exercise reasonable care in such regard even though at time the property was shown to plaintiff realtors were not acting as agents either of plaintiff or landlords.

8. Brokers ⚷101

Negligence of landlords in failing to warn tenant and in allowing a dangerous condition of premises to continue did not relieve realtors of liability for their negligence in failing to warn tenant of dangerous condition at time they showed house to tenant, on theory of an intervening force, in view of fact that negligence of realtors and negligence of landlords could be found to be concurring proximate causes of tenant's injury.

9. Trial 🔑267(2)

No duty was cast upon a court to modify and give as modified a proposed incomplete or erroneous instruction.

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Schell & Delamer, Richard B. Goethals, Earle K. Stanton, Crider, Tilson & Ruppé and Henry E. Kappler, Los Angeles, for defendants and appellants.

Steinmetz & Murrish, Hollywood, Magana & Olney, Los Angeles, William B. Murrish, Fred H. Steinmetz, Hollywood, and Raoul D. Magana, Los Angeles, for plaintiff and respondent.

555 ⌊DOOLING, Justice (pro tem.).

Plaintiff as lessee of a dwelling house brought this action for damages for personal injuries sustained as the result of her fall down a flight of basement stairs. Defendants were Mr. and Mrs. Buck, the owners of the house; Mrs. Clark, the real estate saleswoman who showed the house to plaintiff and negotiated the lease; and Lelah T. Pierson, the real estate agent employing Mrs. Clark. The jury returned a verdict of $65,700 against all defendants and judgment was entered accordingly. Defendants appeal from the judgment and from the order denying their motions for a judgment notwithstanding the verdict or, in the alternative, for a new trial. They contend that (1) the evidence does not sustain the verdict and judgment and (2) there was error in the instructions.

On June 22, 1957, Mrs. Clark took plaintiff to see the Buck's house, a furnished one-story ranch type dwelling in the Brentwood area of Los Angeles. They spent approximately one to one and one-half hours inspecting the premises, with Mrs. Clark pointing out various features considered important to a prospective tenant. That evening plaintiff telephoned Mrs. Clark that she would rent the house. Mrs. Clark prepared the lease, and on June 24 plaintiff and the Bucks signed it. The lease was for one year at a rental of $675 a month commencing June 29, 1957, and it provided that the lessor "shall not be called upon to make any improvements or repairs whatsoever upon the said premises, or any part thereof, but the ⌊said Lessee agrees to keep the same in good order and condition at her own expense." 556

On June 29, 1957, plaintiff moved into the house. That afternoon she opened a door in the central hall of the house, took a step forward and fell down a flight of stairs into the basement. She suffered a broken back, a broken right index finger, and a blackout coma from the fall.

The door to the basement opened inward over the top step which was nine inches wide and 7¾ inches below the level of the hall floor. There was no landing at the top of the stairway and only a three-and-one-half-inch sill. The stairway was a little less than four feet across, had cement walls at its sides and no handrails. There were no windows in the basement but there was a light switch on the wall at the top of the stairs inside the basement. The stairway descended seven feet to the basement floor and it was the only means of access to the basement.

Upon entering the one-floor house there was a circular entry hall, with a den on one side and a living room on the other. Running from the entry hall through the center of the house there was a narrow central hall, with several doors on either side leading into adjoining rooms. At the commencement of the central hall there was on one side a large linen closet and directly opposite on the other side was the door leading to the basement. There was a door, with its top half louvered, between the entry hall and the central hall. The louvered door and the basement door were each 28 inches wide and when opened against the central hall wall, the louvered door practically covered the basement door.

Plaintiff testified that when she and Mrs. Clark inspected the house, the louvered door between the entry hall and the central hall was open, and she did not see the basement door. Mrs. Clark neither mentioned the concealed door nor told her there was a basement under the house. Plaintiff did not again visit the house until she moved there. That afternoon in the process of moving, plaintiff closed the louvered door and then discovered the previously hidden door (leading to the basement). She "could tell from the door jamb" that the door "obviously went in" but she nevertheless assumed that it was a door to another closet. With "natural curiosity" she opened the door, "went with the knob," took a "tiny step" forward, and was "propelled through black, into black space." Sometime later she discovered that she was on the floor of the basement.

Mrs. Clark testified that when she and plaintiff inspected ⊥557 the house, she had her car keys in her hand and as she passed the door leading to the basement, she tapped the door with her keys and said, "Basement Door." At that time plaintiff was three or four feet behind her in the central hall, and she did not know whether plaintiff heard her statement. The next day after plaintiff had said she would rent the house but before the lease was signed, she asked plaintiff if the Bucks could leave "some things stored in the basement" and plaintiff agreed that they could. Mrs. Clark had herself been in the basement some six months to a year prior to showing the house to plaintiff as part of a group of about twenty members of the Pierson realty organization making a tour of the house and knew of the condition of the stairway leading to the basement.

Plaintiff testified that she never met the Bucks prior to the accident and that she had no recollection of any conversation with Mrs. Clark relative to the basement or the Bucks' use of any portion thereof for storage. We must assume that the jury found on this conflicting evidence the facts most favorable to the plaintiff.

Plaintiff sought recovery against the owners Buck upon the basis of common-law principles of landlord and tenant negligence law, that they were liable for failure to warn plaintiff of the known latent danger behind the basement door, the precipitous stairway becoming a veritable trap causing plaintiff's injuries. She also contended that the construction of the stairway violated the Los Angeles Building Ordinance and within its application constituted a "danger to life and limb." Her claim against the defendant realtors, Pierson and Clark, rested on their voluntary undertaking to show her the house and their negligence, as business volunteers, in failing to warn her of the existence of the doorway, the stairs and the basement.

[1, 2] Plaintiff relies, as against defendants Buck, upon the rule "that, if there is some hidden defect in the premises, or danger thereon, which is known to the lessor at the time of making the lease, but which is not apparent to the intending lessee, the lessor is bound to inform the latter thereof, and failing so to do, he is liable for injuries to the tenant arising therefrom. (Citations.)" (Shotwell v. Bloom, 60 Cal.App.2d 303, 309–310, 140 P.2d 728, 732; Stanley v. Lander, 3 Cal.App.2d 284, 289, 39 P.2d 225.) This is a case where the danger was not patent but latent; the danger of the basement stairs was a concealed hazard. A distinction must be drawn between patency of exterior visibility and patency of content of danger. True, the basement door was vis- ⊥558 ible for anyone to see, and from this premise defendants Buck argue that plaintiff had every reasonable opportunity to discover where such door led; and since she failed to make use of such opportunity, she failed to observe care with respect to a patent, not a latent, matter within the rule of nonliability of the landlord. But "patent" in the test of duty to warn refers to the patency of danger and not merely to exterior visibility, and the cases so hold: e. g., Shotwell v. Bloom, supra, 60 Cal.App.2d 303, 140 P.2d 728 (where a crack in the fireplace was physically visible but the hazard of using

the fireplace and thereby causing the fire was obscured so as to create a latent rather than patent danger); Couch v. Pacific Gas & Elec. Co., 80 Cal.App.2d 857, 183 P.2d 91 (where the tenant did not know that some wires protruding through a hole in the kitchen floor were energized; the wires were visible and so patent but the danger was latent; and therefore the landlord was under the duty to warn the tenant of the latent defect in the premises). Similarly here, the danger inhering in the precipitous basement stairs, without landing or handrail, lying immediately behind the inward swinging basement door, was a concealed hazard. The basement door was a visible object but the jury under the prevailing circumstances might well find that the danger of the precipitous basement stairway was not—creating a latent, not a patent, defect in the leased house. Cases cited by defendants are distinguishable on their facts: the dangers were not merely patent but admittedly known to the tenant in full prior to the accident concerned (e. g., Sherrard v. Lidyoff, 108 Cal.App.2d 325, 239 P.2d 28 [cracked stairway board]; Zavalney v. Donovan, 70 Cal.App.2d 182, 160 P.2d 558 [cracked porcelain faucet handle]; Dorswitt v. Wilson, 51 Cal.App.2d 623, 125 P.2d 626 [cracked ceiling]; Colburn v. Shuravlev, 24 Cal.App.2d 298, 74 P.2d 1060 [defective rug]) or the dangers were so open and obvious to reasonable inspection that no question of a latent defect could be raised (e. g., Powell v. Stivers, 108 Cal.App.2d 72, 238 P.2d 34 [visible coils of cord lying in the passageway]; De Motte v. Arkell, 77 Cal.App. 610, 247 P. 254 [shrunken and warped wooden railing]) or the dangers were not even known to the landlord (e. g., Shanander v. Western Loan & Bldg. Co., 103 Cal.App.2d 507, 229 P.2d 864, 26 A.L.R. 2d 1039 [concealed defective plumbing system]; Ayres v. Wright, 103 Cal.App. 610, 284 P. 1077 [concealed defect of wood rot in a porch guardrail].)

As a further basis of liability of defendants Buck, plaintiff ⊥559 submitted that the construction of the basement stairs violated the Los Angeles City Building Code and the court instructed on the effect of such violation.

The Los Angeles Building Code, as enacted June 29, 1956, and in effect at the time of this accident, required that every door in a dwelling shall open upon a landing at least equal in width and length to the width of the door, and the landing shall not be greater than two inches below the threshold. (§ 91.4913(c).) A stairway like the basement stairs in the Buck house was required to have at least one handrail. (§ 91.4916.) While the Buck house was built before enactment of the above 1956 ordinance sections, the requirements thereof were made applicable to existing houses in which a condition existed whereunder any stairway failed to comply with the building code to an extent that endangered the life, limb, health, property, safety or welfare of the public or occupants of the building. (§§ 91.0103; 91.4901.)

The trial court properly instructed the jury on the above requirements of the city building code in relation to the issue of negligence per se of the Bucks for violation of the ordinance sections, but it added a further instruction as follows: "A further portion of the Building Code creates a presumption concerning danger to life, limb and property which must govern your judgment so far as you may find it applicable and not overcome by evidence, if any, negativing such danger.

"Section 91.0103 of the Building Code provides a building or portion thereof shall be presumed to be a menace to life or limb, health, property, or public welfare, if any stairway (or any other portion of said building communicating from any part therewithin to the exterior ground surface) does not provide the degree of security to life or limb, health, property or public welfare required by any portion of the Building Code, including the landing and handrail sections respecting dwelling-house stairways heretofore related to you. If you find this presumption applicable, then unless you find this presumption controverted by direct or indirect evidence, if any, of absence of danger, I instruct you that you are bound to find in accordance with the presumption, and accordingly are bound to find that the dwelling-house landing and handrail requirements * * * heretofore related, do apply even to preexisting dwellings or residential buildings."

The instruction applied the presumption to "any stairway" while the building code made such presumption applicable ⊥560 to an "exit" which did "not provide the required degree of security to life or limb, health, property or public welfare." (§ 91.0103(a)(2).) The code defined an "exit" as "A passageway from a portion of a building to the exterior ground surface including every intervening doorway, passageway, stairway or ramp." (§ 91.0403.)

We may concede that this instruction is open to the objection of applying an erroneous concept to plaintiff's accident by treating it as related to use of the basement stairway as an "exit to the exterior ground surface." Its effect was to place on the Bucks the burden of going forward with proof that they had complied with the code and were therefore not negligent as a matter of law. In the absence of such instruction the jury would first have to find that the basement stairway constituted a dangerous condition in fact before the building code sections could be applied to the Buck house as the premise of liability.

Defendants Buck also complain that the jury was improperly denied consideration of their defense of assumption of the risk of such defects as a reasonable inspection of the premises would reveal. The jury was instructed that the doctrine of assumption of the risk does not apply in cases of the violation of ordinances such as the building code regulating public safety and providing for the "protection of human life."

[3] However, conceding that there was error in these instructions concerning the effect of the Los Angeles Building Ordinance as applied to the defendants Buck, we can find no prejudice in the giving of such instructions under the facts of this case. The court at the time of admitting the evidence of the Los Angeles Building Ordinance admitted this evidence only against the defendants Buck and not against the defendant realtors, and in its charge to the jury the court expressly instructed: "The evidence concerning certain building ordinances applies only in this case to the defendants Buck, but not against the defendants Pierson and Clark, the realtors." In view of this express instruction the jury's verdict against the defendant realtors cannot have been based upon the supposed violation of the building ordinance, but must have been based upon a finding that without regard to any building ordinance the basement door and stairway constituted a concealed hazard the failure to disclose which amounted to actionable negligence. Since no greater duty of disclosure could rest upon defendant realtors than upon defendants Buck, it is clear that the verdict must have gone against defendants Buck even if ⊥561 the alleged violation of the building ordinance had not been submitted to the jury at all.

[4] Defendants Buck also argue that the evidence established beyond dispute plaintiff's contributory negligence, for a person who proceeds into a place of "impenetrable darkness" and falls into an opening "does not as a matter of law exercise ordinary care for her own safety." But the record here does not indicate that plaintiff in conscious disregard of the hazard of darkness proceeded deliberately through the basement door. (Cf. Mitchell v. A. J. Bayer Co., 126 Cal.App.2d 501, 272 P.2d 870; Robinson v. King, 113 Cal.App.2d 455, 248 P.2d 477.) In fact the jury could find that the darkness element did not contribute to her fall but rather the hazard arose from the physical construction of the inward swinging door pulling her over the precipitous stairway, resulting in her fall. The question of plaintiff's contributory negligence was properly submitted to the jury.

[5] It is admitted that at the time of showing the property to the plaintiff the

defendant realtors were not acting as agents either of the plaintiff or of the defendants Buck. Because there was no privity of contract between themselves and plaintiff or between themselves and the property owners Buck these defendants insist that no duty was cast upon them to warn the plaintiff of a hidden danger in the property of which they knew and of which the plaintiff was unaware. In assaying the validity of this argument it is necessary to consider the entire relationship existing between the parties. In showing this home to plaintiff these defendants were not motivated by altruism but by the hope of business profit. The rental of real property was a part of their regular business. In the pursuit of that business they were led to undertake the showing of the property to plaintiff by the hope of earning a commission from the property owners if the plaintiff could be persuaded to rent it. When they undertook to show the property to the plaintiff with the purpose of inducing the plaintiff to rent it so that they might earn a commission they knew (we must assume from the jury's verdict against them) that there was a latent hazard on the property which was unknown to the plaintiff and which might foreseeably result in injury to the plaintiff if she did rent the property. Privity of contract is not necessary to establish the existence of a duty to exercise ordinary care not to injure another, but such duty may arise out of a voluntarily assumed relationship if public policy dictates the existence of such a ⌊562 duty. (Silva v. Providence Hospital, 14 Cal.2d 762, 775, 97 P.2d 798; Perry v. D. J. & T. Sullivan, Inc., 219 Cal. 384, 390, 26 P.2d 485; Darnold v. Voges, 143 Cal.App.2d 230, 248, 300 P.2d 255; Johnston v. Orlando, 131 Cal.App.2d 705, 709, 281 P.2d 357; Valdez v. Taylor Automobile Co., 129 Cal.App.2d 810, 817, 278 P.2d 91.)

[6] We said in Biakanja v. Irving, 49 Cal.2d 647, 650, 320 P.2d 16, 19, 65 A.L.R.2d 1358: "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (See also Lucas v. Hamm, 56 Cal.2d 583, 588, 15 Cal.Rptr. 821, 364 P.2d 685; Stewart v. Cox, 55 Cal.2d 857, 863, 13 Cal.Rptr. 521, 362 P.2d 345; Burke v. Zanes, 193 Cal.App.2d 773, 777, 14 Cal.Rptr. 619.) This case meets these several tests. The transaction was intended to affect the plaintiff by bringing about the very relation of landlord and tenant between the Bucks and plaintiff which led to her occupancy of the property and ensuing injury and the jury's verdict establishes the foreseeability of harm to her, the certainty that she suffered injury and the closeness of the connection between the defendants' conduct and the plaintiff's injury. We have no doubt of the moral blame in this case in view of these defendants' knowledge of the hazard to which they were exposing plaintiff by their failure to warn her, and the policy of preventing future harm will clearly be served by imposing liability upon them.

[7] The case is admittedly one without exact precedent, but we are satisfied that, having affirmatively undertaken to show the house to plaintiff in the regular course of their business with the purpose of earning a commission if she decided to rent it, these defendants were under a duty of care to warn her of a concealed danger in the premises of which they were aware and from which her injury might be reasonably foreseen if she did become a tenant. It was for the jury to determine the extent of the hazard, the question of latency, and the character of the conduct of these defendants necessary to constitute the exercise of reasonable care under all of the circumstances. (McEvoy v. American Pool

⊥563 Corp., 32 Cal.2d ⊥ 295, 299, 195 P.2d 783; Hall v. Barber Door Co., 218 Cal. 412, 420, 23 P.2d 279; Dahms v. General Elevator Co., 214 Cal. 733, 742, 7 P.2d 1013.)

These defendants claim that the furthest extent of their possible duty was to take care that plaintiff was not injured while she was examining the house in the company of defendant Clark, but this argument overlooks the fact that the tour of inspection was for the very purpose of persuading plaintiff to become a tenant and that the possibility of her injury from the concealed hazard if she did become a tenant was reasonably foreseeable unless she was advised of the latent danger.

[8] The argument that the negligence of defendants Buck in failing to warn plaintiff and in allowing the dangerous condition of the premises to continue was an intervening force to break the chain of causation of the negligence of the realtors is answered by the settled rule that two separate acts of negligence may be the concurring proximate causes of an injury. (Fennessey v. Pac. Gas & Elec. Co., 20 Cal.2d 141, 145, 124 P.2d 51; Lacy v. Pacific Gas & Elec. Co., 220 Cal. 97, 98, 29 P.2d 781; 35 Cal.Jur.2d p. 565.) The questions of proximate cause and intervening force to break the chain of causation were properly submitted to the jury and decided adversely to these defendants.

Defendant realtors complain of the form of an instruction upon the duty of a volunteer to use ordinary care. The instruction was a correct statement of the law so far as it went and if these defendants desired a more detailed instruction on the subject it was their duty to propose it. (State Rubbish etc. Assn. v. Siliznoff, 38 Cal.2d 330, 340, 240 P.2d 282; Peri v. L. A. Junction Ry., 22 Cal.2d 111, 129–130, 137 P.2d 441.)

[9] Finally defendant realtors urge the failure to give an instruction proposed by them on the duty of a tenant to make a reasonable examination of the premises for defects and her assumption of the risk of concealed dangers which might have been discovered if she fails to do so. The instruction as proposed was incomplete in omitting the qualification, given in a similar instruction with regard to defendants Buck, that this rule is not applicable "where the condition * * * is such that a reasonable inspection of the premises by a person of ordinary prudence would itself subject such person to the very dangers of the unsafe condition in question." No duty is cast upon the court to modify and give as modified a pro⊥564posed incomplete or erroneous instruction. (Shaw v. Pacific Greyhound Lines, 50 Cal.2d 153, 158, 323 P.2d 391.)

An order denying a motion for new trial is not appealable. (Code Civ.Proc. § 963.) The purported appeals from such order are accordingly dismissed. The judgment and the order denying a judgment notwithstanding the verdict are affirmed as to all appellants.

GIBSON, C. J., and TRAYNOR, PETERS, and WHITE, JJ., concur.

McCOMB, Justice (dissenting).

I dissent. I would reverse the judgment as to defendants Ronald R. Buck and Ann M. Buck, vacate the judgment against Jeanette M. Clark and Lelah T. Pierson, and order the trial court to enter an order that the motion of defendants Clark and Pierson for judgment notwithstanding the verdict be granted and to enter judgment thereon in favor of defendants Clark and Pierson, for the reasons expressed by Mr. Presiding Justice Wood in the opinion prepared by him for the District Court of Appeal in Merrill v. Buck (Cal.App.) 19 Cal. Rptr. 621.

SCHAUER, J., concurs.

Rehearing denied; SCHAUER and McCOMB, JJ., dissenting.

208 Cal.App.2d 773

⊥773 ⊥**The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Fred L. CLAY, Defendant and Appellant.

Cr. 7833.

District Court of Appeal, Second District, Division 2, California.

Oct. 23, 1962.

Prosecution for forgery of payroll checks. From a judgment of the Superior Court, Los Angeles County, Edwin L. Jefferson, J., the defendant appealed. The District Court of Appeal, Herndon, J., held that it was not prejudicial error for prosecutor to request court, in presence of jury, to take judicial notice of fact that defendant had entered and withdrawn a plea of guilty earlier in the proceeding, where evidence of guilt was established apart from plea and where defendant had thereafter taken stand to explain his having made such plea.

Affirmed.

1. Forgery 🔑44

Evidence, including testimony of co-defendant that co-defendant had passed forged payroll checks after signing them according to a sample signature which defendant had obtained, supported forgery conviction. West's Ann.Pen.Code, § 470.

2. Criminal Law 🔑1159(3)

Where there was abundant evidence to support conviction, nothing was presented for appellate court's consideration by appeal in which defendant argued that, in view of conflicting evidence, jury could not properly convict.

3. Criminal Law 🔑1186(4)

It was not prejudicial error for prosecutor to request court, in presence of jury, to take judicial notice of fact that defendant had entered and withdrawn a plea of guilty earlier in the proceeding, where evidence of guilt was established apart from such plea and where defendant had thereafter taken stand to explain his having made plea. West's Ann.Const. art. 6, § 4½.

4. Criminal Law 🔑304(16)

Court may take judicial notice of its own records in the very cause before it.

5. Criminal Law 🔑1030(1)

In absence of objection, error ordinarily cannot be asserted on appeal.

6. Criminal Law 🔑406(4)

Guilty plea entered and later withdrawn is not conclusive evidence, but is competent to be weighed by trier of fact and is relevant as being inconsistent with claim of innocence.

* * *

Fred L. Clay, appellant, in pro. per.

No appearance for respondent.

⊥HERNDON, Justice. ⊥774

This appeal, prosecuted *in propria persona,* is taken from the judgment following a jury trial wherein appellant was convicted of three counts charging him with forgery in violation of section 470 of the Penal Code. During the pendency of this appeal, this court appointed two different attorneys to assist appellant and this court in reviewing the record herein for the purpose of ascertaining whether or not there is any basis for any claim of prejudicial error.

Both of these court-appointed counsel have made separate reports to us to the effect that, after careful study of the record, they had concluded that this appeal was entirely without merit. After making our own examination of the entire record, we have concluded that no prejudicial error was made in the trial court. Although there is some conflict, the evidence supporting the verdict and judgment is more than sufficient.

In summary, it appears that appellant was employed by the Chemical Contour Corporation as a maintenance foreman until August 6, 1960. At that time he had all the keys to the premises and had trained certain security dogs used by the company as the result of a series of robberies. Although the⊥locks on the front part of the premises ⊥775 were changed on August 6, 1960, and appellant returned his keys shortly thereafter, there was evidence from which it could have been concluded that it would have been possible for a person to enter the building through a window in the rear thereof. The broken latch on this window was not repaired until after August 22, 1960.

On August 22, 1960, it was discovered that a number of the company's checks were missing as well as a check protector. Mr. Langworthy, a vice-president of the company, testified that the checks involved in the instant action were among the number series found to be missing and that the impressions made thereon were similar to those made by the stolen check protector.

Mary S. Coleman, a co-defendant who earlier had entered a plea of guilty to one count of the joint information and who was still awaiting sentencing, testified that on August 19, 1960, she had met appellant in a bar. He was unhappy because he had been discharged from his job and had no income. She offered to help him in any way she could. He then told her that he had access to some payroll checks and a sample of the required signature. She agreed to look at them and they drove in separate cars to his former place of employment. She waited in a bar and he returned shortly with the checks and the check protector and said, "See, this makes it perfect." Mrs. Coleman further testified that the same night and the following day certain of the checks were forged, appellant using the check protector on them. He told her that Mr. Langworthy usually signed the checks, so she signed his name simulating his signature as it appeared on a letter discharging appellant. Langworthy had testified earlier that he always signed company checks "Eugene M. Langworthy", whereas the signature on each of the *forged* checks was "E. M. Langworth" as it was on the *letter* by which he had dismissed appellant as an employee of the company.

Mrs. Coleman and appellant then discussed how the checks were to be cashed. Appellant said that he did not wish to use his name because he had a family and if they used someone else's name they would have to acquire different identification cards. The witness, who already had various "non-sufficient-fund" checks outstanding, finally decided to use her own name as payee and testified that she expected to use some of the proceeds from cashing the payroll checks to make good her outstanding checks. However, she said that she did not ⊥776 plan ever to make good the payroll checks and had no expectation of "eventually getting away with this crime." The witness then described how she passed the checks involved in the instant case. Sometimes appellant was present in the store, and sometimes he waited outside, but in every instance she gave him most of the money obtained. She purchased various items when cashing the checks and there were introduced into evidence various shopping lists in appellant's handwriting on which suggested items of children's clothing were enumerated.

On cross-examination, Mrs. Coleman admitted that originally she had told the police that she had stolen and forged the checks herself. She explained that this statement had been made because of her desire to protect appellant and her own "in-laws" who also testified during the trial. She indicated that she had changed her mind when her in-law relatives were inconvenienced by being called as witnesses at the trial. She admitted she was testifying against appellant because she felt he had unnecessarily hurt her family and that she felt "revengeful" toward him.

Various witnesses were called in regard to the cashing of the checks at the various stores where they were employed. Their testimony tended to corroborate that of Mrs. Coleman who was admittedly an accomplice of appellant. Additionally, an in-law relative of Mrs. Coleman testified that on August 21, 1960, appellant and Mrs. Coleman visited him at his residence and appellant indicated that he wanted him to forge some of the checks which, as he admitted to the witness, he had stolen from his former employer. This witness' wife confirmed the fact that appellant visited their home that day although she was ill and did not hear any of the conversation. A Mr. Hooper testified that appellant had sought his participation in the check-passing scheme.

By way of defense, appellant, his wife, and two of his friends sought to establish an alibi on the relevant dates. However, the testimony of appellant's wife was impeached by an officer who testified that at the time of appellant's arrest she had told the officers that her husband had been away from home for two weeks and that when she got up the morning of August 23, 1960, she had found him asleep on the couch and that he must have come in sometime during the night. Appellant also admitted that he had lied to the officers regarding his not having seen Mrs. Coleman during the preceding year, but sought to explain this on the ground that his ⊥777 wife was jealous over his having spent several days with her while on a "binge" a year earlier.

[1, 2] It is apparent from the foregoing summary that there was abundant evidence to support the jury's verdict and that nothing is thereby presented for consideration by an appellate court. (People v. Kemp, 55 Cal.2d 458, 471, 11 Cal.Rptr. 361, 359 P.2d 913; People v. Williams, 53 Cal.2d 299, 303, 1 Cal.Rptr. 321, 347 P.2d 665.)

[3] The only serious question presented by this appeal arose from the following incident. At the close of the People's case in chief, the deputy district attorney, in the presence of the jury, addressed the court as follows: "At this time, if your Honor please, the People ask that your Honor take judicial notice and so instruct the jury that on December 2, 1960, in this courtroom, the defendant entered a plea of guilty to the charge set forth in Count I. I ask your Honor further to instruct the jury that a plea of guilty encompasses an admission of each and every element that is necessary to constitute a charge."

Defense counsel objected both to the proposed method of introducing this fact into evidence and to the requested instruction to the jury. The court then suggested that this be argued out of the presence of the jury, whereupon a discussion was had without reporter and outside the hearing of the jury. At the conclusion thereof the court stated to the jury:

"Pursuant to the request of the People's counsel, The Court does take judicial notice of the fact that this defendant did enter a plea of guilty on December 2, 1960, to Count I, to wit: violating Section 470 of the Penal Code, a felony, and the remaining counts were continued to a future date for proceedings of disposition. The probation report was filed. The Court did not pronounce sentence for the reason the defendant stated that he inadvertently had entered a plea of guilty, and that he felt that he was not guilty, and he wanted a trial. The Court then granted his motion to vacate and set aside the plea of guilty to Count I, and set the matter back on the calendar for a trial. I think that covers it, counsel."

For purposes of appellate review, any claim of error based upon this occurrence appears to be foreclosed in this state by the following expression of our Supreme Court upon the subject in denying a petition for a hearing in the case of People v. Boyd, 67 Cal.App. 292, 302, 227 P. 783, 786:

"We deem it proper, however, to say that we disagree with that portion of the opinion which holds that it was error for ⊥778 the trial court to overrule the objection of the defendant to the admission in evidence of the offer on his part to plead guilty to one offense charged in the information. The action of the defendant in that regard was an admission on his part of the truth of the charge that he obtained money under false pretenses, which, with the other evidence, was properly left to the consideration of the jury. People v. Jacobs, 165 App.Div. 721, 151 N.Y.Supp. 522. Such an admission was not, of course, conclusive evidence against the defendant. It was competent evidence merely; its weight and sufficiency being proper subjects for consideration by the jury. State v. Bringgold, 40 Wash. 12, 17, 82 Pac. 132. When the fact was established that the admission had been made by the accused, the admission was not before the jury as testimony by him establishing the truth of all or any part of the allegations of the information, but the fact that he had made it was before them, and was relevant as being inconsistent with his claim to the jury that he did not obtain any money under false pretenses from the complaining witnesses and was not guilty. State v. Carta, 90 Conn. 79, 96 Atl. 411, L.R.A. 1916E, 634. The defendant's own admission, voluntarily made, was clearly competent evidence against him. That he made the admission in court can detract nothing from its relevancy or its competency. Ehrlick v. Commonwealth, 125 Ky. 742, 102 S.W. 289, 10 L.R.A., N.S., 995, 128 Am.St.Rep. 269; People v. Gould, 70 Mich. 240, 38 N.W. 232, 14 Am.St.Rep. 493."

This rule has been consistently followed in People v. Snell, 96 Cal.App. 657, 662, 274 P. 560; People v. Russell, 77 Cal.App. 113, 120, 246 P. 110; People v. Cooper, 81 Cal. App.2d 110, 117, 183 P.2d 67; People v. Ivy, 163 Cal.App.2d 436, 439, 329 P.2d 505. (See also People v. Carroll, 92 Cal. 568, 571, 28 P. 600 and People v. Sanderson, 129 Cal. App. 531, 532, 18 P.2d 982.)

[4, 5] There is no question but that a court may take judicial notice of its own records in the very cause before it at the moment. (Taliaferro v. Taliaferro, 180 Cal.App.2d 44, 45, 4 Cal.Rptr. 693; 18 Cal. Jur.2d 471, section 53, Evidence.) Further, it appears to be undisputed that appellant's former plea was voluntarily given; and the record indicates that following the discussion outside the hearing of the jury, appellant's counsel offered no objection to the statement by the court above set forth. In the absence of objection, error ordinarily cannot be asserted on appeal.

[6] After the occurrence above set forth, appellant took the stand and was permitted to explain at great length the ⊥779 circumstances under which his prior plea was made. This, of course, was appropriate. As the court stated in People v. Ivy, supra, page 440, 329 P.2d p. 508, "Defendant's plea of guilty to count I was an admission on his part of the truth of the charge. The admission was not conclusive evidence against him. It, together with his explanation, was competent evidence, its weight and sufficiency being for the consideration of the trier of fact. From the record, the plea of guilty appears to have been made voluntarily and it had a direct bearing on the issue raised by defendant's plea of not guilty. As said by the Supreme Court in Boyd, the fact that defendant made the admission in court does not affect its admissibility."

Finally, unlike the early case of People v. Ryan, 82 Cal. 617, 23 P. 121, disapproved by the Supreme Court in the Boyd case, supra, the evidence of guilt was amply established apart from the judicial admission introduced and, in fact, if any error was committed in the manner of its introduction, it was not sufficiently prejudical to merit a reversal. After an examination of the entire cause, including the evidence, this court is of the opinion that any such error could not be said to have resulted in a miscarriage of justice. (Constitution of the State of California, article VI, section 4½.)

The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.

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208 Cal.App.2d 696

⊥696 **The PEOPLE, Plaintiff and Respondent,**
v.
Otis L. CLEMMONS, Defendant and Appellant.
Cr. 7802.

District Court of Appeal, Second District,
Division 4, California.
Oct. 19, 1962.

Prosecution of defendant for administration of narcotics to a minor. The Superior Court of Los Angeles County, Alfred P. Peracca, J., entered a judgment of conviction and the defendant appealed. The District Court of Appeal, Jefferson, J., held that the evidence sustained the conviction, and that the defendant was not denied due process of law by the coercion of minor witness' testimony through use of court's contempt power.

Affirmed.

1. Criminal Law ⇨469

Testimony of narcotics police officer, as expert in field, was properly admitted in prosecution of defendant who was accused of administering narcotics to minor. West's Ann.Health & Safety Code, § 11502.

2. Witnesses ⇨21

Coercion of minor's testimony by sentencing her to jail until she purged herself of contempt she committed by refusing to testify in prosecution of defendant for administering narcotics to minor, after she had been granted immunity from prosecution, was proper. West's Ann.Pen.Code, §§ 19a, 1205, 1324; West's Ann.Health & Safety Code, § 11502.

3. Contempt ⇨30

Court of general jurisdiction has inherent power to punish for contempt persons who obstruct or interfere with its authority. West's Ann.Pen.Code, §§ 19a, 1205.

4. Witnesses ⇨21

Sentencing of witness, who had been granted immunity from prosecution but who still refused to testify in criminal prosecution, to jail was not error and witness' maximum sentence for contempt was not limited to six months. West's Ann.Pen. Code, §§ 19a, 1205, 1324.

5. Constitutional Law ⇨273

Coercion of minor's testimony by use of contempt powers did not deny due process to defendant who was being prosecuted for administration of narcotics to minor. West's Ann.Health & Safety Code, § 11502.

6. Poisons ⇨9

Evidence sustained conviction for administering narcotics to minor. West's Ann.Health & Safety Code, § 11502.

7. Criminal Law ⇨481, 1153(2)

Qualification of person to testify as expert witness is matter within sound discretion of trial court whose determination, in absence of clear abuse, will not be disturbed by reviewing court.

8. Constitutional Law ⇨268
Criminal Law ⇨573

Ordering of continuances in trial of accused for administering narcotics to minor to, among other things, enable reluctant minor witness to purge herself of contempt by testifying did not deny defendant's right to speedy trial or violate due process. West's Ann.Health & Safety Code, § 11502.

9. Criminal Law ⇨586

Granting or refusing of continuance rests in sound discretion of trial court.

* * *

Joseph M. Rosen, Los Angeles, for defendant and appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Gilbert F. Nelson, Deputy Atty. Gen., for plaintiff and respondent.

⊥JEFFERSON, Justice. ⊥698

In an information filed by the district attorney of the County of Los Angeles defendant was charged in two counts with violations of section 11502 of the Health and Safety Code, furnishing, administering and giving a narcotic, heroin, to a minor. Defendant entered a plea of not guilty. The jury returned a verdict of guilty as charged on both counts. Motion for new trial and probation were denied, and defendant was sentenced to state prison for the term prescribed by law, sentences on each count to run concurrently. Defendant filed his notice of appeal in propria persona but thereafter, he made a motion in this court to have counsel appointed to represent him on this appeal. This court granted the motion, and counsel was appointed to represent defendant on appeal.

Sharon Lee Converse, age 17, testified she had known defendant for about three weeks prior to December 14, 1960, when defendant came to her home and remained for a couple of hours. During that time she asked defendant if she could have a "fix." She testified that she used the word "fix" to refer to an injection of heroin. Defendant at first refused, and she asked him again for a "fix." Defendant put a powdery substance in a spoon; dissolved it in water; warmed the liquid with matches; drew the liquid into an eye dropper with a needle on it; and injected the needle in her arm. When the needle was removed from her arm she had a sensation of dizziness, followed by a feeling of nausea, causing her to vomit; she then felt relaxed until she went to bed.

On December 21, 1960, defendant was again in her home and she again asked defendant for another "fix." Again, at first he refused, but later acceded and the same procedure was followed. She testified she had the same sensations of dizziness, nausea and relaxation. She attempted to burn the needle marks off her arm by pushing a smoldering cigarette into the marks left by the injection.

A kit was introduced into evidence, commonly described as a narcotic kit, consisting of an eye dropper, the bowl of a spoon and a needle. The victim identified these objects as being similar to the ones used by defendant on December 14th and 21st.

[1] A narcotics officer from the sheriff's office testified to his extensive experience in the field of narcotics, covering approximately two thousand arrests. He examined the victim on December 21st in the sheriff's sub-station and observed the puncture wounds on the left arm under the cigarette burn.⌊699 The officer further testified he had been in attendance in the courtroom throughout the testimony of this victim and had heard all of the testimony concerning the dizziness, nausea and relaxation following the injection into her arm. He stated, as an expert, that in his opinion heroin had been injected into the victim's arm.

Defendant testified in his own behalf. He stated that he was in the home of the witness Sharon Lee Converse only once while looking for his sister and was there only a few minutes. He denied having ever administered narcotics to her at any time. He admitted having a conversation with the arresting officer in which he admitted the narcotic kit was his.

[2] Defendant contends the trial court committed error in its coercion of the witness, Sharon Lee Converse, to testify. A review of the record in this regard shows that in the trial which began on March 29, 1961, the victim, Sharon Lee Converse, was called to the stand to testify. She refused to answer the questions, and the court asked her on what grounds. She stated she had no grounds. The matter was continued for the second day, and the victim was again called to the stand. The court appointed counsel for her, and instructed counsel to advise her of her constitutional rights. The witness was granted immunity under section 1324 of the Penal Code and was advised by both her counsel and the court that she would have complete immunity from prosecution. Again, she refused to testify. She was then held in contempt, and the trial was continued to April 5, 1961. When the trial was resumed on that date, the witness still refused to testify even though advised to do so by her counsel. The court again held the witness in contempt and transferred her to juvenile court for further action.

The prosecution requested a continuance to April 26, 1961, to give the witness a further opportunity to purge herself of contempt. The court made a finding of good cause for the continuance over the objection of defendant. The juvenile court found the witness unfit for juvenile court law and remanded her back to the trial

1. The sole objection raised to the testimony of the officer being received was on the ground that he did not qualify as an expert. This was properly overruled. No objection was made as to the lack of a hypothetical question. (See People v. Flynn, 166 Cal.App.2d 501, 510, 333 P.2d 37.)

judge for further proceedings. She was brought into court and with her counsel present again refused to purge herself of the contempt charges. She was ⊥700 sentenced to jail until she purged herself of the contempt. Later that day, she was returned to court with her counsel at her request and indicated she wished to purge herself of the contempt charges. The judge ordered her returned to court on April 26, 1961, the date to which the trial had been continued. On the latter date the witness testified, was purged of the contempt and released to the custody of the sheriff for return to the California Youth Authority.

[3, 4] There was no error in the coercive sentence imposed on the witness by the trial court. Defendant claims the maximum sentence should have been six months, since contempt is merely a misdemeanor. This argument is not sound. The same point was raised in In re Salkin, 5 Cal.App.2d 436, 437, 42 P.2d 1041, 1042. In that case, the judge found Salkin in contempt and ordered that he be confined in the county jail until he complied with the court's order. The court held he was never sentenced to confinement in the county jail and sections 19a and 1205 Penal Code did not apply, even though such conditional incarceration extended beyond one year. "[T]he power of the court in the premises is attested by the ruling in the case of Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597, wherein it was held that, aside from statutory authority therefor, a court of general jurisdiction has inherent power to punish for contempt persons who obstruct or interfere with its authority * * *."

[5] Defendant next contends the coerced testimony of Sharon Lee Converse was a denial of the due process right of appellant under the United States Constitution and the Constitution of the State of California. We find no merit in this contention. "Such a situation involves an issue between plaintiff's witness and the state. The determination of such issue is not a matter about which the defendant may be heard to complain. Such an incident may provide argument as to credibility but it in no manner affects the rights of the defendant." (People v. Bernstein, 70 Cal.App.2d 462, 466, 161 P.2d 381, 383; People v. Judson, 128 Cal.App. 768, 773, 18 P.2d 379.)

[6] Defendant next contends the prosecution did not establish the actual commission of the offense by defendant by substantial testimony. The brief review of the evidence produced, as heretofore given, adequately disposes of this contention. "The prosecution need not physically produce the narcotic. It may prove that the substance was a narcotic by the testimony of the user and by the testimony of a doctor, that in his opinion, the substance used was a nar- ⊥701 cotic." (People v. Tipton, 124 Cal.App.2d 213, 217, 268 P.2d 196, 198; see also People v. Candalaria, 121 Cal.App.2d 686, 264 P.2d 71.)

[7] The victim here who had former experience with narcotics and especially with heroin, described the sensations and effects of the injections. An expert in this field, the narcotics officer, was qualified to testify that in his opinion, based on his experience, the substance injected into Sharon's arm was heroin. As stated in People v. Mack, 169 Cal.App.2d 825, 830, 338 P.2d 25, 29: "The qualification of a person to testify as an expert witness is a matter within the sound discretion of the trial court; and its determination, in the absence of a clear abuse, will not be disturbed by a reviewing court." (To the same effect, see People v. Rios, 127 Cal.App.2d 620, 274 P.2d 163.)

[8, 9] Defendant further contends the continuances ordered by the court during the course of the trial were a denial to defendant of his right to a speedy trial and constituted a violation of due process guaranteed by the Constitution of the State of California. With this contention we disagree. "The granting or refusing of a continuance rests in the sound discretion of the trial court [citations]." (People v. DeLosa, 184 Cal.App.2d 681, 684, 7 Cal.Rptr. 753, 754.) There was good cause shown for the continuances granted by the court in

this case. It is to be noted that the information was filed January 31, 1961. The defendant was arraigned on February 6, 1961, and the trial date set for March 14, 1961. On the date of trial defendant requested a continuance to March 28, 1961 which request was granted. The trial commenced on March 28. On March 30 it was continued to April 5 and subsequently to April 26, 1961, by reason of the refusal of the principal witness to give testimony. The trial was completed on April 27, 1961, at which time the jury returned a verdict of guilty. The trial was commenced within the sixty-day statutory period and, as indicated, there was no unreasonable delay in its completion under the circumstances; and therefore, no violation of due process.

Judgment of conviction affirmed.

BURKE, P. J., and FORD, J.*, concur.

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208 Cal.App.2d 753

⊥753 ⊥**Reynolds J. BARBIERI and Evelyn P. Barbieri, Plaintiffs and Respondents,**

v.

Ernest ONGARO and Anita P. Ongaro, his wife; Rudy Lang, Jr. and Marilyn D. Lang, his wife, Defendants and Appellants.

Civ. 20143.

District Court of Appeal, First District, Division 3, California.

Oct. 23, 1962.

Action by landowners to enjoin certain uses of land. The Superior Court, County of Marin, Richard M. Sims, J., entered a decree of injunction and the defendants appealed. The District Court of Appeal, Draper, P. J., held that where defendant landowners, successors in interest of signatories to agreement for restrictions on property, had actual and constructive notice of restrictions, an equitable servitude, enforceable by injunction, was established.

Judgment modified and as so modified, affirmed.

1. Reformation of Instruments 🔑45(7)

There was substantial evidence to support finding that recitation in deed restriction that land conveyed shall not be subdivided into "less than two (2) lots" of approximately equal size was a scrivener's error and that the true intention of parties was to restrict subdivision to not more than two lots.

2. Reformation of Instruments 🔑11

Trial court, in action to enjoin certain users of land, properly corrected typographical error in restrictive clause of deed.

3. Covenants 🔑69(1)

Restriction in deed which is not expressed to be for benefit of land of covenantee cannot be covenant running with the land. West's Ann.Civ.Code, § 1468.

4. Covenants 🔑73

Agreement which was executed by adjoining property owners to resolve certain disputes and which provided that unless all terms and conditions were accomplished agreement should become void was not merely an agreement to agree but relieved all parties of restrictions if any were unenforceable.

5. Records 🔑6

Agreement between three adjoining property owners which imposed specific restrictions and provided for enforcement by injunction of covenants contained in agreement or set forth in conveyances provided for was an instrument affecting title to real property within statute authorizing recording of such instruments. West's Ann. Gov.Code, § 27280.

6. Records 🔑19

Recording of instrument imposing specified restrictions on property and providing for execution of conveyances setting forth such restrictions constituted constructive notice to defendants, successors in interest to one of the signators, of its terms.

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* Assigned by Chairman of Judicial Council.

7. Injunction ⚷58

Where defendant landowners, successors in interest to a signatory of agreement for restrictions on property, had actual and constructive notice of restrictions, an equitable servitude, enforceable by injunction, was established.

8. Injunction ⚷58

Even though covenant is not one running with land it warrants injunction against a subsequent grantee who takes with actual notice of covenant.

9. Injunction ⚷128

Determination that proposed roadway for access to properties outside those subject to present restrictions was not residential use within meaning of agreement imposing restrictions on use of property was not error by trial judge who viewed the premises.

◆

McFarland & Ferdon, San Francisco, for appellants.

Howard K. Morehouse, San Rafael, for respondents.

754 DRAPER, Presiding Justice.

Defendants appeal from decree enjoining certain uses of their land. The question is whether restrictive covenants between plaintiffs and a predecessor in interest of defendants are enforceable against defendants.

Plaintiffs owned a tract of land in Marin County. They conveyed a portion to Gragg, another to Wylie, and retained for themselves the third portion, on which they have built a summer home. Plaintiffs' deeds to Gragg and Wylie contained restrictions not detailed in this record, but which had become the subject of dispute among the three property owners. In 1953 plaintiffs, Gragg and Wylie executed an agreement designed to resolve the disputes. By this agreement plaintiffs were to quitclaim to Gragg and Wylie all interest in their lands; plaintiffs were to convey the lands remaining in their ownership to a title company, which would then reconvey to plaintiffs subject to specified restrictions; Gragg and Wylie were to convey their respective properties to plaintiffs, who in turn would reconvey subject to similar specified restrictions. It was specifically agreed that these new restrictions "are to be effective as to all the above described lands" of the parties; that "the above covenants shall be deemed, and taken to be, covenants running with the land for the common benefit" of the parties; "their heirs and assigns"; that upon any attempted violation of any covenant of the agreement or the deeds by "any of the several parties hereto, their heirs, successors or assigns, or anyone in possession" of any of the properties, any party may seek injunctive relief, and that in such litigation "this Agreement shall be considered * * * as conclusively setting forth the rights of the parties hereto, their successors and assigns". The several deeds required by this agreement were executed and, early in 1954, the agreement and the deeds were recorded. Each deed provided that it should be "subject to the following conditions and restrictions," and then set forth the restrictions specified in the agreement. No deed, however, either specifically referred to the agreement or expressly designated a dominant tenement. 755

Gragg then conveyed about half his land to another. In 1956, he conveyed to defendants Lang the remaining portion of the property Gragg had acquired from plaintiffs, together with some tideland property Gragg had separately acquired. Lang developed a plan for subdividing the whole of the land so acquired into 5 residential lots. Pursuant to that plan, he conveyed to defendants Ongaro, in 1957, about half the land he had acquired from Gragg. Excavation began on both the Ongaro and Lang properties for construction of a residence on each. This action for injunction was then commenced.

It is apparent that the result of these several transactions was to divide into three parcels the land originally sold by plaintiffs to Gragg. The principal issue is whether such division is prohibited by a covenant between plaintiffs and Gragg which is enforceable against defendants Lang and Ongaro.

Both the agreement and the plaintiffs—Gragg deed provide that the land conveyed to Gragg "shall not be subdivided into less than two (2) lots of approximately equal size", and that not more than one dwelling place shall be constructed on each of the resulting lots.

[1, 2] The trial court held the quoted clause to be a scrivener's error, and that the true intention of the parties was to restrict subdivision to "not more than" two lots. Defendants-appellants assert that the findings and conclusion on this issue are unsupported. We cannot agree. The questioned provision is denominated a "restriction" in both agreement and deed. Certainly it is the reverse of a restriction if taken literally to prohibit subdivision into ⊥756 "not less than two lots". The purpose of a "restriction" on subdivision of residential land obviously is to limit the number of lots to result. Defendants' construction would bring a result precisely contrary. It would require subdivision and would place no limit on the extent thereof. Defendants argue that the provision as they construe it would nonetheless have some effect because of the requirement that the resulting lots be of equal size. We fail to see how they find solace in such a view. After half the Gragg property was sold, Lang purchased the remaining half and sold half of that to Ongaro, thus dividing the property sold by plaintiff to Gragg into parcels of one half, one quarter and one quarter, a clear violation of the restriction even as defendants see it. The trial court's findings and conclusion as to the true intent of the parties also are borne out by reference to the restrictions imposed upon the Barbieri (plaintiff) and Wylie portions of the original Barbieri property. As to each of these parcels, the restriction was that the parcel conveyed "not be subdivided into lots of less than" a specified size which was approximately half the total area conveyed. It is clear that the language of the Gragg restriction was but a typographical error, was apparent to anyone reading it, and was properly corrected by the trial court.

[3] It is contended, however, that this restriction, whatever its effect as to Gragg, the original grantee of plaintiffs, is not enforceable against defendants, who were not parties to the original transaction but are claimed to be bound only because their interest is derived from Gragg by mesne conveyances. The evidence was uncontradicted, and the trial court found, that defendants had actual knowledge of the restrictions in the Barbieri—Gragg deed before they purchased. Defendants seek to avoid the effect of this finding by pointing out that the restriction in the deed to Gragg is not "expressed to be for the benefit of the land of the covenantee" (plaintiffs) and thus cannot be a covenant running with the land (Civil Code, § 1468). In this defendants are correct.

[4] They concede, however, that this defect is remedied if the three-party agreement of 1953 may be looked to. They argue that this agreement is ineffective because merely illusory—a document in the nature of an agreement to agree. This argument is based on a clause of the agreement providing that "all conveyances herein provided for shall be accomplished at or about the same time" through a named title company, are to be "recorded so as to accomplish the purposes hereof, and unless all of the terms and conditions hereof are accomplished, this Agreement shall become ⊥757 void and of no effect and none of the parties hereto shall be entitled to any of the benefits hereof." We do not agree with defendants' construction of this clause. Its purpose clearly is neither to negate the agreement nor to relegate its effectiveness wholly to the deeds to be executed pursuant to it. On the contrary, it seems apparent that the parties intended to assure that no deeds would be delivered or recorded until all were deposited with the title company, and that no party could have the

benefit of the others' deeds while withholding deposit of his own. This clause would also serve to relieve all parties of the restrictions if any were unenforceable, but it does not render the agreement meaningless.

[5, 6] The agreement on its face specifies that restrictions are "hereby imposed," and that the covenants contained in it shall be deemed covenants running with the land. It also provides for enforcement by injunction of "the covenants herein contained or set forth in the conveyances herein provided for". We are satisfied that the acknowledged agreement is an "instrument * * * affecting the title to * * * real property", is properly within the statute (Gov.Code, § 27280) authorizing recording (Wayt v. Patee, 205 Cal. 46, 53, 269 P. 660), and thus placed defendants upon constructive notice of its terms (Id., p. 54, 269 P. 660).

[7, 8] Thus an equitable servitude, enforceable by injunction against defendants, is established. In this view, it becomes unnecessary for us to consider whether the restrictions are true covenants running with the land, enforceable by those deriving title from the original grantor against those claiming under the original grantee. Plaintiffs here are the original grantors, and retain the land designed to be benefitted by the restrictions. Defendants derive their title from plaintiffs' grantee, Gragg, and defendants took with actual notice of the restrictions contained in the deed from plaintiffs to Gragg. This actual knowledge, and the clear fact that use by defendants inconsistent with the restrictions would be injurious to plaintiffs' land, bring into play the doctrine of equitable servitude. Even though a covenant is not one running with the land, it does, under these circumstances, warrant injunction against a subsequent grantee who takes with actual knowledge (Guaranty etc. Co. v. Recreation Gun Club, 12 Cal.App. 383, 107 P. 625; see also Marra v. Aetna Construction Co., 15 Cal.2d 375, 378, 101 P.2d 490). Here, in addition to the actual knowledge by defendants of the deed restrictions, there ⌊758 is constructive knowledge of the recorded agreement which makes clear that the restrictions are for the mutual benefit of the several parcels of land. It would be inequitable to permit defendants to breach these restrictive covenants as against the original grantor who still retains his adjoining land. Injunction to enforce this equitable servitude was properly granted.

[9] Defendants attack the provision of the injunction which restrains them from constructing or maintaining a roadway over the lands conveyed by Lang to Ongaro. In his conveyance to Ongaro, Lang reserved an easement for road purposes designed to serve four tideland lots, located wholly outside the properties involved in the Barbieri-Gragg-Wylie agreement. The injunction runs only to construction and maintenance of a road to serve these properties, and does not affect access to the Ongaro property itself. Defendants contend that such a roadway is not violative of the restriction limiting use of the Ongaro-Lang properties to residential use. But there is evidence indicating an intention of Lang to construct a yacht harbor immediately adjoining the four tideland lots. As pointed out, these lots are outside the area limited and to be benefitted by the restrictions here involved. The trial judge viewed the premises, and is in a better position than we to determine the effect of the roadway upon the residential use of plaintiffs' premises and the other lands designed to be benefitted by the restrictions. We accept the conclusion of the trial court that the proposed roadway for access to properties outside those subject to the present restrictions was not a residential use within the meaning of the three party agreement. No street construction by a public body is in issue here. Thus the decision relied upon by defendants (Friesen v. City of Glendale, 209 Cal. 524, 288 P. 1080) is not in point.

The deed from Gragg to Lang included tideland properties not acquired from plaintiffs and not subject to the restrictions here discussed. Through inadvertence, the injunction ordered by the trial court purports to limit use of these tideland lots. In their briefs, the parties agree that the injunction should not run to such lands.

The judgment is modified by deleting from its injunctive provisions all lands not acquired from plaintiffs, and the trial court is directed to effect such modification. As so modified, the judgment is affirmed, with costs to respondents.

SALSMAN and DEVINE, JJ., concur.

208 Cal.App.2d 759

⊥759 ⊥**UNIVERSITY OF SOUTHERN CALIFORNIA, a corporation, Plaintiff and Respondent,**

v.

Morris WEISS, I. Isacsohn, Al Rothman and Torath Emeth Young Israel Academy, Defendants and Appellants.

Civ. 26195.

District Court of Appeal, Second District, Division 1, California.

Oct. 23, 1962.

Rehearing Denied Nov. 19, 1962.

Hearing Denied Dec. 19, 1962.

Action in unlawful detainer. The Superior Court, Los Angeles County, Brodie Ahlport, J., entered summary judgment for landlord and tenants appealed. The District Court of Appeal Wood, J., held that service of notice of termination of a month-to-month tenancy on one of the parties that entered into the lease was notice to other parties involved in the lease where all such parties had bound themselves together as coparties to the lease.

Judgment affirmed.

1. Judgment ⇨186

In a summary judgment proceeding, reference may be made to the pleadings for purpose of defining the issues, but such reference may not be made for purpose of remedying a failure to state facts in an affidavit.

2. Judgment ⇨185.1(1)

It is not necessary to state in an affidavit in support of a motion for summary judgment facts alleged in plaintiff's complaint and admitted by answer. West's Ann. Code Civ.Proc. § 462.

3. Landlord and Tenant ⇨116(5)

Service of notice of termination of a month-to-month tenancy was properly made by mailing a copy of such notice to tenant rather than by personally delivering the notice to tenant. West's Ann.Civ.Code, § 1946; West's Ann.Code Civ.Proc. § 1162.

4. Landlord and Tenant ⇨116(5)

Service of notice of termination of a month-to-month tenancy on one of the parties that entered into the lease was notice to other parties involved in the lease where all such parties had bound themselves together as coparties to the lease.

5. Judgment ⇨185.1(3)

Statements in an affidavit in support of a motion for summary judgment regarding personal mailing of notice and a telephone conversation with a certain party were statements of fact patently within affiant's personal knowledge, and under such circumstances it was not necessary that affiant state expressly that such matters were within his personal knowledge and that he could testify competently thereto.

6. Judgment ⇨185.2(9)

A triable issue of fact was not raised by a purported affirmative defense pleaded in an unlawful detainer proceeding where defendants on plaintiff's motion for summary judgment did not file an affidavit in support of such alleged affirmative defense, and plaintiff was not required to negative such purported defense in order to secure summary judgment. West's Ann.Code Civ. Proc. § 462.

7. Judgment ⇨185.2(3)

Plaintiff in an unlawful detainer action was not required to state in its affidavit in support of its motion for summary judgment facts establishing futility of asserted affirmative defense that tenant had commenced an eminent domain action for purpose of condemning the property it occupied as a tenant.

◆

Joseph W. Fairfield and Ethelyn F. Black, Los Angeles, for appellants.

Musick, Peeler & Garrett and Charles H. Tillinghast, Los Angeles, for respondent.

⊥762 ⊥WOOD, Presiding Justice.

In this action in unlawful detainer, the defendants appeal from a summary judgment which was in favor of plaintiff.

Appellants contend that the affidavit filed in support of the motion for a summary judgment is insufficient as a matter of law to support the judgment.

The complaint alleges, in substance, that: On September 1, 1960, plaintiff, by written lease, leased certain real property (near Third Street and Fairfax Avenue in Los Angeles) to defendants on a month-to-month tenancy at a monthly rental of $575; by virtue of said lease defendants entered into possession of the premises on September 15, 1960, and ever since have been and now are in possession thereof; on April 21, 1961, plaintiff caused to be mailed to defendants, at the address of the property, a "thirty-days' written notice" that said tenancy was terminated as of June 30, 1961, and "requiring" defendants to quit and deliver possession of said premises on or before said date; a copy of said notice is attached to the complaint, marked "Exhibit A," and made a part thereof[1]; ⊥763 ⊥on May 24, 1961, defendant Isacsohn acknowledged receipt of said notice and stated that defendants would deliver possession of the premises to plaintiff as required in said notice; the date of termination of said lease has passed, and plaintiff is entitled to possession of the premises; defendants continue in possession thereof wilfully, without permission of plaintiff, and contrary to the terms of the lease; paragraph 10 of said lease provides that in the event suit shall be brought for unlawful detainer, lessees shall pay to lessor reasonable attorney's fees to be fixed by the court; a copy of said lease is attached to the complaint, marked "Exhibit B," and made a part thereof. The prayer is for: a declaration that the tenancy is terminated; restitution of the premises; treble damages at the rate of $57 a day for each day defendants have been and shall continue to be in possession of the premises after June 30, 1961; and reasonable attorney's fees.

In an answer (filed July 18, 1961) the defendants denied the allegations of the complaint with respect to: mailing the notice of termination of the lease; the acknowledgment by defendant Isacsohn of receipt of the notice; the statement by Isacsohn that defendants would deliver possession of the premises to plaintiff as required by the notice; the plaintiff being entitled to possession of the premises; and the defendants continuing in possession without permission of plaintiff and contrary to the terms of the lease.

As a separate defense, defendants alleged in their answer that, about June 30, 1961, the plaintiffs "indicated to defendants" that they could remain in possession of said premises for a further period of time to be agreed upon between the parties; as a result thereof defendants made necessary arrangements to improve the condition of the grounds and school for the reception of students, and defendants incurred expenses in connection therewith; as a result thereof plaintiff is estopped to maintain this proceeding.

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[1] "April 21, 1961

"Torath Emeth Young Israel
Academy
167 South Edinburgh Avenue
Los Angeles 48, California.

"ATTENTION: Rabbi Isacsohn

"Gentlemen:

"Pursuant to that lease between you and the University of Southern California, whereby you are occupying the premises at 167 South Edinburgh Avenue, Los Angeles, on a month to month tenancy, this is to give you notice that you must vacate said premises and restore the University to possession not later than June 30, 1961.

"Very truly yours,
Charles H. Tillinghast
for Musick, Peeler & Garrett Attorneys for the University of Southern California."

As a second separate defense, defendants alleged as follows: That the property in question has been used by them as a private elementary school for the past six or seven years. ⊥764 On July 3, 1961, they commenced an eminent domain action to condemn said land for continued use as such school. On July 14, 1961, a demurrer to said action was sustained without leave to amend. Defendants have advised plaintiff that an appeal from that judgment will be prosecuted. If defendants are successful in the eminent domain action, any future action in unlawful detainer will become moot. That under the circumstances the trial of this cause (unlawful detainer) be stayed until final determination of the eminent domain action, and that the defendants continue to pay their rent of $575 a month until final determination of the eminent domain action.

On July 19, 1961, plaintiff filed a notice of motion for summary judgment, which stated that on August 1, 1961, plaintiff would make a motion for an order striking out the answer, for entry of judgment as requested in the complaint; and that the motion would be made on the ground that there is no defense to said action.

The affidavit of Charles H. Tillinghast, in support of the motion, stated: He is the attorney for plaintiff in this action. About April 21, 1961, he caused the notice, a copy of which is attached to the complaint, to be mailed to defendants at 167 South Edinburgh Avenue, Los Angeles. On May 24, 1961, he telephoned to defendant Torath Emeth Young Israel Academy and asked to speak to defendant Isacsohn. Affiant has spoken to defendant Isacsohn in the past and is familiar with his voice, and defendant Isacsohn answered the telephone. Affiant asked Isacsohn if he had received the said notice to vacate the premises and he acknowledged that he had received the notice. Isacsohn further stated that defendants would vacate the premises not later than June 30, 1961. Affiant at no time indicated to defendants that they could remain in possession of said premises for a further period of time to be agreed upon between the parties, and affiant is informed and believes and on the basis of such information and belief states that at no time did any representative of plaintiff indicate to defendants that they could remain in possession of said premises for a further period of time to be agreed upon between the parties.

Defendants did not file an affidavit regarding the motion for summary judgment. In their brief, they state that they preferred to oppose the motion on the insufficiency and defects of plaintiff's affidavit.

When the motion was heard on August 1, 1961, an attorney representing plaintiff, and an attorney representing defendants, ⊥765 were present. On that day the motion was granted. On August 2, 1961, a judgment, based upon the granting of said motion, was entered. The judgment decreed that the defendants were guilty of unlawful detainer of the premises; that plaintiff is entitled to possession; that plaintiff recover $575 as damages for detention of the premises from July 1 through July 31, 1961, with costs of $26.50; that plaintiff recover $500 as reasonable attorney's fees; defendants' motion to stay judgment for five days is denied; and the clerk is ordered to issue a writ of possession that plaintiff be restored to possession forthwith.

On August 7, 1961, defendant Academy petitioned the District Court of Appeal for a writ of mandate directing the trial court to order a stay of execution, pending an appeal from the judgment. That petition was denied on August 19. On August 25 the Academy filed a petition for a hearing in Supreme Court, which petition was denied on September 14, 1961.

On September 1, 1961, pursuant to the writ of possession, plaintiff obtained possession of the premises.

Plaintiff (respondent) has made a motion to dismiss the appeal. An affidavit of the business manager of the plaintiff states the plaintiff (University) owns certain real property at the southeast corner of Third Street and Fairfax Avenue in Los Angeles, upon which it is engaged in the construction of a shopping center; that some of the units in the shopping center have been completed and are occupied by tenants; that plaintiff was required by the leases with some of those tenants (Safeway Stores, Inc., J. J. Newberry Co., and Sav-On Drugs, Inc.) to provide, for said tenants, employee parking facilities on the property which is the subject of this unlawful detainer action; about September 1, 1961, plaintiff took possession of the property involved here; about October 1, 1961, plaintiff commenced to remove the buildings from said property and subsequently improved it as a parking lot, which is now used for parking by the employees of the tenants.

In plaintiff's (respondent's) points and authorities in support of the motion to dismiss, it is stated (p. 9) that restoration of possession of the premises (to defendants) is impossible since no building exists in which to conduct a school; and thus, the relief sought on appeal by defendants is impossible to give and the matter has become moot. It is stated further therein that the remedy of restoring defendants for a thirty-day period would work a much greater hardship on respondent and ⊥766 the third-party users of the property (tenants and their employees) than could be justified by benefit to defendants; and that defendants have not sustained any injury.

Appellants assert that the sole question on appeal is whether the affidavit of Mr. Tillinghast, in support of respondent's (plaintiff's) motion for summary judgment is sufficient. They argue that there is no statement in the affidavit that the facts set forth therein are within affiant's personal knowledge and that if he were sworn as a witness he could testify competently thereto; that the only "possible" fact stated in his affidavit is that he asked defendant Isacsohn if he had received the notice, and that Isacsohn acknowledged he had received it, and stated further that defendants would vacate the premises not later than June 30, 1961. Appellants argue further that there are several issues in the case that are not mentioned in the affidavit, and that those omissions are significant since plaintiff cannot prevail in a summary judgment proceeding unless its affidavits cover every element necessary to sustain a judgment in its favor. They state that issues, so omitted, are: the first affirmative defense which refers to an agreement made about June 30, 1961 (to the effect that defendants might remain in possession for a time to be agreed upon); whether Weiss and Rothman were advised of the notice to quit; whether Isacsohn was the agent of Weiss or Rothman or the Academy; the amount of damages, if any.

[1] The defendants have appeared in action by answering the complaint. The answer does not state the names of the defendants but since the defendants named in the complaint are Weiss, Isacsohn, Rothman, and the Academy, it will be assumed that those persons are the appearing defendants. In a summary judgment proceeding, reference may be made to the pleadings for the purpose of defining the issues (Family Service Agency of Santa Barbara v. Ames, 166 Cal.App.2d 344, 348, 333 P.2d 142), but such reference may not be made for the purpose of remedying a failure to state facts in an affidavit. (Coyne v. Krempels, 36 Cal.2d 257, 263, 223 P.2d 244.) The answer did not deny the allegations of the complaint that plaintiff is a corporation; that on September 1, 1960, the plaintiff, by written lease, leased said property to defendants on a month-to-month tenancy at a monthly rental of $575; that by virtue of the lease defendants went into possession of the premises on September 15, 1960, and are now in possession thereof; that the lease provides that in the event suit shall be

brought for unlawful detainer, lessees shall pay reasonable ⊥767 attorney's fees to be fixed by the court; that a copy of the lease is attached to the complaint.

[2] It thus appears that since the allegations of the complaint, just referred to, were admitted by failing to deny them, there was no issue as to: the capacity of the plaintiff; the making of the lease and the terms thereof; the possession of the premises by defendant at the time of answering; the agreement by defendants to pay attorney's fees. It is true that the affidavit in support of the motion did not contain a statement of those admitted facts, but it is clear that stating such facts again in the affidavit would not serve any useful purpose in connection with a determination of the facts of the case—those facts were already determined by defendant's admissions. It was not necessary to state such admitted facts in the affidavit. (Gardenswartz v. Equitable etc. Soc., 23 Cal.App.2d Supp. 745, 752–753, 68 P.2d 322.) In the case just cited it was said at pages 752 and 753, at page 326 of 68 P.2d: "According to the terms of section 462 [of the Code of Civil Procedure],[2] a fact admitted in the answer becomes an established fact *for the purposes of the action.* [Citation.] At a trial of the action the plaintiff need not prove such a fact and the defendant cannot dispute it, nor can it be overcome even by a contrary finding. [Citation.] The affidavits on a motion for summary judgment do not constitute a second set of pleadings in the action. Their purpose is only to show whether the issues apparently made by the formal pleadings are genuine, whether each party has competent evidence to offer which tends to support his side of the issue. On the hearing of such a motion no issues are tried, but the inquiry is limited to the question whether there is an issue to be tried. [Citations.] If the motion is denied for insufficiency of the plaintiff's affidavits, he will not be required, at the trial which must follow, to prove any fact covered by the quoted provision of section 462, because there is no issue regarding it. Why then should he be required to show his ability to prove it, at a hearing intended merely to disclose the reality or unreality of the issues made? Section 462, if applicable here, relieves him from doing so. By its terms it covers such a case, and nothing in the language of section 437c [summary judgment section] demands that such a case be excluded from the operation of section 462; nor is such exclusion required by the ⊥768 purpose or spirit of said section 437c." That quotation from the Gardenswartz case is adopted by this court as a correct state of law applicable in the present case.

The answer of defendants denied generally and specifically paragraphs IV and V of the complaint.

Paragraph IV of the complaint alleged: "On April 21, 1961 plaintiff caused to be mailed to defendants at 167 South Edinburgh Avenue, a thirty days' written notice that said tenancy was terminated as of June 30, 1961 and requiring defendants to quit and deliver up possession of said premises on or before said date. A copy of said notice is attached hereto marked Exhibit A and made a part hereof. On May 24, 1961, defendant Isacsohn acknowledged receipt of said notice and stated that defendants would deliver possession of the premises to plaintiff as in said notice required."

The affidavit on behalf of plaintiff, in support of the motion for summary judgment, has been referred to hereinabove. With respect to the allegations of paragraph IV of the complaint, which allegations were denied in defendants' answer, the affidavit states in substance that the affiant is the attorney for plaintiff; about April 21, 1961, he caused the notice, a copy of which is attached to the complaint, to be mailed to defendants (at the address of the Academy); on May 24, 1961, he telephoned to the Academy and spoke to defendant Isacsohn, with whose voice he was familiar; he (affiant) asked Isacsohn if he had received the notice to vacate the premises and he acknowledged that he had received it, and Isacsohn stated further that defendants would vacate the premises not later than June 30, 1961.

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[2] **Section 462 of the Code of Civil Procedure provides: "Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; * * *."**

As above stated, the defendants did not file an affidavit regarding the motion. The trial court could properly find, in accordance with the statements in Mr. Tillinghast's affidavit, that the facts with respect to giving notice to Isacsohn, and with respect to Isacsohn stating that defendants would vacate the premises, were as stated in the affidavit. In other words, under the affidavit on behalf of plaintiff, the court could properly find that the notice was mailed to the address of the Academy, that Isacsohn admitted that he received it, and said that defendants would vacate the premises not later than June 30.

[3] The question arises as to whether the giving of notice to Isacsohn in the manner stated in the affidavit was proper service of notice of termination of a month-to-month tenancy as required by section 1946 of the Civil Code. That ⌊769 section states that such notice shall be given as prescribed in section 1162 of the Code of Civil Procedure. One method of serving such notice, as provided in said section 1162, is by delivering a copy (of the notice) to the tenant personally. (Two other methods are provided therein, but those methods are not applicable herein.) In the present case the copy of the notice was not delivered to Isacsohn personally by plaintiff's attorney, but it was mailed to him and he admitted that he received it. This method of serving the notice was a sufficient compliance with the provision in said section 1162 as to personal service. In Colyear v. Tobriner, 7 Cal.2d 735, 62 P.2d 741, 109 A.L.R. 191, a notice terminating a month-to-month tenancy was sent by mail to the tenant, Colyear. It was said therein at page 743, 62 P.2d at page 745: "As to the matter of notice, it may be said that where a statute requires notice and does not specify how it shall be given, the presumption is that personal service is required. * * * This rule applies to notice of termination of tenancy given under section 1946, [of the] Civil Code * *. Section 1012 [of the] Code of Civil Procedure, providing for service by mail, relates to actions and proceedings provided for in the Code of Civil Procedure, and does not apply generally to all cases where notice is required to be given, independent of any action, under the Civil Code. However, personal service may be made through the instrumentality of the mails. The postoffice department, as well as any other type of messenger, may be used to effect personal service. Shearman v. Jorgensen, 106 Cal. 483, 39 P. 863; Heinlen v. Heilbron, 94 Cal. 636, 30 P. 8." In the Shearman case, referred to in the cited Colyear case, it was said at page 485, at page 864 of 39 P.: "[H]e admits that he received the notice through the postoffice December 9th, and this in law amounted to a *personal service.*" (See also Hunstock v. Estate Development Corp., 22 Cal.2d 205, 211, 138 P.2d 1, 148 A.L.R. 968; Reserve Oil & Gas Co. v. Metzenbaum, 84 Cal.App.2d 769, 774, 191 P.2d 796.) In the present case the court could find, from the statements in plaintiff's affidavit with respect to mailing the notice and with respect to Isacsohn receiving it, that Isacsohn was served properly with notice of termination of the tenancy.

[4] A further question arises as to whether the other defendants, Weiss, Rothman, and the Academy, were served with the notice of termination. The service of the notice on Isacsohn was notice to the other defendants. In Gentry v. Citron, 36 Cal. App. 288, 171 P. 1079, which was an unlawful detainer action, a three-days' notice to quit was served upon ⌊770 one of the two lessees. Appellants therein (tenants) contended that such service was insufficient. The court said (p. 288, 171 P. at p. 1079): "The point is untenable. As the lessees had bound themselves together as coparties to the lease, standing thus in opposition to the respondent, the lessor, they occupied as between themselves and as to him a relationship

kindred to that of copartners, if, in fact, they might not actually have been regarded by him as copartners [citation], which latter point we do not, however, decide. A notice to one of copartners binds the partnership [citation], and we can see no reason why the spirit and justice of the rule do not require its application to such a case as is here presented. In fact, it has been determined in other jurisdictions that, where two or more tenants hold either jointly or in common a service of notice to quit upon one of them is sufficient to terminate the tenancy of all." In the present case, the court could find, from the statements in plaintiff's affidavit, that all the defendants were served properly with the notice of termination.

[5] As above stated, appellants argue that there is no statement in the affidavit that the facts set forth therein are within affiant's personal knowledge and if he were sworn as a witness he could testify competently thereto. The statements in the affidavit regarding the mailing of the notice and regarding the telephone conversation with Isacsohn are statements of fact which patently are within the affiant's personal knowledge as to which he could testify competently. Under such circumstances it was not necessary to state expressly in the affidavit that such matters were within affiant's personal knowledge and he could testify competently thereto. In Schessler v. Keck, 138 Cal.App.2d 663, 670, 292 P.2d 314, 318, it was said: "It appears that defendants' affidavits speak of things that are within the personal knowledge of the respective affiants, and when that appears the statute has been complied with." (See also Cone v. Union Oil Co., 129 Cal.App.2d 558, 564, 277 P.2d 464.)

This concludes the discussion with respect to the affidavit as to the issues presented by paragraph IV of the complaint and the denial thereof by defendants.

Paragraph V of the complaint, which was denied by defendants, alleged: "The date of termination of said lease has passed and plaintiff is entitled to possession of said premises. Defendants continue in possession thereof wilfully, without permission of plaintiff and contrary to the terms and provisions of said agreement." The affidavit filed on behalf of plaintiff did ⊥771 not include a statement expressly referring to the allegations of paragraph V or the denial thereof. The paragraph is in effect an allegation as to the ultimate legal conclusion to be made in deciding the case, that is, the allegation is that plaintiff is entitled to possession and the defendants are in possession wilfully. The facts, upon which to base the ultimate legal conclusion herein, are those established by the uncontroverted or admitted allegations of the complaint and those found by the court from a consideration of the affidavit filed on behalf of plaintiff. It thus appears that no factual issue was presented by paragraph V and the denial thereof.

[6] Reference is now made to defendants' purported first affirmative defense stated hereinabove. It was therein alleged, in part, that the plaintiff "indicated to defendants" that they could remain in possession of said premises for a further period of time to be agreed upon between the parties. Since the defendants did not file an affidavit in support of such alleged defense, there was nothing before the court from which it could determine that the formal pleaded defense was genuine and presented a triable issue of fact. (See Coyne v. Krempels, 36 Cal.2d 257, 262, 223 P.2d 244; Murphy v. Kelly, 137 Cal.App.2d 21, 27, 289 P.2d 565; Cone v. Union Oil Co., 129 Cal.App.2d 558, 563, 277 P.2d 464.) Respondent (plaintiff) herein was not required to negative, in its affidavit, a possible matter of defense. (Best v. Burch, 132 Cal.App.2d 859, 862, 283 P.2d 262.) Furthermore, it is to be noted that such first affirmative defense herein does not state facts sufficient to constitute a defense—the allegation is that plaintiff "indicated to defendants" that they could remain in possession for a time to be agreed upon. There was no allegation as to facts from which it might be concluded that plaintiff agreed that defendants might

remain in possession. No material issue of fact was presented by the first affirmative defense, and plaintiff was not required to negative such a purported defense.

[7] The second purported affirmative defense was to the effect that defendant, Torath Emeth Young Israel Academy, had commenced an eminent demain action on July 3, 1961 (the same day this unlawful detainer action was commenced), for the purpose of condemning the subject property (which it occupied as tenant) for use as a school. Appellants do not discuss this asserted defense in their briefs. Of course, the fact that such an action was commenced by the Academy is not a defense to plaintiff's claim of right of possession in its un-
772 lawful detainer action. Alleging such defense herein is in effect asserting that the owner of the property is not now entitled to possession because the tenant is presently engaged in the initial stages of a protracted and speculative attempt, by means of an eminent domain action, to deprive the owner of its title to the property in the distant future. The plaintiff was not required to state, in its affidavit, facts establishing the futility of such an asserted defense.

The answer of the defendants did not deny or refer to the allegations of the complaint regarding attorney's fees. It therefore appears that the defendants admitted the allegation of the complaint that the lease provides that in the event an unlawful detainer suit is brought the defendants shall pay to the lessor reasonable attorney's fees to be fixed by the court. There was no issue as to attorney's fees.

Appellants assert that $575, as rental for the month of July, should not have been included in the judgment, for the reason the affidavit on behalf of plaintiff did not justify it. The complaint alleged the making of the lease and the terms thereof, which included an allegation that the monthly rental was $575. That allegation was admitted by failing to deny it. Furthermore, in their asserted eminent domain defense, the defendants in asking that the unlawful detainer action be stayed until final determination of the eminent domain action, asked that meanwhile the defendants continue to pay their rent of $575 a month. There was no issue as to the amount of the monthly rental.

The motion to dismiss the appeal is denied.

The judgment is affirmed.

FOURT and LILLIE, JJ, concur.

208 Cal.App.2d 827

Jerry LOVELACE, Plaintiff and Respondent, 827

v.

Samuel GREENFIELD, Defendant and Appellant.

Civ. 26070.

District Court of Appeal, Second District, Division 2, California.

Oct. 24, 1962.

Action wherein businessman filed motion to vacate the default and default judgment against himself. The Superior Court of Los Angeles County, Alfred J. McCourtney, J., denied the motion and the businessman appealed. The District Court of Appeal, Ashburn, J., held that uncontroverted assertions of businessman that contractor indicated he would take care of personal injury action against himself and businessman did not make refusal to vacate default and default judgment abuse of discretion but merely presented fact question whether businessman's failure to appear was result of contractor's representations or inexcusable neglect.

Affirmed.

Judgment ⚷139

Uncontroverted assertions of businessman that contractor had indicated he would take care of personal injury action against himself and businessman did not make refusal to vacate default and default judgment rendered against businessman abuse of discretion but merely presented fact question whether businessman's failure to appear was result of contractor's representations or inexcusable neglect. West's Ann. Code Civ.Proc. § 473.

Leslie, Bernson & Seton, Harold B. Bernson, Beverly Hills, for appellant.

Fishkin & Goldberg, Sun Valley, for respondent.

⊥828 ⊥ASHBURN, Justice.

Defendant Greenfield appears from order denying his motion to vacate default and judgment by default rendered against him. The motion specifies the ground "that said default and judgment were entered as the result of extrinsic mistake and fraud." The motion was heard on May 5, 1961 and denied on May 18, 1961.

Lovelace on October 23, 1959, sued for damages for personal injuries received by him on April 9, 1959, through alleged negligence in the installing and maintaining of a water meter ⊥829 in the sidewalk area of Sherman Way in Canoga Park; he named as defendants Greenfield, the owner of the adjoining property upon which a building was being constructed; C. R. Bowen, the contractor; Neal Behrendrinker, plumbing subcontractor, and the City of Los Angeles. Summons and complaint were served upon Greenfield in Los Angeles County on January 19, 1960 and, no appearance having been made, his default was entered on February 29, 1960; hearing upon the default was held and judgment rendered against Greenfield and Behrendrinker on February 20, 1961.

Appellant's declaration in support of the motion avers that prior to service of summons upon him he received a letter informing him of the injuries to plaintiff, doubtless a letter which plaintiff's attorney Goldberg sent to appellant on April 21, 1959, advising him of Mr. Lovelace's injuries and his intention to hold appellant responsible, making demand upon him, asking him to notify his insurance carrier, and notifying him that legal proceedings would be instituted if he were not heard from within five days. Receiving no response, attorney Goldberg on June 10, 1959, sent appellant another letter of similar import. Goldberg's declaration in opposition to the motion states that a meeting was held at the site of the accident on August 4, 1959, appellant being present and identifying himself. Goldberg "asked Mr. Greenfield if he had received any correspondence from my office concerning an accident that had occurred on April 9. He told me that he had received said letters but that he had no intention of cooperating with me whatsoever; that he had himself been injured when he was younger and that he did not try and get any money from anybody and he had no sympathy or patience with any attorney or client who tried to get money just because they were hurt. He told me that I could do whatever I wanted to but he assured me that he would have nothing to do with this matter." On March 14, 1961, following the request for entry of default, Goldberg called appellant and had a conversation with him during which appellant admitted that he was served with some papers in the action but stated that he did not remember what he had done with them. He said that normally he doesn't bother with such things and "that this case was not his problem and that the builder was responsible"; he would not cooperate in any way. On the same day Goldberg wrote Greenfield informing him that judgment had been entered against him. Mr. Goldberg further asserts that at no time prior to April 4, 1961, the date of the levy on appellant's ⊥830 automobile, had Mr. Goldberg received any communication from appellant or from anyone representing him in the matter.

William O'Rourke, an employee of the Department of Water and Power, also filed a declaration in opposition to the motion to vacate the default. He stated that he investigated the accident in connection with his duties. On July 10, 1959, he called appellant at his place of business, and told him that a claim had been filed against the Department of Water and Power in connection with the accident. "I indicated that I wanted to get some information as to who was working at the property at the time of this incident. Mr. Greenfield stated that he had received letters from the attorney but that he was just ignoring them. He said that both he and the contractor, Chester Bowen, were covered by insurance. Mr. Greenfield's attitude was very indifferent and his quotation was 'to hell with the attorney—let him have fun'. * * * Mr. Greenfield did not want to discuss this matter and would not give out any information regarding the background of work operations." O'Rourke also confirmed Mr. Goldberg's declaration as to the meeting on August 4, 1959, and appellant's general attitude and statements at that time.

Appellant's explanation of the foregoing matters and the basis of his claim of extrinsic fraud and mistake are found in his supporting declaration. He says that immediately after receiving the above mentioned letter at some time before January 19, 1960, he discussed the matter with C. R. Bowen, the contractor on the job; that Bowen said he was insured and "he would take care of this matter which was of mutual concern"; shortly after service of summons and complaint on January 19, 1960, he mailed copy of same to Mr. Bowen and telephoned him that he had mailed said papers; Bowen replied that the matter would be taken care of. "Since that date I have been under the mistaken belief that the Complaint had been answered on my behalf and that I would have my day in Court and, in the event a judgment was entered against me, C. R. BOWEN's insurance company would take care of the matter. On April 4, 1961, my automobile was picked up and I learned for the first time that a judgment for $6,000 had been entered against me. I immediately contacted Jacques Leslie, attorney at law, who has been my attorney for eleven years. His office immediately ordered photostatic copies of the within action which were received in Mr. Leslie's office on Tuesday, April 18, 1961. Whereupon my attorneys, Leslie, Bernson, Johnson & Wolf, filed this motion as soon as possible." Goldberg's declaration says that neither Bowen nor his attorney at any time indicated that they were acting in appellant's behalf. Appellant's declaration says that on February 28, 1961, about a year after his default was entered, the court dismissed the action with prejudice as to Bowen and other co-defendants, each having made a settlement with plaintiff; that settlement and dismissal took place in spite of the fact that Bowen had promised appellant that he would take care of the matter; that Bowen knew that his representation was false when he made it and that he made the statement for the purpose of inducing appellant's reliance. Appellant asserts that he justifiably relied upon Bowen's representations. Appellant further states in a supplementary declaration that "at all times herein SEYMOUR GOLDBERG knew and was informed by me that I was sure that I was being taken care of in this matter but, nevertheless, willfully refused and failed to inform me of the true nature of the proceedings. Plaintiff's attorney willfully and with the intent to lull Defendant into a false sense of security, refrained from proceeding in this action until Defendant's rights under Section 473 of the Code of Civil Procedure were barred by lapse of time."

As previously indicated appellant rested his motion to vacate upon an appeal to the court to exercise its broad equitable power to grant relief against extrinsic fraud and mistake either upon motion made in the action or through disposition of an independent equity action.

Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328: "One who has been prevented by extrinsic factors from presenting his case to the court may bring an independent action in equity to secure relief from the judgment entered against him. [Citations.] Where the court that rendered the judgment possesses a general jurisdiction in law and in equity, the jurisdiction of equity may be invoked by means of a motion addressed to that court." (Pp. 575–576, 122 P.2d page 567.) At page 575, 122 P.2d at page 567, the opinion states that "'where the legal judgment was obtained or entered through fraud, mistake, or accident, or where the defendant in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his part, or on the part of his agents, then a court of equity will interfere at his suit, and restrain proceedings on the judgment which cannot be conscientiously enforced.'" (Evry v. Tremble, 154 Cal.App.2d 444, 448, 316 P.2d 49; Bacon v. Bacon, 150 Cal. ⊥832 477, 488, 89 P. 317; Champion v. Woods, 79 Cal. 17, 22, 21 P. 534; Zellerbach v. Allenberg, 67 Cal. 296, 7 P. 908.)

Galper v. Galper, 162 Cal.App.2d 391, 328 P.2d 487, involved an attempt by motion, made nine months after entry of default to set aside the default, under the general equity jurisdiction of the court. The motion was denied and an appeal was taken. Affirming the order, the opinion says: "The motion was heard entirely on affidavits and counter-affidavits. In considering an appeal from an order made on a motion based on affidavits, and which involves the determination of a question of fact, if there is any conflict therein, those facts favoring the respondent are accepted by the reviewing court as true, and since all intendments are in favor of the ruling of the lower court, the affidavits in behalf of the successful party are deemed not only to establish the facts directly stated therein, but all facts reasonably to be inferred from those stated. [Citations.]" (P. 393, 328 P.2d page 488.)

At pages 396–397, 328 P.2d page 490: "If appellant is to prevail on this appeal, he must show an abuse of discretion on the part of the trial court in holding that the facts were not sufficient to justify an exercise of its 'inherent power' to vacate the judgment.

"A motion to set aside a default judgment is addressed to the sound discretion of the trial court and, in the absence of a clear showing of abuse in the exercise thereof, an appellate court will not disturb the order of the court below. Stub v. Harrison, 35 Cal.App.2d 685, 96 P.2d 979. In the main, appellant relies upon the language of the court in Dei Tos v. Dei Tos, 105 Cal.App.2d 81, 232 P.2d 873, to point up the power of the court to vacate a default judgment when a condition not amounting to fraud occurs preventing defendant, through no fault of his, from having his day in court. A reading of the authorities upon which the court there relied, and the cases of Hallett v. Slaughter, 22 Cal.2d 552, 140 P.2d 3 and Bartell v. Johnson, 60 Cal.App.2d 432, 140 P.2d 878, cited by appellant, convinces us that although 'extrinsic accident and mistake of fact' may, in some situations, be a proper basis for the exercise of the court's equitable jurisdiction to vacate a default judgment more than six months after entry of default, whether such a condition exists is a question of fact depending entirely upon the particular circumstances in each case. See, also, Larrabee v. Tracy, 21 Cal.2d 645, 134 P.2d 265."

On page 397, 328 P.2d on page 491: "[R]ealizing that circumstances not ⊥833 amounting to extrinsic fraud, but of a serious nature for which defendant was not responsible and which prevented him from being heard, may exist to create an injustice, our courts in a limited number of situations have exercised their 'inherent power and jurisdiction' to relieve the defaulting party from a judgment where it is probable that an injustice has resulted. The courts have labeled such situations 'extrinsic accident' and 'mistake of fact' but in doing so, have made it plain that the lack of vigilance on the part of the person seeking to be relieved must be such as would not have occurred with a man of ordinary care and prudence under the circumstances."

It is appellant's contention that because his assertions of fact with respect to his mistake are not controverted, the trial court should have granted his motion. The law is to the contrary (2 Cal.Jur.2d § 33, p. 641). Appellant is a businessman and states that he has been represented by an attorney for eleven years. The declarations present a question of fact as to whether his failure to appear in this matter was a result of the representations of Bowen or of his own inexcusable neglect. The trial court well could have been of the opinion that a man of appellant's experience should not have relied merely upon the representations of Bowen but should have pursued the matter to ascertain whether, in fact, he was being represented in the action. It does not appear that the trial court abused its discretion in this matter.

Appellant relies on the case of Newton v. De Armond, 60 Cal.App. 231, 212 P. 630. This case is cited for the proposition that mistake arising from the representations of a third party "that everything will be taken care of" is extrinsic mistake which entitles the injured party to relief under the general equity powers of the court. In that case the defendant was served, saw an insurance agent who also insured a co-defendant, and the agent told defendant that he had attended to the matter. The appellant thought that this meant he would be represented. His default was entered and he received notice of default and judgment. The error having become apparent, defendant obtained his own attorney and, so far as appears from the opinion, moved for relief from default within the six month time limit set forth in Code of Civil Procedure, § 473. The grounds for relief were stated in the opinion to be inadvertence, surprise and excusable neglect according to the statute. The holding is that, under the facts stated, appellant was entitled to relief under the statute, not pursuant to the general equity powers of the court.⊥834 In the instant case the motion was not made within six months following the entry of default but barely within fourteen months. The trial court could well have considered this extensive lapse of time in arriving at its conclusion.

The contention is also made by appellant that attorney Goldberg filed a false affidavit re military service in that the affidavit asserted that appellant told Goldberg that he was not in military service. Appellant denies having made that statement. Appellant's declaration and Goldberg's affidavit re military service merely present a question of fact which was decided adversely to appellant.

The order is affirmed.

FOX P. J., and HERNDON J., concur.

Edward SHAHINIAN, Plaintiff and Appellant,
v.
John McCORMICK, Charlotte McCormick, Defendants and Respondents.
Civ. 26089.

District Court of Appeal, Second District, Division 4, California.
Oct. 19, 1962.

For Opinion on Hearing, see 30 Cal.Rptr. 521, 381 P.2d 377.

An action was brought for injuries sustained when the plaintiff, while water skiing, was struck by defendants' motor boat, which was used to pull water skiers, and which was operated by defendant wife. The Superior Court of Los Angeles County, Jesse J. Frampton, J., rendered judgment adverse to the plaintiff, and the plaintiff appealed. The District Court of Appeal, Burke, P. J., held that violation of ordinance making it unlawful for any person to operate boat at speed in excess of 5 miles per hour within 100 feet of any person engaged in skiing did not bar defense of assumption of risk, where the plaintiff knew that the defendant wife was inexperienced in operating the boat, and plaintiff and defendant husband persuaded defendant wife to operate boat to pull skiers.

Judgment affirmed.

1. Negligence ⚷105

In certain cases where negligence of defendant is predicated on violation of ordinance made for protection of human life, plaintiff does not assume risk attendant to such violation.

2. Negligence ⚷105

Violation by defendant wife of ordinance making it unlawful for any person to operate boat at speed in excess of 5 miles per hour within 100 feet of any person engaged in water skiing did not bar defense of assumption of risk in action for injuries sustained by plaintiff when struck by defendants' motor boat operated by defendant wife while plaintiff and defendant husband were water skiing, where plaintiff knew that defendant wife was inexperienced in operating boat, but plaintiff and defendant husband persuaded her to operate boat so they could ski behind boat.

3. Negligence ⚷138(1)

Instruction that person assumes risk when he freely, voluntarily, and knowingly manifests his assent to dangerous condition and voluntarily exposes himself to that danger, or when he knows that danger exists and voluntarily remains within area of danger sufficiently defined "assumption of risk".

See publication Words and Phrases for other judicial constructions and definitions.

4. Negligence ⚷121(2)

Doctrine of res ipsa loquitur is applicable where accident is of such nature that it can be said, in light of past experience, that it probably was result of negligence by someone, and that defendant is probably one responsible.

5. Negligence ⚷121(2)

There is no room for operation of any inference under res ipsa loquitur where evidence in case clearly reveals precise cause of accident and facts and circumstances surrounding its occurrence.

6. Negligence ⚷121(2)

Introduction of specific acts of negligence into evidence does not necessarily deprive plaintiff of benefit of doctrine of res ipsa loquitur.

7. Negligence ⚷121(3)

Doctrine of res ipsa loquitur was not applicable in action by water skier for injuries sustained when struck by motor boat being used to pull skier.

8. Negligence ⚷83.10

Last clear chance doctrine was not applicable in action by water skier for injuries sustained when struck by motor boat which had been used to pull water skier, where there was no evidence of possible negligence on part of water skier except that immediately attending occurrence of accident.

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Gifford, Wyse, Darby & Franciscus, Pasadena, for plaintiff and appellant.

Dryden, Harrington, Horgan & Swartz, by Vernon G. Foster, Los Angeles, for defendants and respondents.

BURKE, Presiding Justice.

This is an action for personal injuries suffered by plaintiff, a water skier, when struck by defendants' motor boat. Plaintiff appeals from a judgment entered pursuant to a jury verdict for defendants and alleges error in the refusal of the trial judge to give certain instructions to the jury as requested by plaintiff.

The accident occurred on Bass Lake in Madera County. Defendants, Mr. and Mrs. McCormick, were vacationing there with plaintiff, Edward Shahinian, and his wife. Defendants were owners of a sixteen-foot motor boat powered by an outboard engine.

On the day of the accident the weather was clear and the sun was shining. In the afternoon Mr. McCormick and Mr. Shahinian decided to ski together behind the boat. Mrs. Shahinian refused to drive and

Mrs. McCormick was thereafter persuaded to operate the boat. It appears that she had not driven the boat in the past as it was recently acquired by the McCormicks, so that she was first instructed by Mr. McCormick in the operation of the boat. After this instruction period the two men skied for about one-half hour and then dropped the tow lines. The men were in the water about three hundred feet apart and the boat continued on about one hundred and fifty feet beyond them. After pulling in the tow lines, Mrs. McCormick turned the boat around and drove back to where her husband was in the water and was told to go over and get Mr. Shahinian as Mr. McCormick wanted to ski some more. Mrs. McCormick then came about and headed toward Mr. Shahinian. The latter was wearing an orange life belt which held him high in the water so that he was clearly visible to all parties.

There was conflicting testimony as to the speed of the boat as it approached Mr. Shahinian. The plaintiff and his wife testified that the boat was traveling approximately fifteen miles per hour and did not slow down at any time. Defendants testified that the boat was heading toward Mr. Shahinian at about ten to fifteen miles per hour and then slowed down before finally reaching him. As the boat approached it was bearing nearly straight on Mr. Shahinian, slightly to his left. In quick sequence, as the boat neared Mr. Shahinian, Mrs. Shahinian, who was riding in the boat, screamed, Mrs. McCormick turned the boat sharply to the right and Mr. Shahinian tried to dive under the boat. The attempted dive was ineffective because of the life belt. The rear of the boat passed over Mr. Shahinian and his arm was gashed by the propeller. The boat then stopped ten to twenty feet from the accident.

Plaintiff's testimony showed his awareness of Mrs. McCormick's inexperience; that he was reluctant to ski with her operating the boat. He said, "But there wasn't anything I could do about it." He stated he knew it would be necessary for the boat to pick him up when he finished skiing.

The principle question raised on appeal is whether the court erred in refusing to give the following instruction:

> "You are instructed that there was an ordinance in effect at the time of the accident which reads as follows:
>
> "It is hereby declared to be unlawful * * * for any person to operate or use a boat at a speed in excess of 5 miles per hour * * * within 100 feet of any person who is engaged in bathing or swimming, skiing or aquaplaning."

The ordinance further provides:

> "Any person who uses, operates or drives any boat upon a boating area in willful or wanton disregard for the safety of persons * * * is guilty of reckless operation, which is hereby declared to be a misdemeanor." Madera County Ordinance No. 242–A.
>
> "If you find that the defendant violated said ordinance and that the violation was a proximate cause of an injury found by you to have been suffered by plaintiff, then you are instructed that the principle of assumption of risk does not apply and is not a defense."

In place of this requested instruction the jury was told:

> "It is unlawful * * * for any person to operate or use a boat at a speed in excess of 5 miles per hour * * * within 100 feet of any person who is engaged in bathing or swimming, skiing or aquaplaning." Madera County Ordinance No. 242–A.

The jury was thereafter instructed that if defendant violated the ordinance and if the violation proximately caused plaintiff's injury, a presumption of negligence on the part of defendant arose which could be rebutted by evidence of excuse or justification.

Following the giving of the above instructions the court instructed the jury on the defense of assumed risk. Plaintiff assigns error in refusing to give an instruction removing assumption of risk from the jury's consideration as a defense if a violation of the ordinance was found to have proximately caused plaintiff's injury.

[1] The defense of assumption of risk reflects the individualism of the common law in relationships wherein it was felt that the duty of self-protection against many hazards rested primarily on each participant. See 2 Harper and James, The Law of Torts (1956) section 21.1, page 1165; and "in the ordinary case (of negligence based on violation of statute) assumption of the risk will be a defense." Prosser, Torts, p. 161. But in certain cases where defendant's negligence is predicated on violation of an ordinance made for the protection of human life, plaintiff does not assume the risk attendant to such violation. (See Finnegan v. Royal Realty Co., 35 Cal.2d 409, 430, 218 P.2d 17.) In the latter instance the statutes or ordinances involved are so clearly intended to protect members of a particular class against their own inability to protect themselves that the policy of the enacting body is interpreted to preclude such defenses. See Prosser, supra, pages 161, 313–314. Examples of such statutes are the child labor acts and laws designed to protect working men on their jobs.

The key to the problem lies in the relationships of the parties as amplified by the surrounding circumstances. Thus, in the vast majority of California cases dealing with this point the relationship of the parties is that of employer and employee. (See, e. g. Lokey v. Pine Mountain Lbr. Co., 205 A.C.A. 587, 596, 23 Cal.Rptr. 293; Loser v. E. R. Bacon Co., 201 A.C.A. 441, 445, 20 Cal.Rptr. 221.) "The workman has no alternative but loss of his livelihood, it is his 'poverty and not his will' which consents, and economically he is no more free to leave his employment than a soldier or a sailor." (Finnegan v. Royal Realty Co., supra, 35 Cal.2d 409, 431, 218 P.2d 17, 31.) The relationship of landlord and tenant is another important class of cases where the defense may be barred. For example, where a landlord fails to make repairs to a gas heater after notice from his tenant in violation of a statute, the tenant does not assume the risk of his landlord's omission. (Ewing v. Balan, 168 Cal.App.2d 619, 336 P.2d 561.) And plaintiff's mere passive acquiescence in defendant's violation is not thought to be a waiver thereof. (Martello v. Beletich, 59 Cal.App. 533, 211 P. 20; Finnegan v. Royal Realty Co., supra, 35 Cal.2d 409, 218 P.2d 17.) In McAllister v. Cummings, 191 Cal.App.2d 1, 9, 12 Cal.Rptr. 418, it was held that a motorcycle policeman in hot pursuit with red light and siren under the statutory emergency exemption does not assume the risk that others will not yield the right of way as required by law. It has also been held that an adjoining landowner cannot waive his right of action against maintenance of a nuisance, the existence of which is proscribed by ordinance. (Friedman v. Pacific Outdoor Advertising Co., 74 Cal.App.2d 946, 952–953, 170 P.2d 67.) And finally, where posted signs admonish that use of a swimming pool is at the swimmer's risk, an eleven-year old boy who violates no rules does not assume the risk that defendant will fail to provide a qualified lifeguard at the pool as required by a rule of the State Department of Health (Lindsey v. De Vaux, 50 Cal.App.2d 445, 455–456, 123 P.2d 144). In each of the foregoing examples the relationship of the parties is one where social policy prescribes special duties, usually based on economic necessity and inequality of bargaining power. The voluntary character of the association, principal element of the defense, is thought to be vitiated in such cases.

[2] In the case at bar the relationship of the parties was that of equal voluntary participants in a purely recreational adventure; none of the vitiating elements described above are present. Nobody coerced plaintiff to participate in the water skiing; his livelihood and home did not depend on it. He knew Mrs. McCormick was inexperienced in operation of the boat and admittedly felt some trepidation over her undertaking to do so, even to the extent of considering (possibly in jest) the contin-

gency of being hit by the boat while being handled by Mrs. McCormick. Lack of judgment and experience in operation of the boat clearly include the possibility that she would be unable to properly control the speed or direction of the boat when performing necessary functions relating to water skiing, which all parties knew included picking up skiers who were down in the water. In the light of these circumstances surrounding the voluntary association present here, there was no error in refusing an instruction that violation of the ordinance barred the defense of assumption of risk.

[3] Plaintiff next argues that the instructions given on the doctrine of assumption of risk were fatally deficient because they failed to inform the jury that the defense is available only when the risk has been assumed with knowledge and appreciation of that risk. He asserts the jury should have been instructed that plaintiff must "appreciate the magnitude of the risk." (See Hawk v. City of Newport Beach, 46 Cal.2d 213, 293 P.2d 48.) The pertinent instruction given by the court is as follows:

> "There is a legal principle commonly referred to by the term 'assumption of risk,' which now will be explained to you:
>
> "A person is said to assume a risk when he freely, voluntarily and *knowingly* manifests his assent to a dangerous condition, and voluntarily exposes himself to that danger, or when he *knows* that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, and voluntarily places himself, or remains, within the area of danger.
>
> "A person who thus assumed a risk is not entitled to recover for damage caused him without intention, and which resulted from the dangerous condition or conduct to which he thus exposed himself." (Emphasis added.)[1]

Although the phraseology requested by plaintiff was not followed the basic principle that plaintiff must have knowledge of the risk is adequately stated. (See Garcia v. San Gabriel Ready Mixt, 155 Cal.App.2d 568, 572, 318 P.2d 145.) There is no error here.

Plaintiff also claims error in the refusal of the trial court to invoke the doctrine of res ipsa loquitur and to instruct the jury thereon by giving form instructions, B.A. J.I. 206–206–A, revised, which would submit to the jury the elements of the doctrine. The instruction would then advise the jury that an inference of negligence arises if the facts in the case fulfill the stated requirements for application of the rule.

[4, 5] "The doctrine of res ipsa loquitur is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible." (Di Mare v. Cresci, 58 A.C. 297, 303, 23 Cal.Rptr. 772, 776, 373 P.2d 860, 864.) In California the rule raises an inference based on probabilities derived from circumstances surrounding the accident. (Leet v. Union Pac. R. R. Co., 25 Cal.2d 605, 155 P.2d 42, 158 A.L.R. 1008.) While there are many differences among the several states in enunciating as well as applying the doctrine it appears to be a generally accepted rule that there is no room for the operation of any inference under res ipsa loquitur where the evidence in the case clearly reveals the precise cause of the accident and the facts and circumstances surrounding its occurrence. (See 33 A.L.R.2d 791; Prosser, Torts, p. 214.) In California justification for resort to the inference of negligence is eliminated if the facts as to the cause of the accident and the care exercised by the defendant are shown as a matter of law; i. e., when the testimony nec-

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[1] B.A.J.I. 207, California Jury Instructions The court also gave B.A.J.I. 207–A, 207–B, 207–C and 207–D. The form of these instructions was approved in Ching Yee v. Dy Foon, 143 Cal.App.2d 129, 299 P.2d 668.

essarily excludes the use of inference in determining whether there was negligence. (Di Mare v. Cresci, 58 A.C. 297, 304, 23 Cal.Rptr. 772, 373 P.2d 860.) This is so because when the conduct of the defendant attending occurrence of the injury is fully shown and the cause not open to doubt, the question of defendant's negligence is no longer a matter of probabilities; rather it becomes a problem of evaluating the known conduct in light of the duty owed to plaintiff. There is no justification for resort to an inference when nothing remains to be inferred.

[6, 7] All the facts and circumstances in the case at bar were fully presented through testimony to the jury. The cause of the accident was undisputed. While there was conflict in the testimony as to the speed of the boat, it has not been asserted, nor could it be, that resort to an inference is necessary to resolve conflict in testimony of percipient witnesses to the event. The jury was fully instructed on the several direct theories of negligence advanced by plaintiff. In concluding there was no error in refusing to give an instruction on res ipsa loquitur here we have fully considered the salutary rule that introduction of specific acts of negligence into evidence does not necessarily deprive plaintiff of the benefit of the doctrine. (See Di Mare v. Cresci, supra, 58 A.C. 297, 304, 23 Cal.Rptr. 772, 373 P.2d 860; Leet v. Union Pac. R. R. Co., 25 Cal.2d 605, 620–622, 155 P.2d 42, 158 A.L.R. 1008.) As pointed out by the Supreme Court in the Di Mare case there are circumstances when the giving of the instructions on the doctrine of res ipsa loquitur would be proper even though evidence has been introduced of specific acts of negligence. However, under the facts in this case we hold there was no room for inference and that the trial judge was not in error in refusing to instruct on the doctrine.

[8] Plaintiff finally argues that it was error to refuse an instruction on the doctrine of last clear chance. This doctrine is designed to ameliorate the sometimes harsh effects of the defense of contributory negligence and in a proper case refusal to give an appropriate instruction constitutes reversible error. But here, viewing the evidence in the light most favorable to the contention that the doctrine is applicable (Doran v. City & County of San Francisco, 44 Cal.2d 477, 283 P.2d 1), the only act attributable to plaintiff which might be viewed as contributory negligence was his attempt to dive under the boat. In time, the sequence of events occurred rapidly—Mrs. Shahinian screamed, plaintiff dove and Mrs. McCormick attempted to turn the boat sharply. The last clear chance doctrine "excludes from its application any case in which plaintiff's state of helplessness, resulting from his own negligence, is created so nearly simultaneously with the happening of the accident that neither party may be fairly said to have thereafter a last clear chance to avoid the accident." (Doran case, supra, at page 488, 283 P.2d at page 7.) Since there is no evidence of possible negligence on the part of plaintiff save that immediately attending the occurrence of the accident, the trial court correctly refused to instruct the jury on the doctrine of last clear chance under the rule announced in the Doran case, supra.

The judgment is affirmed.

JEFFERSON and FORD, JJ.,[2] concur.

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[2] Assigned by Chairman of Judicial Council.

208 Cal.App.2d 633

⊥633 ⊥**The PEOPLE, Plaintiff and Respondent,**

v.

Luther C. HUNTER, Defendant and Appellant.

Cr. 8175.

District Court of Appeal, Second District, Division 3, California.

Oct. 17, 1962.

Prosecuted for alleged grand theft and convicted, in the Superior Court of Los Angeles County, Federick W. Mahl, Jr., J., under misdemeanor statute, the defendant appealed. The District Court of Appeal, Shinn, P. J., held that defendant could not be convicted under statute providing that anyone committing any of a number of enumerated acts for which no other punishment is expressly prescribed is guilty of misdemeanor, as section does not apply to grand theft for which punishment is otherwise prescribed.

Reversed.

Criminal Law 🔑1167(1)
Indictment and Information 🔑191(5)

Defendant charged with grand theft could not be convicted under statute providing that anyone committing any of a number of enumerated acts for which no other punishment is expressly prescribed is guilty of misdemeanor, as section does not apply to grand theft for which punishment is otherwise prescribed, and conviction under such misdemeanor provision was required to be reversed. West's Ann.Pen.Code, §§ 489, 650½.

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Thomas H. Greenwald, Beverly Hills, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., George Roth, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Luther C. Hunter was accused by information in count I of grand theft and in count II of forgery. In a nonjury trial the cause was submitted on the evidence contained in the transcript of the preliminary hearing. Hunter was acquitted of forgery, but upon count I the court found him guilty of violation of section 650½ of the Penal Code, as if it were included in the crime of grand theft. Proceedings were suspended and probation was granted for one year on the condition, among others, that defendant pay a fine of $200. He appeals from the order granting probation, as a judgment.

The facts were: the Superior Court of Los Angeles County approved a compromise of a claim of defendant's daughter, Linda Hunter, a minor, for personal injuries. The net amount due the minor was $618.50. The order required defendant⊥634 to deposit the money in Wilshire Federal Savings and Loan Association in defendant's name as trustee for the minor, and to be withdrawn only upon order of the court. Defendant received a check for the amount payable to him as trustee for Linda and to Wilshire Federal Savings and Loan Association. Defendant endorsed the check by writing thereon the name of the loan association and his own name as trustee. The loan association did not authorize the endorsement. Defendant deposited the check to his own account in a Nevada bank.

The sole point on the appeal is that defendant was found guilty of an offense which is not necessarily included in the offense of grand theft.

Section 650½ of the Penal Code provides that any person who commits any of a number of enumerated acts "for which no other punishment is expressly prescribed by this code, is guilty of a misdemeanor."

It is unnecessary to decide whether violation of section 650½ is an offense necessarily included within the offense of grand theft. Defendant could not be found guilty of violation of section 650½ for the reason that it does not apply to a prosecution for grand theft, for which other punishment is prescribed by section 489 of the Penal Code.

(People v. Proctor, 46 Cal.2d 481, 296 P.2d 821.)

The judgment is reversed.

FORD and FILES, JJ., concur.

208 Cal.App.2d 599

⊥599 ⊥**The HOUSING AUTHORITY OF the CITY OF NEEDLES, R. C. McReynolds, T. G. Duke and Bess W. Brewer, Petitioners and Respondents,**

v.

CITY COUNCIL OF the CITY OF NEEDLES et al., Respondents and Appellants.

Civ. 6848.

District Court of Appeal, Fourth District, California.

Oct. 16, 1962.

Rehearing Denied Nov. 8, 1962.

Action by city housing commissioners seeking reinstatement to their office. The Superior Court, San Bernardino County, Jesse W. Curtis, Jr., J., entered judgment and order for issuance of peremptory writ of mandamus, and the city appealed. The District Court of Appeal, Brown, J., held that mandamus rather than quo warranto was the proper remedy and that evidence supported the lower court's determination that city council had erroneously held city housing commissioners guilty of an abuse of discretion in selecting tenants, excessive absence from meetings, and misconduct and inefficiency in office.

Affirmed.

1. Appeal and Error 🔑337(2), 428(2)

Notice of appeal filed prior to entry of findings and judgment but after rendition of judgment was valid and was deemed to have been filed immediately after entry, and reviewing court, in exercise of discretion, would consider trial court's findings and judgment despite premature appeal. West's Ann.Code Civ.Proc. § 632; Cal.Rules of Court, rules 1, 2, 2(c), 3.

2. Municipal Corporations 🔑159(6)

Even though terms of city housing commissioners had expired prior to appeal in proceeding to remove them from office, question of propriety of their removal was not rendered moot in view of fact that their successors had not been appointed. West's Ann.Gov.Code, § 1302; West's Ann. Health & Safety Code, §§ 34200 et seq., 34272.

3. Mandamus 🔑77(4)

Mandamus rather than quo warranto was proper remedy by which city housing commissioners who had been removed from their offices by city council could seek reinstatement. West's Ann.Code Civ.Proc. §§ 803, 811, 1085, 1094.5; West's Ann.Health & Safety Code, §§ 34272, 34282; West's Ann.Gov.Code, § 1302.

4. Municipal Corporations 🔑159(6)

Removal of housing commissioners for inefficiency, neglect of duty, or misconduct in office is reviewable. West's Ann.Health & Safety Code, § 34282.

5. Municipal Corporations 🔑54

City council, while functioning pursuant to Housing Authorities Law, is agency of state functioning under law to fulfill state purposes. West's Ann.Health & Safety Code, § 34200 et seq.

6. Municipal Corporations 🔑159(1)

Evidence supported determination that city housing commissioners were not guilty of an abuse of discretion in selecting tenants, excessive absences from meetings, or misconduct or inefficiency in office. West's Ann.Health & Safety Code, § 34200 et seq.

7. Mandamus 🔑172

Determination by trial court that there was no substantial evidence to support city council's finding of misconduct and inefficiency on part of city housing commissioners was within scope of its statutory jurisdiction and was not the result of an unauthorized trial de novo. West's Ann.Code Civ.Proc. § 1094.5.

King & Mussell and C. L. Vineyard, San Bernardino, for petitioners and respondents.

Harold Payne, Needles, for respondents and appellants.

⊥600 ⊥BROWN, Justice.*

This is an appeal from a judgment and order for the issuance of a peremptory writ of mandamus in favor of petitioners and respondents (hereinafter referred to as petitioners).

McReynolds and Duke, petitioners, were reappointed to the Housing Authority of the City of Needles as commissioners on June 3, 1957, for terms of four years, and petitioner Brewer was appointed on July 17, 1957, and again appointed in June 1959, for a term of four years. On June 8, 1960, the city council passed a resolution purporting to abolish the housing authority of the City of Needles, apparently relying on a section of the Needles Charter, and on learning of the existence of section 34282 of the Health and Safety Code, the city council rescinded their action. On July 27, 1960, another resolution was passed proposing to remove petitioners from their offices as commissioners on the grounds that (1) said members were improperly and unjustly biased and prejudiced in matters of tenant selection; (2) said members were unduly and improperly absent from meetings of the board; and (3) said members have failed to have reports rendered to the ⊥601 State properly signed by a city official as required by the State housing authority, all of which amounts to misconduct and inefficiency in office.

On August 9, 1961, the city council met, two councilmen being absent. A hearing was held under section 902 of the Needles Charter which hearing was reported by an official court reporter. The witnesses at the hearing were the City Manager, the City Attorney, the Mayor, and McReynolds and Duke, commissioners. The council acted as judge, jury and prosecutor in this matter. The meeting was adjourned to August 12th when the city council adopted and passed a resolution dismissing petitioners as commissioners. There are no rival claimants.

On October 11, 1960, said petitioners filed a petition for writ of mandate commanding the city council and its councilmen to reinstate them as commissioners on the Housing Authority of the City of Needles. An alternative writ of mandamus was issued and the city filed an answer to the petition, denying that it had no just cause for dismissal of petitioners. The matter was set for hearing on November 7, 1960. Petitioners were present at the hearing which was submitted without testimony but with exhibits; respondents and appellants were not present personally or by counsel, but did submit points and authorities. A memorandum opinion by the court was filed on February 23, 1961, issuing a writ, and a minute order was made in accordance therewith on February 21st. On March 17th appellants filed a notice of motion for new trial, which was denied on April 13th. On May 11, 1961, appellants filed a notice of appeal from the judgment and order for the issuance of peremptory writ of mandamus.

Thereafter, on June 20, 1961, the judge signed his findings of fact and conclusions of law and the judgment ordering that the writ be issued, requiring appellants to set aside the order or decision to discharge the commissioners. These findings were that the written charges provided to the commissioners were vague, indefinite and general to such an extent that notice of the charges proposed against the commissioners was inadequate and that there was no substantial evidence to support the charges against the commissioners.

[1] Appellants claim that the findings of fact and conclusions of law and judgment that were signed and filed on June 20th are of no effect and are void because jurisdiction was lost after the filing of the notice of appeal, referring to ⊥602 rule 1 of

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* Assigned by the Chairman of the Judicial Council.

California Rules of Court.[1] However, rule 2 provides that the notice of appeal shall be filed within 60 days of the date of entry of judgment unless the time is extended by rule 3 and that the date of entry of a judgment shall be the date of its entry in the judgment book. Rule 2(c) covers premature notices. In this case the notice of appeal was filed prior to entry of the judgment but after its rendition and shall be valid and be deemed to have been filed immediately after entry. A notice of appeal prior to rendition of the judgment but after the judge has announced his intended ruling may, in the discretion of the reviewing court, for good cause be treated as having been filed immediately after entry of judgment (rule 2(c)). Therefore, the findings and judgment are not void, and this court at its discretion does consider this in spite of its being a premature appeal. Furthermore, appellants' failing to be present in person or through their attorneys at the superior court hearing, they cannot actually complain about the lack of findings because findings were filed. (Code Civ.Proc. § 632.)

[2] As admitted by the pleadings, the terms of petitioners McReynolds and Duke would have expired on June 3, 1961 (Health & Saf.Code, § 34272). Appellants claim that the question is moot as to these two commissioners because their terms have expired. However, Government Code, § 1302 provides that an officer whose term has expired shall continue the duties of his office until his successor has qualified, and there is no mention in the Housing Authorities Law (Health & Saf.Code, § 34200 et seq.) of terminating the office on the date of its expiration. Therefore, these commissioners continue to hold office until the successors have qualified and while appellants have had at all times since the expiration of their terms of office the right to appoint their successors, there is nothing in the record to indicate that this has been done. Had this been done, the matter would be moot as to these two commissioners, saving money to appellants, petitioners and the State of California.

[3] The appellants maintain that the writ of mandate is not one of right and not appropriate and that the action of quo warranto affords them the correct remedy.

603 ⊥Code of Civil Procedure section 803 provides for quo warranto proceedings to be brought by the Attorney General against persons who usurp, intrude or unlawfully hold or exercise any public office, and section 811 provides that the action may be maintained by the board of supervisors or the legislative body of any municipal corporation. In other words, this is the remedy for determination of title to office, and usually where there is more than one person claiming the office.

In Barendt v. McCarthy, 160 Cal. 680, 683–684, 118 P. 228, 230 the court said:

> "The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorari*, error or appeal, or by *mandamus*, prohibition, *quo warranto*, or information in the nature of a writ of *quo warranto*, according to the circumstances of the case, and the mode of procedure established by common law or by statute."

The court said in Petersen v. Morse, 48 Cal.App. 428, 434, 192 P. 51, 53:

> "* * * title to office cannot be tried by *mandamus*. * * * The proper proceeding * * * is by the legal action of *quo warranto*."

And in Stout v. Democratic County Central Com., 40 Cal.2d 91, 94, 251 P.2d 321, 322, it was said:

> "Title to office may be incidentally determined in mandamus [citations] and discretion rests with the court to determine whether the title should be so determined. [Citations.] Generally, quo warranto is appropriate only where there is involved a public office in the sense that the incumbent

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[1] Formerly Rules on Appeal.

> exercises some of the sovereign powers of government * * *."

In the Stout case, supra, the court did issue a writ of mandate because there were other questions involved and the title to the office was incidental to the main question.

The question we have here is whether title is involved in this office or whether this comes under section 1085 of the Code of Civil Procedure for which writs may be issued "* * * to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person."

Code of Civil Procedure, § 1094.5 provides for a writ of mandate to review administrative orders or decisions which have been made "* * * as the result of a proceeding in which by law a hearing is required to be given, evidence is required
604 to be taken and discretion in the determination of the facts is vested in the inferior tribunal, corporation, board or officer, * * *"

[4] Section 34282 of the Health and Safety Code provides the grounds for removal of housing commissioners to be inefficiency, neglect of duty, or misconduct in office. Such action is not stated to be final by this section and therefore is reviewable. (See Boyd v. Pendegast, 57 Cal.App. 504, 207 P. 713.)

In Lotts v. Board of Park Commrs., 13 Cal.App.2d 625, 634, 57 P.2d 215, 220, certain city employees were removed from positions to which they had been regularly appointed and the court held that, "* * * the writ of *mandamus* will lie to compel the reinstatement to their positions of employees thus arbitrarily and illegally removed" and that, "Section 1085 of the Code of Civil Procedure is authority for resort to the writ of *mandamus* to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by a board, tribunal or officer."

In Housing Authority of City of Eureka v. Superior Court, 35 Cal.2d 550, 219 P.2d 457, involving a writ of prohibition, the question was whether a certain contingent effect existed to warrant local application of state legislation, and the court said at page 558, 219 P.2d at page 461, "* * * the exercise of that narrow authority is an administrative act and not a legislative one."

In Klose v. Superior Court, 96 Cal.App.2d 913, 918, 217 P.2d 97, 100, the court said:

> "The question of whether mandamus rather than quo warranto is the proper remedy where there is a dispute over whether a vacancy in office exists, is rather muddled in California. The courts have almost uniformly stated that mandamus cannot be used to try title to office, and then in a number of instances, have, in effect, tried title on the theory that title was only incidentally involved."

In Welch v. Ware, 161 Cal. 641, 119 P. 1080, there was a petition for a writ of mandate to require the auditor to pay the appellant his salary as fish and game warden. He had also been appointed by the board of supervisors as a fire warden. At the time of commencement of the action Welch, as fire, fish and game warden, had been removed by the board of supervisors without a hearing, under former Political Code section 4149b. The court held that he was entitled to a writ of mandate directing the auditor to pay his salary only as to his position as fish and game warden and not as to fire warden of $50 per month, and that the action of the supervisors in removing 605
him from his office as fish and game warden was void and petitioner still held the office.

[5] There is no doubt that the city council, while functioning pursuant to the Housing Authorities Law, is an agency of the State functioning under the law to fulfill State purposes. (Housing Authority v. City of Los Angeles, 38 Cal.2d 853, 243 P.2d 515; Lockhart v. City of Bakersfield, 123 Cal.App.2d 788, 267 P.2d 871.)

In People ex rel. Smith v. Olds, 3 Cal. 167, a writ of mandamus was requested by the plaintiff who claimed to be duly elected to the office of clerk of San Francisco and set forth the proceedings he had taken to qualify and obtain possession of the records of the defendant who was then acting as clerk of said city and county. The court held that mandamus was not the proper remedy.

In Titus v. Lawndale School Dist., 157 Cal.App.2d 822, 322 P.2d 56 (hearing denied by Supreme Court), the appellant was the elected superintendent of schools and was removed by the school board without a hearing, though they did go through a form of filing charges, giving appellant ten minutes to answer the charges. The court said at page 830, 322 P.2d at page 61:

> "One of the commonest applications of mandamus is restoration of a school teacher to a position from which he or she has been wrongfully ousted. (See 23 Cal.Jur. § 100, p. 137; 32 Cal.Jur.2d § 23, p. 168.)"

And at page 831, 322 P.2d at page 62, the court said:

> "That this is a proper case for mandamus follows from a consideration of the apposite authorities. [Volume] 34, Am.Jur. § 203, page 974: 'Since mandamus does not generally lie to determine mere contract rights, the writ will not be awarded to compel reinstatement of a schoolteacher who has been removed and whose relation to the school officers rests wholly in contract. But where the teacher by positive provision of law has a fixed tenure of office, or can be removed only in some prescribed manner, and where, consequently, the removal is not authorized, mandamus will issue, even though another teacher has been selected to fill the position. So, also, the remedy will lie to compel reinstatement of a teacher who has been removed in violation of statutory rights.' The language just quoted fairly reflects California law. The leading cases are Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042; Saxton v. Board of Education, 206 Cal. 758, 276 P. 998, and Holbrook v. Board of Education, supra, 37 Cal.2d 316, 231 P.2d 853."

The court, in Kennedy v. Board of Education, 82 Cal. 483, at page 491, 22 P. 1042, at page 1044, stated:

> "The writ of *mandamus* may issue in this state 'to compel the admission of a party to the use and enjoyment of a *right* or *office* to which he is entitled, and from which he is unlawfully precluded.' Code Civil Proc. § 1085."

In Saxton v. Board of Education, 206 Cal. 758, 766, 276 P. 998, 1001, the court said that, "* * * *mandamus* is the proper remedy to be invoked by a teacher, wrongfully dismissed from his position, and who holds it not under contract, but by virtue of statutory authority."

In People v. Van Siclen, 43 Hun. 537, 50 N.Y.Sup.Ct. 537, the court said, "The object being to restore her to a right given her by law, mandamus is the proper remedy."

And in Elevator Operators Etc. Union v. Newman, 30 Cal.2d 799, 808, 186 P.2d 1, 6, it was said:

> "His claim was based, not on breach of contract, but on the theory that he had a right to reinstatement to the office. It is settled that mandamus does not lie when there is no cause of action for reinstatement to a position, but merely a claim for damages for breach of contract."

In the present case the housing authority was established by law as a public office and the incumbents thereof exercise some of the sovereign powers of the state, while employees of a city or housing authority as such do not exercise such powers.

The appellants claim that the scope of the jurisdiction is limited to determine whether there has been an abuse of discretion and the court has no power to try issues de novo. In appellants' notice to the clerk to prepare the papers on appeal we note that they request one of the exhibits, the transcript of the city council meeting held on August 9, 1960, which was made by the court reporter. In their motion for a new trial appellants constantly refer to the reporter's record and base their motion on the record and documents on file, including the reporter's transcript.

[6, 7] In the court's memorandum nothing is said about the trial being de novo (Munns v. Stenman, 152 Cal.App.2d 543, 314 P.2d 67), and the scope of the court's jurisdiction is outlined and in particular it was to determine whether there was a fair trial, whether there was any abuse of discretion, and whether the findings of the city council are supported by the weight of substantial evidence (Code Civ.Proc. 607 § 1094.5). In its memorandum opinion the court stated that evidence failed to show fraudulent or arbitrary acts or abuse of discretion by the commissioners in the selection of tenants, that the evidence showed nothing more than the fact that some of the commissioners were absent and the failure to obtain signatures of city officials on state reports was not substantiated nor any proof of any service agreement being signed by the city or the housing authority.

From the testimony before the city council it appears that there were no signatures on the management service contract dated October 15, 1955. Health and Safety Code, § 34314 is permissive and not mandatory.

Title 42 of United States Code Annotated, § 1415, subsection 7, covers contracts between the United States Government and local housing agencies.

Appellants have a natural feeling that because under section 34272 of the Health and Safety Code the City of Needles appoints the commissioners of the housing authority, there is an implied cooperative agreement or understanding that because the city is a State agency and the housing authority is in the City of Needles, the citizens have a right to complain to city officials that qualified persons were excluded from occupancy of the low-rent housing facilities.

In Housing Authority v. City of Los Angeles, supra, 38 Cal.2d 853, at page 862, 243 P.2d 515 at page 519, it is stated:

> "Each functioning body, the city and housing authority, is a separate body politic vested with specific duties and powers under the Housing Authorities Law and Housing Cooperation Law to effect a state objective. Neither is functioning independently of that state law. In pursuing the state objective each is governed by the state law and neither may exercise powers not vested or recognized by that law. The city and the housing authority function as administrative arms of the state in pursuing the state concern and effecting the legislative objective."

Appellants feel slighted that the mayor was told that none of the activities of the housing authority was any concern of theirs and that the city council was not invited to attend joint meetings with the housing commissioners or be in on interviews with officials from the Public Housing Authority in San Francisco.

The legislative findings and declaration of policy with regard to housing authorities are outlined in section 34201 of 608 the Health and Safety Code. The financing of such projects has been made by the Public Housing Authority, an agency of the United States Government, and detailed reports as shown by the exhibits were regularly filed with the Public Housing Administration for the current years showing income, outgo, occupancy and many other details. The report for the year ending June 30, 1959, showed the liabilities of the Housing Authority to the United States Government of $430,000.

These housing authorities were set up on either a county or city basis and the Legislature provided for some local interest with respect to appointment of commissioners inasmuch as the city or county must adopt resolutions declaring the need for such an authority. (Health & Saf.Code, § 34270.)

From time to time the Public Housing Administration audits and reviews the reports of the housing agency and makes recommendations and advises the local agency of the changes in federal housing legislation as are shown by the exhibits on file in this matter.

Appellants complain of the prejudicial selection of tenants but cite only one instance and we think that the selection of tenants is a matter of discretion with the housing authority so long as it is not arbitrary and unfair. There seems to be no reference to this matter in the examinations by the Public Housing Authority which regulates such details as to rent and collections as shown by the Public Housing Administration report of April 22, 1958, one of the exhibits.

Appellants complain of the absenteeism of petitioners during their period of office. At least one of the commissioners worked for the Santa Fe at Needles and was required to be away from time to time and according to the testimony of the city manager, Commissioner McReynolds was not absent at any meetings from June 1957 to the date of the hearing; Commissioner Brewer was absent once in 1960, once in 1959, three times in 1958, and four times in 1957, and she was reappointed by the City of Needles in June 1959. There is no evidence as to the number of times Commissioner Duke was absent from meetings.

Appellants state that the court will not substitute its own judgment for that of the administrative body. Government Code, § 11523 states that mandate is the proper procedure as to administrative adjudications.

Here we have the question of substantial evidence. The court found that there was no substantial evidence as to the ⊥609 charges; that they were vague, indefinite and that notice of the charges was inadequate. The court could look at the record to see if there was substantial evidence; if not, then grant the writ. Had the court heard the case de novo it might have reached a different finding of fact. (Pranger v. Break, 186 Cal.App.2d 551, 560, 9 Cal.Rptr. 293.)

We conclude that mandamus was the proper procedure through which petitioners may seek reinstatement to their offices, that the findings of the court below are well supported, and that there was no abuse of discretion on the part of that court.

The judgment is affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

Bob FEINBERG, Plaintiff and Respondent,

v.

INTRASTATE ESCROW CORPORATION, Defendant and Appellant.

Civ. 25960.

District Court of Appeal, Second District, Division 4, California.

Oct. 16, 1962.

Rehearing Denied Oct. 26, 1962.

Action by creditor against a corporation which had served as an escrow agent under an independent contract between a lender and the plaintiff's debtor and which, when the debtor had terminated the escrow, had paid the proceeds from the escrow back to the debtor instead of to the plaintiff after having repeatedly orally promised the plaintiff that it would see that the plaintiff was paid. From a judgment of the Superior Court, Los Angeles County, William J. Palmer, J., holding that the action was not time barred, the escrow agent appealed. The District Court of Appeal, Burke, P. J., held that the creditor's action was governed by two-year statute of limitations applicable to actions not founded on a written instrument.

Reversed.

1. Limitation of Actions 🔑28(1), 30

Two-year statute of limitations for bringing actions not founded on written instruments applies both to actions for breach of escrow agreements and actions for damages on account of negligence in the performance thereof. West's Ann. Code Civ.Proc. § 339, subd. 1.

2. Limitation of Actions ⚷16

Applicable period of limitation on filing a cause of action is determined by the basic nature of the right sued upon.

3. Appeal and Error ⚷171(1)

Where trial court's findings in action by creditor against his debtor's escrow agent had expressly negated fraud as the basis for the action, creditor could not reverse his theory on appeal so as to invoke three-year statute of limitations applicable to actions based upon fraud and escape dismissal of his action as time barred. West's Ann.Code Civ.Proc. § 338, subd. 4.

4. Pleading ⚷370

Plaintiff may not change his theory of a case for each point raised by defendant.

5. Limitation of Actions ⚷37(2)

In creditor's action against his debtor's escrow agent which had allegedly falsely assured creditor that escrow agreement making provision for payment to creditor had not been cancelled when in fact it had been cancelled, invoking of doctrine of equitable estoppel so as to bar evidence of cancellation of the escrow agreement did not call for application of three-year limitation period applicable to fraud cases. West's Ann.Code Civ.Proc. § 1962, subd. 3.

6. Limitation of Actions ⚷16

Use of doctrine of equitable estoppel so as to prevent defendant from denying a false set of facts he had allegedly deliberately led the plaintiff to believe were true did not serve to invoke the statute of limitations applicable to an action based upon those facts defendant was estopped to deny. West's Ann.Code Civ.Proc. § 1962, subd. 3.

7. Trusts ⚷91

"Constructive trusts" are remedial devices whereby courts of equity, through use of sanctions applicable to trustees, compel payment of funds found owing because of prior delict.

See publication Words and Phrases for other judicial constructions and definitions.

8. Limitation of Actions ⚷37(2)

Mere fact that constructive trust is used as a remedial device in an action does not call for application of three-year statute of limitations applicable to fraud cases. West's Ann.Code Civ.Proc. § 338, subd. 4.

9. Limitation of Actions ⚷28(1)

Creditor's action against debtor's escrow agent which had allegedly falsely assured creditor that escrow agreement providing for payment to creditor had not been cancelled when in fact it had been cancelled was controlled by two-year limitation statute governing agreements not in writing and not by four-year limitation period governing actions founded upon instruments in writing where creditor was not a principal party to any transaction to which any signed instruments pertained including the loan transaction for which the escrow had been created. West's Ann.Code Civ.Proc. §§ 337, subd. 1, 339, subd. 1.

10. Contracts ⚷35

Escrow agent performing its services for a fee was not the recipient of a "benefit" from the contract between the parties for whom the agent was holding the escrow so as to hold escrow agent bound as if agent had signed the contract.

See publication Words and Phrases for other judicial constructions and definitions.

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Lever & Anker and Kurt R. Anker, Beverly Hills, for defendant and appellant.

Henry Himmelfarb, Los Angeles, and Sidney E. Horvitz, Beverly Hills, for plaintiff and respondent.

BURKE, Presiding Justice.

After a trial without a jury the trial court held that defendant escrow agent breached an agreement with plaintiff whereby defendant had promised to turn over proceeds of a loan escrow to satisfy a debt owed to plaintiff by one of the parties to the escrow. Defendant appeals.

Viewed most favorably to the prevailing party the evidence showed that in June of 1956 one Patricia Kennedy (Kennedy) was indebted to plaintiff in the sum of $2,800. On June 14, 1956, she opened an escrow with defendant in connection with obtaining a loan through Klein Mortgage Company as loan broker. At about the same time plaintiff threatened to attach certain property in the hands of Kennedy which was to serve as security for the new loan in order to satisfy the debt Kennedy owed to plaintiff. Kennedy then came to plaintiff's place of business and informed an employee of plaintiff, Rubin Rifkin, that an escrow had been opened with defendant and that she would pay off the debt with the proceeds therefrom. Rifkin did not trust Kennedy and called defendant escrow company to verify opening of the escrow. Miss Winthers (Winthers), defendant's president, informed him that the escrow had been opened and asked him not to sue and attach the real property because it would cloud the title and tie up the property, and that if plaintiff would be patient she would see to it that plaintiff got his money.

Thereafter Kennedy came to plaintiff's place of business with an escrow instruction directing the escrow to pay plaintiff the sum of $2,800. This instruction was signed by Kennedy.

On several later occasions Kennedy came to plaintiff and stated she was in further financial difficulties and requested additional loans. Before advancing any additional money Rifkin telephoned defendant and informed it of Kennedy's request. A supplemental escrow instruction was prepared whereby the additional advances would be covered by the proceeds from the escrow. The first escrow, however, could not be closed due to the fact that loans funds were not available.

Thereafter, on July 24, 1956, a new escrow with a different mortgage company as loan broker was opened and all documents contained in the first escrow were transferred into it. On that occasion Rifkin personally told Winthers that they were relying on defendant's assurances and "not levying on anything." Winthers stated, "I'll see to it that you are protected and get your money." Between July 24 and August 1, 1956, plaintiff and Rifkin called the defendant three or four times to determine the status of the loan. On each occasion defendant gave assurances that the loan would be forthcoming and not to worry.

On August 1, 1956, Kennedy cancelled the second escrow and voided the instruction to pay plaintiff the amount due him. On the same day all pertinent documents were transferred from the second escrow into a third escrow with the exception of payover instructions. Plaintiff did not know and was not advised of any of these transactions.

On August 7, 1956, the same loan broker involved in the second escrow obtained a lender and the proceeds were deposited with defendant in the third escrow. On August 8, 1956, the third escrow closed and the proceeds were paid to Kennedy.

At no time between August 1 and August 8, 1956, was plaintiff informed by defendant of the fact that the escrow instruction to pay plaintiff the amount due him had been canceled. However, between those dates plaintiff or Rifkin had called the escrow company on several occasions to determine the status of the loan and on each occasion was assured the loan would be forthcoming and money paid to plaintiff. On August 8 plaintiff learned for the first time that the instructions were canceled and Kennedy had already received the funds.

Defendant's evidence was in irreconcilable conflict with plaintiff's. Winthers testified that she had telephone conversations with plaintiff or Rifkin on two or three occasions; that she had no knowledge of their loans to Kennedy until after the close of escrow; that she at no time assured plaintiff or Rifkin that she would see that money was paid to plaintiff; that she disbursed the funds in accordance with instructions from Kennedy.

On August 10, 1956, plaintiff commenced an action against Kennedy and obtained judgment. Thereafter Kennedy disappeared and has not been located.

Based on the above facts plaintiff filed this action against defendant on February 18, 1959. The theory of the action was fraud and equitable estoppel. The trial court found that Kennedy, defendant and plaintiff entered into a three-party agreement by the terms of which plaintiff agreed to refrain from attaching Kennedy's property; Kennedy agreed to instruct defendant to pay plaintiff from any loan obtained the sum of $4,175 and defendant agreed to accept such instruction and act upon it with knowledge that plaintiff was relying on the agreement.

The court further found that plaintiff refrained from levying attachment on Kennedy's property and lent additional sums to Kennedy, all in reliance on the agreement and escrow instructions.

In the exercise of its equity jurisdiction the court invoked and applied the principle of equitable estoppel stated in section 1962, subdivision 3, Code of Civil Procedure, and concluded that certain moneys received by defendant were received in trust for plaintiff and that defendant violated the duty incident to that trust to pay said moneys to plaintiff.

[1] In its attack on the judgment defendant first asserts the bar of the statute of limitations (Code Civ.Proc. § 339, subd. 1) which allows two years for bringing actions not founded on a written instrument. This statute has been held applicable either to an action for breach of an escrow agreement or to an action for damages on account of negligence in the performance thereof. Shumaker v. Rippy, 138 Cal.App.2d 815, 816, 292 P.2d 536; Howard v. Security Title Ins. & Guar. Co., 20 Cal.App.2d 226, 229–230, 66 P.2d 1247.) This action was filed more than two years and six months after the alleged improper payment to Mrs. Kennedy. Where an escrow agent is sued for breaching a contract to deliver money or title papers to the damage of a party to the escrow more than two years after such breach the action is barred by the two-year statute. (Shumaker v. Rippy, supra.) It must therefore follow that the action here is barred unless some other theory will support the judgment.

Plaintiff attempts to avoid the application of the two-year statute upon two theories: (1) that the case can be categorized as an action for fraud, or an action to impose a constructive trust, in which event the three-year period (Code Civ.Proc. § 338, subd. 4) applies; (2) that defendant is deemed to have signed the escrow agreement so that, being estopped to deny the agreement, the action is founded on a written contract and the four-year period of section 337, subdivision 1, applies. Plaintiff cites no cases to sustain his conclusions.

[2] The general rule is that the applicable period of limitation on filing a cause of action is determined by the basic nature of the right sued upon. (Jefferson v. J. E. French Co., 54 Cal.2d 717, 718, 7 Cal.Rptr. 899, 355 P.2d 643.)

[3, 4] In the present case, notwithstanding plaintiff's original theory, fraud as a basis for the action is expressly negated in the court's findings of fact. Indeed plaintiff in his brief does not mention fraud as a basis for upholding the decision until he reaches the statute of limitations point. It requires no citation of authority to hold that plaintiff may not change his theory of the case for each point raised by defendant. Since the trial court negated fraud in its findings of fact and the evidence is in conflict, this court cannot now invoke the three-year statute of limitations applicable to actions based on fraud.

Plaintiff also contends that application of the doctrine of equitable estoppel invokes the period applicable to fraud. No cases are cited in support of this contention and none have been uncovered. Section 1962, subdivision 3, Code of Civil Procedure, reads:

> "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it; * * *."

[5, 6] On the basis of this section the trial court concluded that defendant is estopped to deny cancellation of the payover instructions. After application of the section, recovery is predicated upon the state of facts which defendant is estopped to deny; in effect here finding the payover instructions to be in force. Plaintiff's case is then based on the fictional existence of those instructions, and the basic rights incident thereto must determine the applicable period of limitations. (Jefferson v. J. E. French Co., supra, 54 Cal.2d 717, 7 Cal.Rptr. 899, 355 P.2d 643.) Plaintiff's rights, if any, flow from the agreement, not from a rule of evidence that permits the agreement to be established.

[7, 8] Furthermore, imposition of a constructive trust cannot be the basis for applying the three-year statute. Constructive trusts are remedial devices whereby a court of equity, through the use of sanctions applicable to trustees, compels payment of a fund found owing because of a prior delict. The applicable period cannot be determined from the remedy of constructive trust because it is not the basic right involved in plaintiff's case. (See Jefferson v. J. E. French Co., supra, 54 Cal.2d 717, 718, 7 Cal.Rptr. 899, 355 P.2d 643.)

[9] Thus, as found by the trial court, plaintiff's action is founded upon the three-party agreement whereby plaintiff became a party to the escrow. Plaintiff contends that this agreement was in writing so that section 337, subdivision 1, Code of Civil Procedure, providing a four-year limitation on actions founded on a written instrument, applies. In support of this contention they state: "The trial court's reasoning was that there was written evidence of the agreement in three documents entitled 'Amendment to Escrow Instructions' which were signed by Kennedy and prepared by the defendant. That by this agreement the plaintiff was made a party to the escrow as if the entire agreement had been spelled out in separate writing and signed by the three parties, and an agreement which defendant is deemed to have signed. Therefore, defendant being estopped to deny the agreement and deemed to have signed it, the applicable Limitation of Action Statute would be Code of Civil Procedure, Section 337."

Defendant did not in fact sign anything, nor is it argued that there is any other writing in connection with the escrow other than instruments relating to the loan, to which plaintiff was not a principal party, and the instructions signed only by Mrs. Kennedy. All communications between plaintiff and defendant were oral.

In Howard v. Security Title Ins. & Guar. Co., supra, 20 Cal.App.2d 226, 228, 66 P.2d 1247, 1248 with respect to section 337, subdivision 1, Code of Civil Procedure, the court quoted Chipman v. Morrill, 20 Cal. 130, where it was said: "'The question is whether the present action is, in the meaning of the statute "founded upon an instrument of writing." Our conclusion is, that it is not thus founded; that the statute by the language in question refers to contracts, obligations, or liabilities resting in, or growing out of written instruments, not remotely or ultimately, but immediately; that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties who are sought to be charged in favor of those who seek to enforce the contracts, obligations, or liabilities. The construction would be the same if the word "founded" were omitted, and the statute read "upon any contract, obligation, or liability upon an instrument of writing."'"

Applying the rules thus announced to the instant case, the conclusion follows that it is not an action upon a contract, obligation or liability upon an instrument in writing; rather it is upon the agreement formed by the oral communications between plaintiff and defendant's president, Winthers.

Notwithstanding this conclusion, and the rules asserted in the Shumaker (Shumaker v. Rippy, supra, 138 Cal.App.2d 815, 292 P.2d 536) and Howard (Howard v. Security Title Ins. & Guar. Co., supra, 20 Cal. App.2d 226, 66 P.2d 1247) cases, plaintiff concludes, and the trial court so found, that defendant is deemed to have signed the escrow instructions and the action is thereby based on a written instrument.

Plaintiff and the court in its Notice of Decision rely on Minton v. Mitchell, 89 Cal. App. 361, 370, 265 P. 271, 275 where it is said: "A party who accepts the benefits of a contract is bound thereby, even if he has not signed it." In the Minton case one of two assignors of a land sale contract sought to avoid making proper restitution under a written rescission of the assignment. The rescinding agreement was signed only by the other assignor. The court held that since the nonsigning party had signed the original assignment and participated in subsequent efforts to dispose of the same property, that party was bound as well by the agreement to rescind, and was required to make restitution of benefits received. The party so bound was a direct beneficiary of and immediate party to the contract in question.

[10] Here, the contract involved in the escrow was primarily between Mrs. Kennedy and the lender, neither of whom are parties to the present action. Plaintiff, at best, was an incidental third party beneficiary of the escrow transaction, wherein by virtue of Kennedy's unilateral declaration he was to receive the proceeds in satisfaction of his debt. Defendant was a mere stakeholder and received a fee for its services. Such a fee is not a benefit within the meaning of Minton v. Mitchell, supra, which contemplates "benefit" as a *quid pro quo* passing between the immediate parties to the contract. The contention that an escrow holder's fee is such a "benefit" cannot be sustained. Therefore, defendant cannot be deemed to have signed the contract.

We conclude that it was only under the oral agreement between plaintiff and defendant that plaintiff could sue to enforce the escrow agreement against defendant. Thus the two-year statute of limitations applies and the action in this case is barred.

Accordingly, the judgment is reversed.

JEFFERSON and FORD,* JJ., concur.

209 Cal.App.2d 41

⌊**Edith CONFORTI, an Incompetent Person, Etc., Plaintiff and Appellant,** ⌊41

v.

Leo C. DUNMEYER et al., Defendants and Respondents.

Civ. 6840.

District Court of Appeal, Fourth District, California.

Oct. 26, 1962.

Rehearing Denied Nov. 21, 1962.

Suit by defaulting vendee to set aside forfeiture in foreclosure proceedings, which were based on default in payment of monthly installments due on home, and to have premises reconveyed. The Superior Court of San Bernardino County, Joseph T. Ciano, J., dismissed the third amended complaint without leave to amend, and the vendee appealed. The District Court of Appeal, Brown, J., assigned by the Chairman of the Judicial Council, held that vendee's tender of amount due for purchase of home was invalid, where offer to pay was conditioned upon deduction of amounts received by vendors as rent for use of property during period of default, and that dismissal of third amended complaint was not abuse of discretion where all four complaints had similar defects.

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* Assigned by Chairman of Judicial Council.

Affirmed.

1. Evidence 🔑43(3)

Reviewing court may take judicial notice of proceedings in other cases in same courts.

2. Judgment 🔑403, 456(1)

Suit to set aside forfeiture for failure to pay installments due, on grounds that vendee was mentally ill, insane, and incompetent and that no guardian had been appointed, and to obtain reconveyance of property on payment of balance due plus interest, was proper action in equity and could be brought at any time by motion or independent action in equity. West's Ann. Civ.Code, § 3275.

3. Judgment 🔑438, 447(1)

Incompetent defendants are entitled to relief in equity such as are characterized as extrinsic mistakes; generally, equity will not interfere with judgment which is unjust unless it appears that party whose interest is infringed can present meritorious defense. West's Ann.Civ.Code, § 3275.

4. Judgment 🔑460(6)

Requirement that complaint for relief from unjust judgment, on ground of extrinsic mistake, allege meritorious case does not require absolute guaranty of victory, but it is enough if facts from which it can be ascertained that claim is sufficiently meritorious to entitle complaining party to trial in adversary proceeding are presented. West's Ann.Civ.Code, § 3275.

5. Equity 🔑66

Person asking for equity must be willing to do equity.

6. Vendor and Purchaser 🔑170

Defaulting vendee's tender of amount due on agreement for purchase of home was invalid, precluding vendee from having forfeiture based on default set aside and from obtaining reconveyance of property upon payments of sum due, where offer to pay was conditioned upon deduction of amounts received by vendors as rent for use of property during period of default.

7. Forfeitures 🔑1

Forfeitures are not favored in law or equity.

8. Pleading 🔑356(1)

Dismissal of third amended complaint was not abuse of discretion where all four complaints had similar defects.

9. Judgment 🔑460(1)

Complaint of defaulting vendee who sought to have forfeiture, based on default in payment of installments, set aside and to obtain reconveyance of property, did not sufficiently show ability of vendee to pay amount due under the contract.

Marshall Miles, San Bernardino, for plaintiff and appellant.

Wilson & Wilson, San Bernardino, for defendants and respondents.

⊥BROWN, Justice. ⊥43

Appellant and her deceased husband entered into an agreement of sale with respondents to purchase a home for $14,000, payable $3,000 down and $75 per month, in which time was of the essence. They made payments thereon until March 1955. In September 1956 respondents filed an action to foreclose the appellant's interest in said real property because of default in payments. Summons and complaint were served on appellant on September 27, 1956, and a default judgment was granted October 16, 1956.

Appellant's complaint alleged that since the date of default on the contract in March 1955 and during the time of this first suit she was mentally ill, insane and incompetent and that no guardian had been appointed. On November 1, 1956, appellant was committed to Patton State Hospital and was discharged in October 1959 as a person not recovered but whose discharge would not be detrimental to public welfare.

Thereafter, a guardian was appointed for appellant and a suit was filed in July 1960 seeking to set aside the forfeiture in the foreclosure proceedings, alleging that the balance due under the contract at time of judgment was approximately $9,276.77; offering to pay the balance due on the contract as of October 16, 1956, plus sums for improvements, taxes and repairs, plus interest, and less any amounts received by respondents as rent and the reasonable value of their use of said property since that date; and asking for an accounting under section 707 of the Code of Civil Procedure (statutory rights of redemptioner), alleging that an accounting had been demanded and that appellant had offered to pay respondents the sum due for a reconveyance of said property, which was refused.

In Bolln v. Petrocchi, 95 Cal.App.2d 589, 592, 213 P.2d 513, 515, the court said, "Accordingly, relief will be granted whether or not time has been made of the essence."

In Benedict v. Calkins, 19 Cal.App.2d 416, 65 P.2d 831, the court exercised discretion under Civil Code section 1492. Where time is not of the essence, the court may grant a period of time for defaulting party to make the payment.

Respondents successfully demurred to the first three complaints and their demurrer, general and special, to the third amended complaint was sustained without leave to amend. Appellant appeals from the judgment of dismissal.

[1] This court augmented the record ⊥44 by having all the prior ⊥ pleadings in this action added to the clerk's transcript. The court may take judicial notice of proceedings of other cases in the same court such as the foreclosure action. (Pike v. Archibald, 118 Cal.App.2d 114, 117, 257 P.2d 480.)

[2] This is a proper action in equity and proceedings to set aside a judgment in an action such as this may be made at any time by motion or an independent action in equity. (Dei Tos v. Dei Tos, 105 Cal.App.2d 81, 84, 232 P.2d 873; Olivera v. Grace, 19 Cal.2d 570, 575, 122 P.2d 564, 140 A.L.R. 1328; Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333.)

[3] While in this action there is no allegation of any fraud on the part of the respondents in the conduct of the foreclosure action such as the respondent knew that the appellant was incompetent, as in the Dei Tos case, supra, the fact that there is no fraudulent design makes no difference in that the principle of the law involved is that "* * * through no fault of his, the defendant was not permitted to participate in the proceedings." (See Civ.Code, § 3275; 50 Cal.Jur.2d, Vendor and Purchaser, § 565, pp. 726–727.) Incompetent defendants are entitled to relief in equity such as are characterized as extrinsic mistake. The general rule is that equity will not interfere with a judgment which is unjust unless it appears that the one whose interest is thus infringed can present a meritorious case. (Olivera v. Grace, supra, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328; 5 Pomeroy, Equity Jurisprudence, (2d ed.) pp. 4671–4672; 29 Cal.Jur.2d, Judgments, § 170, p. 124; 15 Cal.Jur., Judgments, § 128, p. 29; 3 Freeman, Judgments (5th ed.) p. 2465.)

[4] The requirement that the complaint allege a meritorious case does not require an absolute guarantee of victory. "It is enough if the complaint presents facts from which it can be ascertained that the plaintiff has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding." (Olivera v. Grace, supra, p. 579, 122 P.2d p. 569.)

While the law allows this type of proceeding, it is still necessary for appellant to state a cause of action.

Where the complaint is sufficient against a general demurrer it has been held that a trial court ought not to sustain a special demurrer without leave to amend. (Olivera v. Grace, supra; Kauffman v. Bobo & Wood, 99 Cal.App.2d 322, 221 P.2d 750.) In the Kauffman case, supra, the court also held that pleadings and amendments should be construed liberally with the object of affording every litigant his day in court and rendering substantial justice to all parties. (Wennerholm ⊥ v. Stanford University ⊥45

School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358.)

Failure to Plead Ability to Pay

The appellant claims that she has shown ability to make the payments which were due. In her complaint she admits that no payments had been made or tendered to respondents since March 1, 1955, and up to and including the date of foreclosure judgment on October 16, 1956, the amount would be approximately $1,425, plus interest and taxes. She alleges that she gave to her son the sum of $630 in September 1955, and on her committal to the hospital she had approximately $300 in cash. She does allege that she had money on hand available to make each payment as due at that time or now. In her complaint she states that she believes that at the time of her commitment she had enough money to pay all the payments, but in her prayer she prays for the court to allow her a reasonable time to make the payments.

In Bennett v. Hibernia Bank, 47 Cal.2d 540, 554, 305 P.2d 20, 29, the court said:

> "Ordinarily equity will not interfere with a judgment on the ground of extrinsic fraud or mistake unless the one whose interests were infringed can present a meritorious case; the plaintiff must plead and prove facts from which it appears, at least prima facie, that if the judgment were set aside and the proceedings were reopened, a different result would probably follow."

Appellant also alleges in her brief that the lower court in its exercise of equitable power would have provided her a redemption period in which she could redeem her property by paying all the sums due under the contract and that a different result would have followed. It is not necessary to guarantee that she definitely would win, but cases where a different result might follow cover situations where testimony by witnesses who would be called upon to testify might or might not prove the case. (Los Angeles Auto Tractor Co. v. Superior Court, 94 Cal.App. 433, 271 P. 363.) In the present case she must definitely allege that there would be a different result by showing ability to pay and tender of the amount due.

It is stated in 18 California Jurisprudence, 2d, Equity, section 57, at page 240:

> "There is but one form of action, and that form applies as well to a suit in equity as it does to an action at law. Likewise, the pleadings in all civil actions, as well as the rules ⌊46 by which their sufficiency is determined, are prescribed by statute. A bill in equity for any kind of equitable relief, therefore, with its formal parts governed by the old rules of chancery practice, does not obtain in this state. Instead, the same form of complaint is used in both equitable and legal actions; and this complaint consists simply of a statement, in ordinary and concise language, of the facts that constitute the plaintiff's cause of action. Thus, although the substantive distinction between law and equity is still as naked and as broad as ever, there is no difference, under the California system, between the form of what would otherwise be a bill in chancery and a common-law declaration. Nevertheless, a plaintiff who invokes the aid of equity is bound by the rules that apply to equitable proceedings; * * *."

Failure to Plead a Tender

In plaintiff's third amended complaint she states that she is able and willing to pay the balance due on the contract as of October 16, 1956, plus sums expended for improvements, taxes, repairs, upkeep, and interest at 6 percent, less amounts received by respondents as rent and the reasonable value of their own use of said property, and further, that she "* * * has demanded an accounting and has offered to pay defendants the sum due them for reconveyance of said property, but defendants have refused said offer and have refused to render an accounting."

In the present case the allegation of the offer also includes the refusal of the respondents to accept.

[5] A person asking for equity must be willing to do equity and this would require in this case that the appellant make a valid tender to the respondents in order to be placed back in possession as of October 1956, or have the property reconveyed, without conditions attached to the offer. (18 Cal.Jur.2d, Equity, §§ 30, 31, pp. 190–195.)

> "The general rule is that the party making a tender acts at his own peril and must see to it that the amount tendered is large enough, at least where the correct amount is not within the exclusive knowledge of the creditor. An offer of partial performance is of no effect. A tender is not invalidated, however, by insufficiency in the amount tendered if no objection is made by the creditor to the amount." (47 Cal.Jur.2d, Tender, § 6, pp. 258–259; § 19, pp. 277–278.)

In Christin v. Story, 119 Cal.App. 326, 334, 6 P.2d 301, 304, the court said:

> "He had made neither a tender to respondent ⊥47 nor into court, and has failed to plead or prove that he is ready, willing, and able to make the payments due."

(See also Wilson v. Security-First National Bank, 84 Cal.App.2d 427, 432, 190 P.2d 975.)

[6] Both parties in their briefs have failed to be of much help to the court in citing but a few authorities as to their positions. We do find, however, that in this case the appellant alleges her offer with a condition to deduct amounts received as rent for the use of the property by respondents, and we think that this invalidates the tender.

In Sutter St. R. R. Co. v. Baum, 66 Cal. 44, 52, 53, 4 P. 916, it is stated that such a tender was not necessary where the plaintiff cannot determine in advance of the suit the amount due because of the need to base the ascertainment of the sum due on facts independent of the terms of the contract. In the present case we have a contract which by its terms can be easily ascertained, not only as to principal, but interest and taxes. To the same effect is Miller v. Cox, 96 Cal. 339, 31 P. 161, which required an appraisement of property outside the information of the party to become liable.

[7] Appellant makes no request for leave to amend again (which was not necessary), but requested only a reversal of the judgment, basing her statement on the belief that the complaint did state a cause of action, and now makes no argument or request that she could properly amend the complaint if the judgment is reversed. (Code Civ.Proc. § 472c.) Had appellant made an offer to pay all amounts regardless of credits, she would be offering full equity. It is well accepted law that forfeitures are not favored in law or equity.

[8] Here, appellant has submitted four complaints, all similar in defects, and refusal to allow her to amend was not an abuse of discretion by the court. (Findley v. Garrett, 109 Cal.App.2d 166, 240 P.2d 421.)

[9] Appellant's complaint contains many conclusions of law—she is able and willing to pay and has offered to pay, with no definite fixed sum or no allegation of her ability to pay. However, she has not alleged a proper tender, nor has she shown ability to pay.

In Black v. Arnold Best Co., 124 Cal.App.2d 378, 383, 268 P.2d 513, 516, the court said, "The right to relief from default there authorized is not a matter of right under all circumstances, and that section [Civ. Code, § 3275] presupposes that the party seeking relief from a forfeiture is in default, and ⊥48 in order to secure relief under its terms it is necessary for him to plead and prove facts that will justify its application."

The judgment is affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

208 Cal.App.2d 726

726 ⊥**In the Matter of the Arbitration between LONG CONSTRUCTION COMPANY, a Partnership consisting of Herbert Long and Walter Long, Judgment Creditor and Appellant,**

and

EMPIRE DRIVE-IN THEATRES, INC., a California corporation, Judgment Debtor,

TU-VU DRIVE-IN CORPORATION, Third-Party Claimant and Respondent.

In the Matter of the Arbitration between LONG CONSTRUCTION COMPANY, a Partnership consisting of Herbert Long and Walter Long, Appellant-Respondent,

and

EMPIRE DRIVE-IN THEATRES, INC., a California corporation, Appellant-Respondent,

TU-VU DRIVE-IN CORPORATION, Third-Party Claimant-Respondent.

Civs. 6748, 6921.

District Court of Appeal, Fourth District, California.

Oct. 22, 1962.

A proceeding was brought to obtain confirmation of an award of arbitration. A judgment was entered therein and a writ of execution was issued and levied on property which the judgment debtor had transferred to third party, and claims were filed by the third party. The Superior Court of San Diego County, Bonsall Noon and George A. Lazar, JJ., rendered judgments granting the claims of the third party and an order denying motion to quash writ of execution, and appeals were taken. The District Court of Appeal, Coughlin, J., held that the creditor of a transferring corporation has no right to attack a transfer which does not conform to the section of Corporations Code providing that a corporation shall not sell, lease, convey, exchange, transfer, or otherwise dispose of all, or substantially all, of its property and assets except in accordance with one of the subdivisions of the section.

Judgments affirmed and order denying motion to quash reversed.

1. Corporations 🔑182.4(1)

Creditor of transferring corporation has no right to attack transfer which does not conform to section of Corporations Code providing that corporation shall not sell, lease, convey, exchange, transfer, or otherwise dispose of all, or substantially all, of its property and assets except in accordance with one of subdivisions of section. West's Ann.Corp.Code, § 3901.

2. Corporations 🔑182.4(1)

Even if judgment creditor of corporation had right to have transfer of corporation's property to claimant set aside for failure of corporation to comply with Corporations Code, judgment creditor could not prevail in third-party-claim proceeding without notice to claimant of rescission and offer to restore claimant to status quo. West's Ann.Corp.Code, § 3901.

3. Corporations 🔑182.4(3)

Approval by stockholders of transfer by corporation of all, or substantially all, of its property and assets may be given before or after transfer without any limitation as to time. West's Ann.Corp.Code, § 3901.

4. Trial 🔑49

Where judgment creditor had ample opportunity to make offer of proof if judgment creditor intended to urge that transfer by corporate debtor of its property to claimant did not comply with provisions of Corporations Code, but judgment creditor did not do so, trial court's action in interrupting judgment creditor's cross-examination of witness of claimant and suggestion that they get on to the crux of matter, did not foreclose any opportunity of judgment creditor to make offer of proof.

5. Constitutional Law 🔑315

Order of trial court terminating hearing on third-party claim did not deprive judgment creditor of due process of law, where there were no pleadings to outline issues to be determined, and there was extended discussion between court and counsel before court concluded that any further evidence would not be pertinent to issues at hand.

6. Execution 🔑60, 72

Where conditional money judgment is entered, court alone is authorized to determine whether conditions have transpired, and therefore clerk cannot issue writ of execution on judgment except on order of court directing him to do so.

7. Execution 🔑60

Where judgment based on arbitration award decreed that judgment creditor should recover 1,500 shares of Class "A" and 950 shares of Class "B" stock of corporate debtor and that if debtor did not issue and deliver stock to creditor within designated period, debtor should pay creditor $24,500, clerk had no authority to issue writ of execution to effect recovery on provision of judgment directing payment of $24,500 on application by judgment creditor's attorney and his oral representation that judgment creditor had not received stock in accordance with judgment.

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William F. Davies, Lemon Grove and White, Froehlich & Peterson, San Diego, for respondent and appellant, Long Const. Co.

Higgs, Fletcher & Mack, and Vincent E. Whelan, San Diego, for third party claimant and respondent.

Crittenden & Gibbs and Philip Crittenden, San Diego, for Empire Drive-In Theatres, Inc.

⊥729 ⊥COUGHLIN, Justice.

The appeals in this matter arise out of a proceeding to obtain confirmation of an award by arbitration in which a judgment was entered; a writ of execution was issued therein and levied upon certain theatre equipment; claims were filed by a third party contending that it was the owner of the property upon which the levy had been made; hearings upon said claims resulted in judgments in favor of the third party claimant; the judgment debtor moved to quash and recall the writ of execution; and its motion was denied. The judgment creditor appeals from the judgments in favor of the third party claimant and the judgment debtor appeals from the order denying its motion to quash. By stipulation, and order of this court, the three appeals have been consolidated for hearing and determination.

The Long Construction Company, hereinafter referred to as "Long" or the judgment creditor, brought the proceeding in question which resulted in a judgment based upon and after confirmation of an arbitration award in its favor against Empire Drive-In Theatres, Inc., hereinafter referred to as "Empire" or the judgment debtor; obtained issuance of a writ of execution upon the money provisions of that judgment; and caused this writ to be levied upon theatre equipment formerly in possession of "Empire" but, at the time of levy, in possession of and claimed by Tu-Vu Drive-In Corporation, hereinafter referred to as "Tu-Vu" or third party claimant.

The judgment in favor of "Long" is dated October 10, 1960 and was ordered entered *nunc pro tunc* as of October 1, 1959; recites that the award of the arbitrator was confirmed by an order of court dated October 1, 1959, which directed that judgment be entered accordingly; decrees that "Long" shall recover from "Empire" a designated number of shares of stock of the latter corporation to be delivered within a specified time; and further decrees that in the event "Empire" does not issue and deliver the aforesaid stock within that time that it shall pay to "Long" the sum of $24,500.00. Thereafter the attorney for "Long" told the county clerk that the shares of stock in question had not been delivered to his client, and, at his request, a writ of execution was issued covering the alternate money judgment in the sum of $24,500.00. ⊥Subsequently, a levy was made under ⊥730 this writ upon theatre equipment which "Tu-Vu" had purchased from "Empire", the judgment debtor, two years previously, i.e., on September 30, 1958.

Prior to September 30, 1958, "Empire" operated a drive-in theatre; had leased the real property used for this purpose; and was purchasing the equipment in question under a contract of sale. On that date, pursuant to an agreement between "Empire" and "Tu-Vu", substantially all of the assets of the former were transferred to the latter, including a sublease of the theatre real property for the remainder of the term of the master lease, and an assignment of its interest in the theatre equipment. In exchange "Tu-Vu" agreed to assume and pay the rental prescribed by the master lease; to assume and pay the equipment sales contract obligation, which amounted to $58,652.10; to pay into escrow the sum of $23,840.00, which was to be used to pay "Empire's" creditors in full; and to pay the further sum of $6,160.00, which was to be used for additional construction work. Thereafter, "Tu-Vu" took possession of the theatre; operated the same; paid the prescribed rental, which amounted to approximately $32,000.00; paid between $30,000.00 and $35,000.00 on the conditional sales contract; and paid $30,000.00 into escrow.

The foregoing agreement and the transfer in question, preliminary to execution, were approved at a special meeting of the stockholders of "Empire" by the owners of 11,430 of the corporation's 21,757 issued shares of stock. The apparent purpose of this approval was to comply with Section 3901 of the Corporations Code which provides:

> "A corporation shall not sell, lease, convey, exchange, transfer, or otherwise dispose of all or substantially all of its property and assets except in accordance with one of the following subdivisions:
>
> * * * * * *
>
> "(b) Under authority of a resolution of its board of directors and with the approval of the principal terms of the transaction and the nature and amount of the consideration by vote or written consent of shareholders entitled to exercise a majority of the voting power of the corporation."

After levy of execution upon the theatre equipment, "Tu-Vu" filed a third party claim in the instant proceeding seeking release thereof; a hearing was held thereon before the Honorable Bonsall Noon; and judgment was entered in its ⊥731 favor. Because the claim in question had not described all of the equipment levied upon, "Tu-Vu" filed another third party claim seeking release of the balance thereof; a hearing followed before the Honorable George A. Lazar; and judgment again was entered in its favor. "Long" has appealed from these two judgments.

Between the entry of the first and second judgments, "Empire" moved, and the court denied its motion, to recall and quash the writ of execution upon the ground that it had been issued illegally. "Empire" has appealed from this order of denial.

APPEAL FROM JUDGMENT BY HONORABLE GEORGE A. LAZAR.

At the hearing before Judge Lazar, "Long" contended, and now contends, that the agreement and transfer in question were not made in conformance to the requirements of Section 3901 of the Corporations Code; that 9000 of the 11,430 issued shares of stock of "Empire" which voted approval of the transfer to "Tu-Vu" were issued illegally; that the 9000 shares in question had been issued to a Mr. Tanner, who was president of "Empire", after a permit authorizing the same had expired and prior to its renewal; that, in any event, Tanner had not complied with the conditions of such permit; that, for this reason, the subject transfer did not have approval of the shareholders entitled to exercise a majority of the voting power of the transferring corporation; that "Long", as a judgment creditor of that corporation, had a right to assert the claimed invalidity of the transfer in support of its contention that "Tu-Vu", the third party claimant, had no title to the equipment levied upon; and that the claim in question should be denied.

[1] One of the primary issues raised by this contention is whether a creditor of a transferring corporation has a right to attack a transfer which did not conform to

the provisions of Section 3901 of the Corporations Code. We have concluded that it does not have such a right. In support of its position to the contrary, "Long" has cited a number of cases which it contends establish the rule that the provisions of Section 3901 were enacted for the benefit of stockholders and creditors. Our review of the decisions in these cases convinces us that the rule contended for has not been established.

Principally relied upon is the decision in Porter v. Anglo &⊥732 London Paris Nat. Bank, 36 Cal.App. 191, 171 P. 845, where, in an action by a judgment creditor to determine title to a bank account levied upon under a writ of execution in his favor, the court declared that a previous transfer thereof by his judgment debtor, a corporation, to the defendant, a third party, was void because of noncompliance with the provisions of former Civil Code Section 361a, requiring stockholder approval, and subjected the bank account to the plaintiff's execution lien. Appellant "Long" contends that the decision in the cited case is controlling in the case at bar because the provisions of former Civil Code Section 361a are substantially identical to those now contained in Section 3901 of the Corporations Code. The weakness in this contention lies, primarily, in the asserted premise that the two code sections are substantially identical. Former Civil Code Section 361a provided that "No sale, * * * transfer or conveyance of the business, franchise and property, as a whole, of any corporation * * *, *shall be valid* without the consent of stockholders thereof," holding two-thirds of its issued capital stock. (Italics ours.) (Civ.Code, sec. 361a, Stats. 1903, p. 396.) Contrastingly, Section 3901, which heretofore has been quoted herein, does not declare that a sale, transfer or conveyance without the required consent is not "valid". In the cited case, i. e., Porter v. Anglo & London Paris Nat. Bank, supra, 36 Cal.App. 191, 171 P. 845, the court held that the transfer there under consideration "was *void* as against the plaintiff, in the capacity of an execution creditor of the corporation, and therefore ineffectual as a transfer to the intervener [the third party claimant] of any * * * money in suit." (Italics ours.) Contrary to this ruling, in Solorza v. Park Water Co., 86 Cal.App.2d 653, 658–661, 195 P.2d 523, 527, where stockholders of a corporation brought an action to effect the rescission of a transfer of all of its assets, which had been made without obtaining the consent required by Section 3901, the court held that the transfer in question was not void but voidable; that the action of a board of directors "in making a sale in contravention of the provisions of the statute is not to be regarded as illegal and void *ab initio*, but rather as an ultra vires act of the directors, and voidable at the election of stockholders or creditors"; "that while such transactions * * * are violative of the provisions of the statute, they are voidable and may be rescinded and set aside at the election of a shareholder or creditor, for whose benefit alone the statute was enacted"; and⊥733 that as a condition to rescission the transferee must be placed in status quo.

The Porter case (Porter v. Anglo & London Paris Nat. Bank, supra, 36 Cal.App. 191, 171 P. 845), pivoted on the conclusion that the transfer under consideration was void, as evidenced by the decisions cited in support thereof, i. e., Pekin Mining etc. Co. v. Kennedy, 81 Cal. 356, 363, 22 P. 679; McShane v. Carter, 80 Cal. 310, 312, 22 P. 178; Bennett v. Red Cloud Mining Co., 14 Cal. App. 728, 730, 113 P. 119; Williams v. Gold Hill Mining Co., 9 Cir., 96 F. 454, wherein it was held that corporate transfers not in compliance with statutory provisions requiring stockholder consent were void, and for this reason could be attacked by any person connected with the title of the corporation, as well as its stockholders, and this included a corporation creditor claiming under an execution or mortgage lien. Appellant "Long" also cites the foregoing decisions in support of its contention.

The assertion in the Solorza case (Solorza v. Park Water Co., supra, 86 Cal.App.2d 653, 659, 195 P.2d 523), that Section 3901 was enacted for the benefit of creditors of the subject corporation as well as its stockholders was pure dictum, reiterating the dicta in two prior cases to the same effect, in none of which were the rights of creditors involved. The latter cases, i. e., Gunther v. Thompson, 211 Cal. 631, 296 P. 611, and Lost Burros Gold Mining Co. v. Inyo County Bank, 83 Cal.App. 679, 257 P. 209, which also are relied upon by appellant "Long", involved the application of former Civil Code Section 361a; held that a person who was not a stockholder or a creditor could not contest the validity of a transfer subject to but not in accord with the requirements of that section; in each instance affirmed a judgment denying relief to the person attacking the transfer; and in the course of the respective opinions therein stated that: "The provisions of section 361a are for the protection of stockholders and creditors of the corporation, and the stockholders and creditors alone have the right to object to such a transfer" (Gunther v. Thompson, supra, 211 Cal. 631, 634, 296 P. 611, 612), and: "The legislative restriction in question was enacted for the benefit of stockholders and creditors of a selling corporation, and they alone have a right to object to the mode of transfer." (Lost Burros Gold Mining Co. v. Inyo County Bank, supra, 83 Cal.App. 679, 683, 257 P. 209, 211.) Each of these two cases relies upon the decision in South Pasadena v. Pasadena Land etc. Co., 152 Cal. 579, 584, 93 P. ⌊734 490, as authority for the foregoing quoted statements of the law. However, the South Pasadena case (South Pasadena v. Pasadena Land etc. Co., supra, 152 Cal. 579, 584, 93 P. 490, 492), merely held that former Section 361a of the Civil Code permitted a *quasi*-public corporation to transfer all of its assets upon consent of its stockholders, a power not theretofore possessed by such a corporation. In the course of the opinion in that case it was said that "In the absence of legislative restrictions * * * an ordinary commercial corporation, * * * can alienate its entire property whenever it is necessary or proper to do so for the best interests of its stockholders and creditors. (Citation) And it would seem that the stockholders and creditors, alone, would have the right to object to such a transfer by a corporation of that character * * *. The effect of this statute [Civ.Code, sec. 361a] is, therefore, twofold. It deprives ordinary private business corporations of the power they previously possessed to dispose of their entire property, franchises, and business, as a whole, at the will of a mere majority of the stockholders, or of less than two-thirds of them, and it confers upon *quasi* public corporations the power to make such dispositions with the consent of two-thirds of the stockholders expressed in the mode fixed, a power which such corporations did not have before." Even the dictum in the foregoing quotation does not support the conclusion that the court there said that Section 361a was enacted for the benefit of creditors as well as stockholders.

In 1931, which was after the decision in all of the foregoing cases except that in Solorza v. Park Water Co., supra, 86 Cal. App.2d 653, 195 P.2d 523, former Civil Code Section 361a was supplanted by Civil Code Section 343, the provisions of which are similar to those in Section 3901 of the Corporations Code; did not contain a provision declaring that a transfer in noncompliance therewith is invalid; and must be interpreted as intentionally removing such a consequence from such noncompliance. Two years later, i. e., in 1933, there was added to Civil Code, Section 343 the provisions now appearing in Section 3902 of the Corporations Code that:

> "The approval of the shareholders may be given before or after the adoption of the resolution by the board of directors, and before or after any such transfer or disposition."

The effect of these provisions was especially noted in Solorza v. Park Water Co., supra, 86 Cal.App.2d 653, 659, 195 P.2d 523, and con⌊735tributed to the conclusion therein that a transfer in noncompliance with the present statute is voidable and not void.

The issue which now must be determined is whether a creditor of a corporation, as well as a stockholder therein, may attack a transfer subject to but not in conformity with the provisions of Section 3901 of the Corporations Code; a transfer which is voidable and not void; which may be validated by subsequent approval of the stockholders alone (Corp.Code., sec. 3902); and which requires a rescission to set it aside.

Section 3901 makes no reference to creditors. A somewhat analogous situation was presented in McKee v. Title Insurance etc. Co., 159 Cal. 206, 220–223, 113 P. 140, where corporation bonds, secured by a mortgage, were attacked by a creditor as invalid because not issued in compliance with the provisions of former Civil Code Section 359 requiring stockholder approval and the court, noting that there was no provision declaring the bonds to be void because of such noncompliance, held that the requirements in question were enacted for the protection of stockholders alone and reversed a judgment in favor of a creditor.

To permit a creditor to attack a transfer for noncompliance with the provisions of former Civil Code Section 361a was not unreasonable under the status of the law prescribed by that section as interpreted by the courts; such a transfer was void; was not subject to subsequent approval by stockholders; and did not require any affirmative action to terminate its effect; but, to the contrary, was ineffectual to vest any right in the transferor; did not exist; and, in substance, never had taken place. As heretofore noted, such is not the present status of the law. (Solorza v. Park Water Co., supra, 86 Cal.App.2d 653, 195 P.2d 523.) Noncompliance with Section 3901 does not inhibit immediate vesting of title in a transferee even though that title may be terminated because the transfer is voidable; creditors of the corporation who levy upon property so transferred levy upon property the title to which is in the transferee and not in the corporation; if, subsequent to transfer, the stockholders indicate their approval thereof, whether or not the corporation's creditors are in accord with this decision, the right to set aside the transfer ceases; and considering the provisions of Sections 3901 and 3902 as a whole, it is reasonable to conclude that the subject statute was enacted for the benefit of the stockholders alone.

[2] Even assuming that a debtor corporation has the right ⊥736 to set aside a transfer made by it in noncompliance with Section 3901,[1] and its judgment creditor is subrogated to this right, or that by some juridicial gymnastics the corporation's judgment debtor is subrogated to the rights of the stockholders in the premises, or even that the judgment debtor receives such a right directly from the statute, nevertheless, it could not prevail in a third-party-claim proceeding in which the transferee was claimant unless the transfer is rescinded. Being voidable only, such a transfer is fully operative until set aside. (Loud v. Luse, 214 Cal. 10, 12, 3 P.2d 542; Bancroft v. Bancroft, 110 Cal. 374, 379, 42 P. 896; Hewlett v. Pilcher and Watson, 85 Cal. 542, 544, 24 P. 781; Frink v. Roe, 70 Cal. 296, 311–312, 11 P. 820.) In the instant case there was neither a notice of rescission nor an offer to restore the transferee to its *status quo*. Barring exceptional situations, such a notice and such an offer are basic to a rescission whether it be in *pais*, or by an action in equity. (Estrada v. Alvarez, 38 Cal.2d 386, 390, 240 P.2d 278; Neet v. Holmes, 25 Cal.2d 447, 457, 154 P.2d 854; McCall v. Superior Court, 1 Cal.2d 527, 535, 36 P.2d 642, 95 A.L.R. 1019; Civ. Code, sec. 1691.) Under the circumstances, the right of the judgment debtor, "Long", to prevail in the instant proceedings, must be denied.

[3] There is a further reason why the subject judgment should be sustained. It

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[1] Lost Burros Gold Mining Co. v. Inyo County Bank, supra, 83 Cal.App. 679, 257 P. 209, held that the transferring corporation might not urge the invalidity of its transfer even though, under former Civil Code Section 361a, such a transfer was void and of no effect. (See also Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 578.)

appears without conflict that as of January 4, 1961, the holders of 15,284 shares of "Empire's" outstanding stock, which constituted a majority of the voting power, had indicated their approval of the subject transfer in writing. Appellant contends that this approval is of no effect because it was obtained during the course of the hearing upon the third party claim. However, the approval required by Section 3902 may be given either before or after the transfer subject thereto without any limitation as to time. (Corp.Code, sec. 3902.) This state of the facts demonstrates that the statute in question, i. e., Sections 3901 and 3902 of the Corporations Code, is for the benefit of the stockholders alone.

Whether "Long", the judgment creditor, as against "Tu-Vu", an apparent purchaser for value without notice, was entitled to assert the alleged illegality of the issuance of 9000 shares of stock to Tanner, in whose name they appeared ⊥737 on the books of the corporation, and attack the stockholder approval herein upon the ground that without these 9000 shares it was not supported by a majority of the voting power of the corporation;[2] and whether the action of the judgment creditor was barred by laches, as a matter of law,[3] are questions which need not be determined, in view of the other conclusions reached by us which support the judgment.

APPEAL FROM JUDGMENT BY HONORABLE BONSALL NOON.

[4] At the hearing on the first third party claim in this matter after proof of title in the third claimant, i. e., "Tu-Vu", by transfer from "Empire" pursuant to resolution of its board of directors, and approval by a vote of the shareholders entitled to exercise a majority of its voting power as disclosed by its records, the trial judge interrupted the cross-examination of one of the third party claimant's witnesses with the remark: "Listen, Gentlemen, let's get on to the crux of this matter. We can go on forever on this"; indicated that the issue presented for determination, as apparently outlined by counsel, was whether 60% of the stockholders had approved the transfer; directed attention to evidence showing such approval; engaged in a discussion with counsel for the judgment creditor as to whether the percentage referred to was 60% of the voting power at the meeting or 60% of the total shareholder voting power; noted that the 60% approval requirement was founded upon a provision in the agreement under consideration; expressed the belief that a creditor could not take advantage of this provision; and concluded that the third party claim should be granted. The attorney for "Long", the judgment creditor, contended that the agreement between "Empire" and "Tu-Vu", which resulted in the transfer, was conditioned, among other things, upon approval by the shareholders of "Empire" holding 60% of the voting power, and that ⊥738 the corporation's records showed that such approval had not been given; referred to Section 3901 of the Corporations Code, but did not argue that the transaction in question failed to comply with that code section; made no contention that the shareholders of a majority of the voting power of the corporation had not approved the transfer; and did not suggest that Tanner's 9000 shares had been illegally issued and could not be considered in determining such majority. "Long" contends that the trial judge rebuffed its request for further cross-examination and to put on its

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[2] Respondent "Tu-Vu" claims that the rule applied in Eberhard v. Pacific Southwest Loan & Mortg. Corp., 215 Cal. 226, 228, 9 P.2d 302, protects it in the instant action. (See also Kuhlman v. Pacific States Savings & Loan Co., 17 Cal.2d 820, 112 P.2d 620; Pores v. Purity Milk Co., 135 Cal.App.2d 305, 310, 287 P.2d 169; and Wachner v. Richardson, 14 Cal.App.2d 422, 429, 58 P.2d 714.)

[3] The defense of laches properly is asserted against a claim of noncompliance with Section 3901. (Hamud v. Hawthorne, 52 Cal.2d 78, 86, 338 P.2d 387; Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., 200 A.C.A. 320, 323, 19 Cal.Rptr. 208; Ballantine & Sterling, California Corporation Laws (1962 ed.), pp. 555–556.)

case, and thus foreclosed any opportunity to make an offer of proof in connection therewith. The record belies this contention. Considerable time was consumed by both parties and the court in discussing prospective issues in the matter, and in an attempt to define those issues. The claim that the judgment debtor might attack the sale upon the ground that the conditions specified in the agreement between "Empire" and "Tu-Vu" had not been met, properly was rejected by the court because, (1) for approximately two years both of the parties complied with that agreement; (2) the latter was paying the monthly contract installments on the equipment which had been levied upon; and (3) stockholders of the former had made no objection to the transaction. The agreement in question was a matter between the two corporations and their stockholders; their creditors were not parties thereto; and there was no claim that the transfer was fraudulent as to the latter. "Long" had ample opportunity to make an offer of proof if it then intended to urge that the transfer did not comply with the provisions of Section 3901, but did not do so. Under these circumstances the action of the trial court was not error. (Stickel v. San Diego Elec. Ry. Co., 32 Cal.2d 157, 162, 195 P.2d 416; Moore v. Rogers, 157 Cal.App.2d 192, 197, 320 P.2d 524; Blackburn v. Union Oil Co., 90 Cal. App.2d 775, 778, 204 P.2d 69.)

[5] In support of its contention that the order of the court terminating the hearing deprived it of due process of law and is ground for reversal, appellant cites the decision in National Automobile Ins. Co. v. Fraties, 46 Cal.App.2d 431, 115 P.2d 997. However, the facts in that case are substantially different from those in the case at bar; there the court announced its decision without giving the third party claimant an opportunity to be heard, while in the instant case there was an extended discussion between court and counsel before the former concluded that any further evidence would ⊥739 not be pertinent to the issues at hand. Other than the third party claim, there were no pleadings to outline the issues to be determined and the trial judge was compelled to rely upon counsel to state appellant's position. Not having done so, it cannot now be presumed that it intended to raise the same issues thereafter raised in the hearing before Judge Lazar.

Even if it be assumed that the issues respecting the alleged illegal issuance of stock to Mr. Tanner, and the alleged consequent lack of a majority of the voting power in support of the subject transfer, were not an afterthought; that appellant intended to produce evidence in support of its contention respecting such issues; and that the evidence produced would have simulated that produced in the hearing before Judge Lazar, nevertheless, under the law and the evidence heretofore noted, appellant was not entitled to set aside the transfer by which "Tu-Vu" acquired title to the property in question from "Empire", even though that transfer did not comply with Section 3901 of the Corporations Code. Any decision to the contrary would have been reversed. The judgment by Judge Noon in favor of "Tu-Vu" should be affirmed.

APPEAL FROM ORDER DENYING MOTION TO QUASH.

The judgment based on the arbitration award decreed that "Long" should recover 1500 shares of Class "A" and 950 shares of Class "B" stock of "Empire"; that in the event "Empire" did not "issue and deliver" this stock to "Long" within a designated period, "Empire" should pay "Long" $24,500.00; and that payment of the latter amount would extinguish the obligation to issue and deliver the stock.

Upon application by the attorney for "Long", and his oral representation that 1500 shares of Class "A" stock which "Empire" had delivered to "Long" had been issued in violation of a permit, or without a permit, and that in his opinion the stock was void, the county clerk executed a writ of execution to effect recovery under the provisions of the judgment directing the payment of $24,500.00. "Empire" moved to quash the writ, contending that its issuance was without the scope of the clerk's authorized functions, and appeals from the order denying such motion.

[6, 7] Where a conditional money judgment is entered, as in the instant case, the court alone is authorized to determine whether the conditions authorizing recovery thereon have transpired. Such determination involves the exercise of a judicial function which is without the realm of the authority ⊥740 conferred upon the clerk. Under such circumstances, the latter may not issue a writ of execution on the judgment except on order of court directing him to do so. (Adams v. Bell, 219 Cal. 503, 505, 27 P.2d 757.) The motion to quash should have been granted.

Each of the judgments is affirmed and the order denying the motion to quash is reversed. Tu-Vu Drive-In Corporation and Empire Drive-In Theatres, Inc. are awarded costs on appeal.

GRIFFIN, P. J., and STONE,* J., concur.

208 Cal.App.2d 645

⊥645 **Murray MATTAL, Plaintiff and Appellant,**
v.
AMERICAN TRUST COMPANY, a corporation, and Jane B. Kiesel, Defendants and Respondents.
Civ. 20208.

District Court of Appeal, First District, Division 2, California.
Oct. 18, 1962.
Rehearing Denied Nov. 5, 1962.
Hearing Denied Dec. 12, 1962.

Tenant's action against landlords to recover damages for breach of covenant in a written lease. The Superior Court, County of Contra Costa, Hugh H. Donovan, J., entered a judgment for the defendant landlords and the tenant appealed. The District Court of Appeal, Shoemaker, J., held that lease provision terminating the lease if the premises are damaged or destroyed by fire and cannot be repaired or restored within 60 days, but providing that if damages can be repaired within 60 days then landlord must repair premises at its own expense was not a mere covenant to repair, and landlord was obligated to rebuild premises totally destroyed by fire.

Reversed and remanded for trial on merits.

1. Landlord and Tenant 🔑150(2)

In absence of covenant landlords were under no duty to rebuild premises that were totally destroyed by fire. West's Ann.Civ. Code, § 1933, subd. 4.

2. Bailment 🔑22

General covenant to repair is not in itself sufficient to prevent application of statute providing that hiring of thing terminates by destruction of thing hired. West's Ann.Civ.Code, § 1933, subd. 4.

3. Landlord and Tenant 🔑150(2)

Lease provision terminating lease if premises are damaged or destroyed by fire and cannot be repaired or restored within 60 days but providing that if damage can be repaired within 60 days then landlord must repair premises at its own expense was not a mere covenant to repair, and landlord was obligated to rebuild premises totally destroyed by fire. West's Ann.Civ. Code, §§ 1932, subd. 2, 1933, subd. 4.

4. Landlord and Tenant 🔑37

Lease must be construed as whole and in such manner as to give effect to every provision, if reasonably possible.

5. Landlord and Tenant 🔑37

An interpretation which will give effect and purpose to lease provision is more reasonable than one which fails to do so.

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* Assigned by Chairman of Judicial Council.

6. Appeal and Error ⇨1008(3)

Where trial court construes lease without aid of extrinsic evidence, construction of lease presents question of law and reviewing court is not bound by trial court's interpretation.

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P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, San Francisco, Albert E. Levy, San Francisco, of counsel, for appellant.

Eugene Elerding, Berkeley, John U. Calkins, Jr., Berkeley, of counsel, for respondents.

⊥646 ⊥SHOEMAKER, Justice.

Plaintiff Murray Mattal brought this action against defendants American Trust Company and Jane Kiesel to recover damages for breach of a covenant in a written lease.

The complaint alleged that on February 15, 1960, defendants leased to the plaintiff a certain building located in Lafayette, California[1]; that the lease, which was incorporated by reference into the complaint, provided in part as follows: "19. If the demised premises be damaged or destroyed by fire or other casualty and they cannot be repaired or restored within sixty (60) days after possession is given to the Lessor for the purpose of so restoring the same, this lease shall terminate and the parties hereto shall be released from all obligation hereunder thereafter accruing; but if the damage so caused can be repaired within said period of sixty (60) days, the Lessor shall repair the demised premises at the Lessor's own cost and expense * * *. With respect to any damages of the demised premises which the Lessor is obligated to repair under the terms of this paragraph, the provisions of Section 1932, subdivision 2, and of Section 1933,⊥647 subdivision 4 of the Civil Code of the State of California are waived by the Lessee"; that on April 20, 1960, a fire damaged the demised premises; that plaintiff then gave defendants written and oral notice that he considered them obligated under paragraph 19 of the lease to restore the premises; and that defendants failed to comply with this request and informed the plaintiff that they would not restore the premises.

Both defendants answered, denying that the complaint stated a cause of action, and alleging that the leased premises had been damaged in such a manner as to preclude restoration within a 60-day period.

Defendants then moved for summary judgment on the ground that the complaint presented no triable issue of fact. Defendants take the position that the demised building had been completely destroyed by the fire and that paragraph 19 of the lease obligated them only to repair damage but not to restore or rebuild the entire structure subject to the lease. Plaintiff, in opposing the motion for summary judgment, conceded that a complete rebuilding would be necessary but contended that paragraph 19 obligated defendants to undertake such restoration. The only issue of fact tendered by the affidavits of the respective parties was as to whether or not, under paragraph 19 of the lease, the landlord was bound to rebuild.

The trial court, considering this sole question, ruled in favor of defendants' contention, and granted the summary judgment, from which plaintiff appeals.

[1] The problem before this court is whether paragraph 19 of the written lease expressly required respondents to rebuild the demised premises in the event that they were totally destroyed by fire. There can be no doubt that, in the absence of such a covenant, respondents were under no such duty. Civil Code, section 1933, subdivision 4, provides that "The hiring of a thing

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[1] Although the written lease was signed only by the plaintiff and the American Trust Company, Jane Kiesel appears to have been named as an additional defendant for the reason that the bank was acting as her agent in executing the lease.

terminates * * * [b]y the destruction of the thing hired." Accordingly, in the absence of an express agreement to the contrary, respondents' duties as a landlord would immediately have ceased upon the destruction by fire of the demised premises.

[2] It is also clear, as respondents point out, that a general covenant to "repair" is not in itself sufficient to prevent the application of section 1933. In Realty & Rebuilding Co. v. Rea (1920), 184 Cal. 565, 194 P. 1024, the court held that a leasehold covenant requiring the lessees to ⌊648 "repair and keep in good order, condition and repair the whole of said premises" (p. 573, 194 P. p. 1028) did not obligate them to rebuild a structure which had been completely destroyed. The court stated that a general covenant to repair does not constitute an agreement to rebuild unless the term "repair" also means to replace. "To repair means to mend an old thing, not to make a new thing; to restore to a sound state something which has become partially dilapidated, not to create something which has no existence. [Citation.] When we speak of repairing a thing, the very expression presupposes a thing in existence to be repaired. If a workman undertakes to repair an article, he obviously contemplates making whole an existing article and not the manufacture of something new." (P. 576, 194 P. p. 1029.) (Also see Friedman v. Isenbruck (1952), 111 Cal.App.2d 326, 244 P.2d 718.)

[3] Appellant contends, however, that the Realty and Friedman cases were both decisions construing covenants requiring the *tenant* to repair. He urges that a different rule ought to govern a landlord's covenant to repair. Appellant also asserts that paragraph 19 cannot be viewed merely as a general covenant to "repair" since it expressly requires respondents to repair *or restore* damaged *or destroyed* premises. Since this latter contention is clearly sound, it becomes unnecessary to determine whether the reasoning of the Realty case would be equally applicable to a landlord.

Paragraph 19 provided, as above noted, that "If the demised premises be damaged *or destroyed* by fire * * * and they cannot be repaired *or restored* within sixty (60) days after possession is given to the Lessor for the purpose of so *restoring* the same, this lease shall terminate * * * but if the damage so caused can be repaired within said period * * * the Lessor shall repair the demised premises at the Lessor's own cost and expense * * *" (emphasis added). This paragraph, when read as a whole, clearly cannot be construed as a mere covenant to repair. Had such been the intent of the parties, there would have been no reason for the inclusion of any reference to a "destruction" by fire and to a "restoration," as opposed to a "repair," of the building. Although there appears to be no California decision construing the term "restore," the recent New York case of Manufacturers Trust Company v. Bach (1961), 32 Misc.2d 858, 223 N.Y.S.2d 86, contains an analysis of the words "restore" or "rebuild" as used in the fire clause of a lease. The court there stated, "The use of the language 'restore' and 'rebuild' is significant. It connotes ⌊649 more than damage which is repairable [citation]; it implies such destruction of the premises by fire that repairs of the existing structure cannot be made and that a new structure must be built." (P. 89.) Similarly, in Leonardi v. Furman (1957), 83 Ariz. 61, 316 P.2d 487, the court held that the terms "restore" and "repair," as employed in a lease, were not synonymous. The court stated, "We believe there is a clear distinction between 'restore' and 'repair'. A thing may be repaired without being restored. It is restored when it is put back to a former, original, normal or unimpaired condition. * * * Black, Law Dictionary (3rd ed. 1933) at page 1505, defines 'reconstruction' as follows: 'To construct again; to rebuild; to *restore* again as an entity the thing which was lost or destroyed.'" (Pp. 65–66, 316 P.2d p. 490.)

Respondents contend, however, that the words "destroy" and "restore" appear only in the clause enumerating those contingencies upon which the lease was to terminate. They urge that the subsequent clause, which imposes an affirmative duty on the lessor, refers only to "repair" of "damage" and accordingly creates no obligation in respect to a total destruction of the building. Respondents thus contend that paragraph 19 can be "fully understood" only if it is divided into two definitely separate provisions.

[4, 5] Such an approach to the problem violates the basic canons of contract interpretation. The rule is well established that a lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible. (Goodman v. Jonas (1956), 142 Cal.App.2d 775, 790, 299 P.2d 424.) An interpretation which will give effect and purpose to a provision is more reasonable than one which fails to do so. (Chapin Lumber Co. v. Lumber Bargains, Inc. (1961), 189 Cal.App.2d 613, 620, 11 Cal.Rptr. 634, 637, 638.) If respondents were correct in contending that the first clause of paragraph 19 was intended to serve no other purpose than to set forth certain conditions upon which the lease would terminate, the parties certainly would have made no reference to the restoration of the premises or to the transferring of possession to the lessor "for the purpose of so restoring the same." The mere fact that the subsequent clause affirmatively delineates the lessor's obligation in terms of repair alone is of no great consequence. Indeed, an examination of the final clause of paragraph 19, wherein the lessee waives the provisions of Civil Code, section 1933, subdivision 4, "[w]ith respect to any *damages* of the demised 650 premises which the Lessor is obligated to repair under the terms of this paragraph," (emphasis ours) conclusively establishes that the parties intended the words "repair" and "damages" to include a restoration of the premises after a total destruction of the building. If respondents were not obligated to restore the leased premises after a total destruction, the provision requiring appellant to waive the benefit of said code section would be utterly devoid of meaning.

[6] Where a trial court construes a lease without the aid of extrinsic evidence, the construction of the lease presents a question of law, and a reviewing court is not bound by the trial court's interpretation. (Livingston Rock & Gravel Co. v. De Salvo (1955), 136 Cal.App.2d 156, 159–160, 288 P.2d 317, 318–319.) We are satisfied on the record presented that paragraph 19 obligated respondent lessor to restore the demisesd premises after a total destruction by fire.

The judgment is reversed and the cause remanded for trial on the merits.

KAUFMAN, P. J., and AGEE, J., concur.

208 Cal.App.2d 680

Andrew L. DARBEE, as Executor of the Will of Annie H. Darbee, also known as A. H. Darbee, and Memorial City, Inc., Petitioners, 680

v.

SUPERIOR COURT, COUNTY OF SAN MATEO, Respondent.

Julius F. CASTELAN, Real Party in Interest.

Civ. 20672.

District Court of Appeal, First District,
Division 1, California.
Oct. 19, 1962.

Proceeding on petition for writ of mandate to require that the respondent court compel real party in interest to answer certain interrogatories. The District Court of

Appeal, Molinari, J., held that real party in interest, who sought to compel the specific performance of a real estate option, failed to sustain burden of showing that the defendants' interrogatories concerning negotiations for resale of land about time real party in interest exercised option were improper.

Peremptory writ of mandate issued.

1. Discovery ⚷41

Discovery by interrogatories may be had as to any matter which is relevant to subject matter involved in pending action provided said matter is not privileged. West's Ann.Code Civ.Proc. § 2016(b).

2. Discovery ⚷41

It is not necessary that matter sought to be discovered by interrogatories be relevant to issue in case and thus admissible at trial as long as testimony sought appears reasonably calculated to lead to discovery of admissible evidence. West's Ann.Code Civ.Proc. § 2016(b).

3. Discovery ⚷29

In determining relevancy of interrogatories to subject matter in pending action, discovery statutes must be construed liberally in favor of disclosure unless request is clearly improper by virtue of well-established causes of denial. West's Ann.Code Civ.Proc. § 2016(b).

4. Mandamus ⚷159

When District Court of Appeal issued alternative writ on petition to compel real party in interest to answer certain interrogatories, it indicated its belief that petitioners had alleged sufficient facts to show, prima facie, an abuse of discretion or possible abuse of discretion.

5. Mandamus ⚷168(2)

Real party in interest, in making return to alternative writ issued on petition to compel real party in interest to answer certain interrogatories, had opportunity to rebut prima facie case made by petitioners and it was his burden to show facts from which court might find that interrogatories were interposed for improper purposes, that they were directed to subject matter which was not relevant to pending action, or, in spite of such relevancy, that information sought was not reasonably calculated to lead to discovery of admissible evidence. West's Ann. Code Civ.Proc. § 2016(b).

6. Discovery ⚷56

Real party in interest, who sought to compel specific performance of real estate option, failed to sustain burden of showing that defendants' interrogatories, concerning negotiations for resale of land about time real party in interest exercised option, were improper. West's Ann.Code Civ.Proc. § 2016(b).

7. Discovery ⚷28

Depositions and interrogatories are different procedures to which litigants may resort for purpose of pretrial discovery, and they are not mutually interdependent and prior use of one procedure does not exclude subsequent use of the other.

8. Depositions ⚷44, 81

Deposition is not final until read, signed and filed and until that time it may be corrected, while purpose of interrogatory is to ferret out relevant information which may lead to other admissible evidence and to immediately and conclusively bind answering party to facts set forth in reply.

9. Discovery ⚷70

Because same question has been answered in previous deposition does not preclude request for reply to interrogatory in absence of showing that requirement of reply would be unjust, inequitable, oppressive or burdensome, and burden of such showing is upon one who objects to interrogatory.

10. Discovery ⚷65

Absence of sufficient showing to sustain order which upheld objection to interrogatory did, in absence of any reasons or grounds on part of trial court for sustaining objections, compel conclusion that there was an abuse of discretion on part of trial court.

11. Discovery 🔑65

Claim that information sought by interrogatory is not relevant to subject matter of pending action must be supported by some showing to suffice as valid objection.

12. Discovery 🔑41

"Subject matter of the action", to which interrogatory must be relevant in order to be proper, is the circumstances and facts out of which cause of action arises; it is the property, contract or other thing involved in dispute; it is not the act or acts which constitute cause of action, but describes physical facts in relation to which suit is prosecuted. West's Ann.Code Civ. Proc. § 2016(b).

See publication Words and Phrases for other judicial constructions and definitions.

13. Discovery 🔑37

Intent of discovery procedures is to discover facts for trial preparation as well as for use at trial itself. West's Ann.Code Civ.Proc. § 2016(b).

14. Discovery 🔑65

Claim that interrogatory is not relevant to issues is without merit as is objection that in any event facts sought could not be presented at trial. West's Ann.Code Civ.Proc. § 2016(b).

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Brobeck, Phleger & Harrison, San Francisco, for petitioners.

Erskine & Tulley, San Francisco, for real party in interest.

⊥682 MOLINARI, Justice.

This is a petition for a writ of mandate seeking a direction to respondent that it grant petitioners' motion to compel the real party in interest, Julius F. Castelan, to answer certain interrogatories.

On August 7, 1957, the petitioners entered into a written option agreement with Castelan whereby they agreed to convey certain real property to him upon his exercise of said option. The agreement required that the option be exercised within six months from August 7, 1957. By the terms of the agreement the purchase price of $7,000 per acre was to be paid upon delivery of the grant deed as follows: 10 per cent in cash and the balance by Castelan's promissory note payable in 10 equal annual installments. On February 5, 1958, two days before the six months' period expired, Castelan gave notice to the petitioners that he was exercising the option. On April 2, 1958, Castelan requested of petitioners that a survey of the land be made so that the acreage and purchase price could be accurately determined. The petitioners furnished Castelan with a 1942 survey of the property on April 30, 1958, and at the same time requested that a substantial deposit be made on the acreage known to exist. Subsequently an oral agreement was entered into between the parties extending the time within which to place in escrow the deposit ⊥683 required under the option agreement until July 7, 1958. This oral extension was confirmed by the petitioners by a letter dated June 25, 1958. It is unclear whether there was any activity on the part of the parties from the date of this oral agreement until February 9, 1959, when the petitioners by letter demanded of Castelan the return of certain corporate documents which had been forwarded to him for his perusal and requesting that he do something about rental lost to the petitioners occasioned by Castelan's raising the rent of a tenant on the property causing said tenant to move out. Apparently Castelan had, in the interim, either taken possession of the property or exercised some control over it. Nothing further transpired until May 18, 1960, when the petitioners gave Castelan a written "Notice of Termination of Option by Reason of Defaults." Thereafter on August 16, 1960, Castelan, through his attorneys, informed the petitioners by letter that he had no intention of abandoning his option on the property, claiming that the survey forwarded to him by the petitioners was incomplete and that therefore it was impossible to ascertain the exact acreage and purchase price to be paid. The said attorneys then also stated that Castelan was willing to pay the required sums upon proof of exact acreage and conveyance of sufficient title.

On April 28, 1961, Castelan filed an action against petitioners for specific performance of the option contract and for a declaratory judgment to determine which party has the obligation to ascertain the number of acres subject to the option agreement. The petitioners have answered the complaint, denying, inter alia, the plaintiff's allegations " 'that the contract was fair and equitable' " and " 'that plaintiff has performed all of the terms and conditions of the agreement which he is required to perform and has otherwise performed all conditions precedent to his right to bring suit.' " The petitioners also raise the defenses of abandonment of the contract and laches.

Petitioners took Castelan's deposition. Among the questions asked were several directed to whether anybody had agreed to buy the property from him at the time he exercised the option, and at any time after February 5, 1958, until the day of the taking of said deposition, and also whether during this period he had agreed to sell the property to anyone. Castelan refused to answer these questions, whereupon a motion was made to compel him to answer the questions. In ruling upon the motion a judge of the respondent court stated as follows: ⊥684 "That the other questions involved in this action relating to whether the plaintiff had agreed to sell the property to others at or about the time he attempted to exercise the option in question are relevant to the subject matter of the action and the plaintiff is directed to answer them."

Upon the resumption of the deposition Castelan was again asked the questions hereinabove alluded to and in addition was asked whether he had discussed the sale of the subject property with other people, when he last discussed the possibility of such people buying the property, and whether he had "a person to whom you can resell it right now." Plaintiff refused to answer these or any other questions concerning his resale activities after August 7, 1958, upon the ground that the court had ruled such questions proper only if they related to such activities "at or about the time" he exercised the option in question, stating, as a basis for his refusal that the date August 5, 1958, i. e., six months after the exercise of the option was the outer limit of "at or about." The petitioners thereupon again moved the court to compel answers to said questions, said motion being heard and denied without opinion by another judge of the respondent court.

The petitioners thereupon put several questions relating to the same subject matter to Castelan in the form of written interrogatories. These included the following numbered interrogatories to which Castelan objected, to wit:

" '7. After August 5, 1958 and before the filing of the complaint, did you discuss with anyone the purchase by them from you of the property described in the option agreement?

" '8. State the names and addresses of all persons with whom you had discussions of the kind described in Interrogatory 7.

" '9. State the times and places and persons present at each of the discussions described in Interrogatory 7.

" '10. Have you made any agreements, written or oral, with anyone concerning the disposition of the property described in the option agreement, in the event you should obtain title to it?

" '11. State the names and addresses of each person with whom you have made an agreement or agreements of the kind described in Interrogatory 10.

" '12. State which of any such agreements are written, and which are oral.' "

The form and nature of such objections have not been presented to us other than the statement in the return of the ⊥685 real party in interest to the effect that he objected to said interrogatories "except as they related to the period from six months prior to until six months subsequent to the time of exercise of the option." The petitioners then moved the court for an order requiring further response to these interrogatories, the motion being heard by a judge other than the two judges who had ruled on the previous motions. Said motion was denied without opinion or the statement of any reasons assigned for sustaining these objections. Petitioners thereupon filed a petition for a writ of mandate to compel the respondent court to order the plaintiff to answer said interrogatories numbered 7 through 12. Upon the basis of said verified petition this court granted its alternative writ.

[1–3] The following interpretations of the discovery statutes are now well-established: Discovery by interrogatories may be had as to any matter which is *relevant to the subject matter* involved in the pending action, provided said matter is not privileged. It is not necessary that such matter be relevant to an issue in the case, and thus admissible at the trial, as long as the testimony sought *"appears reasonably calculated to lead to the discovery* of admissible evidence." (Code Civ.Proc. § 2016, subdiv. (b); emphasis added.) In determining such relevancy the discovery statutes must be construed liberally in favor of disclosure unless the request is clearly improper by virtue of well-established causes of denial. (Greyhound Corp. v. Superior Court, 56 Cal.2d 355, 390–391, 15 Cal.Rptr. 90, 364 P.2d 266; Regents of University of California v. Superior Court, 200 A.C.A. 808, 811, 19 Cal.Rptr. 568; Code Civ.Proc. § 2016, subdiv. (b).)

The real party in interest makes no claim of privilege or of improper purpose. Nor does he, in his return to the alternative writ, make any claim of nonrelevancy to the subject matter. In his return he stands upon the proposition that three different judges of the respondent court denied three separate motions to establish a right to interrogate him concerning negotiations engaged in or any contract he entered into for the land subsequent to August 5, 1958. The basis of his return is the ruling of the first judge that such questions were proper only if they related to such activities "at or about the time he attempted to exercise the option in question" and his *own* (Castelan's) "judicial" interpretation that "at or about" means six months prior to and six months subsequent to such time. Tacit approval of the first judge's ⊥686 statement and the interpretation placed thereon by the real party in interest are read by the latter into the subsequent rulings of the other two judges, both of whom apparently denied the petitioners' motions without comment or without setting forth any reasons or grounds therefor.

[4, 5] When this court issued its alternative writ it necessarily indicated its belief that petitioners had alleged sufficient facts to show, prima facie, an abuse of discretion or a possible abuse of discretion. In making his return to that writ the real party in interest had the opportunity to rebut the prima facie case made by the petitioners. It was his burden to show the facts from which the court might find that the interrogatories were interposed for improper purposes, or that they were directed to subject matter which was not relevant to the pending action, or, in spite of such relevancy, that the information sought was not reasonably calculated to lead to the discovery of admissible evidence. (See Coy v. Superior Court, 58 A.C. 212, 222–223, 23 Cal.Rptr. 393, 373 P.2d 457.)

[6–9] The showing made by the real party in interest is insufficient to sustain the burden imposed upon him. The only substantiation of the third judge's order (which is the order under attack here) is the first judge's ruling and its interpretation by the real party in interest. The placing by Castelan of a six months' limitation, prior and subsequent to the date of the exercise of the option, amounts to a usurpation of the judicial function and constituted an unwarranted and arbitrary interpretation of the court's language "at or about the time he attempted to exercise the option * * *." Moreover, the real party in interest loses sight of the fact that the first judge's ruling was in connection with a motion to compel answers *in a deposition*. Even if we were to concede (which we do not) that the first judge's limitation was a proper one, the ruling there made has no connection with our present inquiry. Depositions and interrogatories are different procedures to each of which litigants have the right to resort in the same proceeding for the purpose of pretrial discovery. (Greyhound Corp. v. Superior Court, supra, 56 Cal.2d 355, 373, 15 Cal.Rptr. 90, 364 P.2d 266.) They are not mutually interdependent; nor does the prior use of one procedure exclude the subsequent use of the other. (Coy v. Superior Court, supra, 58 A.C. 212, 220, 23 Cal. Rptr. 393, 373 P.2d 457; Carlson v. Superior Court, 56 Cal.2d 431, 15 Cal.Rptr. 132, 364 P.2d 308.) In the Coy case the court pointed out the distinction between the function of the two procedures as follows: "A deposition is not final until read, signed and ⊥687 filed. Until that time it may be corrected or the answers changed. * * * Certainly an answer in a deposition remains undetermined, or uncertain, until such time as the document is signed. As such it may be valuable as a matter of pretrial discovery. But it does not adequately serve the same purpose as an interrogatory. The function of the latter is twofold. It not only ferrets out relevant information which may lead to other admissible evidence, but it immediately and conclusively binds the answering party to the facts set forth in his reply." (Pp. 220–221, 23 Cal.Rptr. p. 397, 373 P.2d p 461; footnote omitted.) It should also be pointed out that because the same question has been answered in a previous deposition does not preclude the request for a reply to an interrogatory in the absence of a showing that the requirement of a reply would be unjust, inequitable, oppressive or burdensome. Here, again, the burden of such a showing is upon the one who objects to the interrogatory. (Coy v. Superior Court, supra, 58 A.C. 212, 220, 23 Cal.Rptr. 393, 373 P.2d 457.)

[10] The trial court made no assignment of its reasons for denying the motion. We would be resorting to clairvoyance if we undertook to read the first judge's ruling into the third judge's order. The absence of a sufficient showing to sustain the order, and the absence of any reasons or grounds on the part of the trial court for sustaining the objections compel the conclusion that there was an abuse of discretion on the part of the trial court.

[11, 12] We are not unmindful of the *claim* made by the real party in interest in his "Points and Authorities" that the information sought is not relevant to the subject matter of the pending action. As we have hereinbefore pointed out, to suffice as a valid objection such claim must be supported by some showing. No such showing was made in the return. We note, moreover, that the real party in interest concedes relevancy to the subject matter in his "Points and Authorities" but again reiterates that such relevancy is restricted to the six months' period limitations he himself has set up. He there makes the bold assertion that "Beyond these limits the information sought by the defendants could have no conceivable relevance to the subject matter of the action." He attempts to bolster the assertion by argument which we find unconvincing. Suffice it to say, we cannot see how information which is relevant to the subject matter loses its relevancy one day after the expiration of the arbitrary six months' period. If questions directed to activities occurring within the six ⊥688 months' period can lead, admittedly, to the discovery of admissible evidence, we fail to see why the same questions directed to any period during the pendency of the action would not reasonably be calculated to do so. There can be little doubt that the information sought by these interrogatories was relevant to the subject matter of the pending action. The "subject matter of the action" is the circumstances and facts out of which the cause of action arises; it is the property, contract or other thing involved in the dispute; it is not the act or acts which constitute the cause of action, but describes physical facts in relation to which the suit is prosecuted. (McAndrews v. Chicago, L. S. & E. Ry. Co., 7 Cir., 162 F. 856, 858; Odell Hardware Co.

v. Scarborough's, Inc., 186 S.C. 370, 195 S.E. 631, 633; Cantrell v. City of Caruthersville, 359 Mo. 282, 221 S.W.2d 471, 475.) The thing involved here was the option agreement and its enforceability. Any of the physical facts or circumstances bearing upon or touching this agreement would be proper matters for inquiry in the quest for facts which may lead to admissible evidence.

[13, 14] With the subject matter of the pending action in mind it is readily apparent from a mere reading of the interrogatories in question that they are reasonably adapted to the purpose of ascertaining facts which are likely to result in the discovery of admissible evidence. The petitioners in their argument indicate that the testimony sought is calculated to produce evidence of Castelan's inability or unwillingness to pay, his abandonment of the contract, his reasons for the 26-month period of silence, his delay for speculative reasons bearing upon the question of laches, inadequacy of the price, the highest and best use of the property for valuation purposes, and the identity of the parties having the actual or beneficial interest in said option. The testimony elicited might be admissible as direct evidence bearing on the issues or it may be adaptable to the purposes of impeachment. It may develop that the facts discovered will not serve either purpose or that the petitioners have no thought of producing those facts at the trial. These circumstances do not necessarily preclude the discovery of the facts sought because the intent of the new discovery procedures is to discover facts for trial preparation as well as for use at the trial itself. (Greyhound Corp. v. Superior Court, supra, 56 Cal.2d 355, 372, 15 Cal.Rptr. 90, 364 P.2d 266.) In countering the petitioners' argument the real party in interest falls into the common pitfall of attempting
689 to demonstrate that the answers to these interrogatories would not be relevant to the *issues* and therefore would not be admissible at the trial. In the adoption of the discovery statutes the Legislature intentionally did away with the older test of materiality to the *issues* and substituted therefor the test of relevancy to the *subject matter.* (Coy v. Superior Court, supra, 58 A.C. 212, 219, 23 Cal.Rptr. 393, 373 P.2d 457.) Accordingly the claim that an interrogatory is not relevant to the issues is without merit as is the objection that in any event the facts sought could not be presented at the trial. The ultimate right to present at the trial the facts sought by the interrogatories is not the criterion upon which the right to interpose them is based. The admissibility of the sought testimony or the probabilities of the inquiring party's questions leading to relevant evidence are not subject to predetermination during the discovery stages of the case as long as the desired testimony seems "reasonably calculated" to lead to relevant evidence. We cannot define what will be relevant evidence in the case prior to trial, but must wait for the trial itself; and even then, the " 'question must be determined in each case according to the teachings of reason and judicial experience. * * *' " (Moody v. Peirano, 4 Cal.App. 411, 418, 88 P. 380, 382; Regents of University of California, supra, 202 A.C.A. 808, 814–815, 19 Cal.Rptr. 568; Witkin, Calif. Evidence, § 113, p. 135.)

It is therefore ordered that a peremptory writ of mandate issue directing the respondent court to vacate the order denying the motion for further answers, and to enter an order requiring further answers to the said interrogatories.

BRAY, P. J., and SULLIVAN, J., concur.

208 Cal.App.2d 722

⊥722 ⊥**PEOPLE of the State of California, Plaintiff and Respondent,**
v.
James W. CARTER, Defendant and Appellant.
Cr. 4055.

District Court of Appeal, First District, Division 3, California.
Oct. 22, 1962.
Rehearing Denied Nov. 21, 1962.

The defendant was convicted in the Superior Court, County of San Francisco, Gerald S. Levin, J., of forgery of narcotic prescription and two burglaries of automobiles, and he appealed. The District Court of Appeal, Devine, J., held that denial of continuance requested by defendant to produce witnesses was justified where defendant failed to advise court of testimony he expected from witnesses.

Affirmed.

1. Criminal Law 🔑586

Motion for continuance is addressed to sound discretion of court.

2. Criminal Law 🔑603(2)

Party moving for continuance must show that testimony of absent witness would be material, that diligence has been exercised in attempt to procure his attendance, and that facts to be established by such witness cannot otherwise be proved.

3. Criminal Law 🔑603(7)

Denial of continuance requested by defendant to produce witnesses was justified where defendant failed to advise court of testimony he expected from witnesses.

* * *

Philip N. Schmidt, San Francisco, for appellant.

Stanley Mosk, Atty. Gen. of the State of California, John S. McInerny, Derald E. Granberg, Deputies Atty. Gen., San Francisco, for respondent.

DEVINE, Justice.

Appellant was convicted of violating section 11715 of the Health and Safety Code, which makes punishable the forgery of narcotic prescriptions, and of two burglaries of automobiles.

On March 30, 1961, at about 11:30 a. m., Dr. Anthony P. Bagatelos parked and locked his automobile in front of his⊥office ⊥723 at 2367 Ocean Avenue, San Francisco. When he returned at 12:05 p. m., the right front window had been broken, and his medical bag containing, among other things, some narcotic medications and some triplicate narcotic prescription blanks, was missing. Among the prescription blanks taken was one bearing the number LL-244,644.

On the same date, at about noon, Dr. William Dwyer also parked and locked his car near his office at 2435 Ocean Avenue. Twenty minutes later, when he returned, he found his car had been broken into and his medical bag, containing three or four ampules of pantopon, a narcotic, missing. Subsequently, the bag was recovered, but the pantopon was not inside.

On April 6, 1961, at about 1:00 p. m., the appellant went into Bowerman's Pharmacy at 2501 Ocean Avenue, and handed the sales clerk two copies of a prescription. The prescription was numbered LL-244,644, was made out for a patient of Dr. Bagatelos who had died some six weeks before, called for morphine sulphate, a narcotic, and bore the forged signature of Dr. Bagatelos. The pharmacist, suspicious of the prescription, called Dr. Bagatelos, and subsequently the police were called. An officer arrived and, after a struggle, took appellant into custody.

At trial, the prosecution presented expert testimony to the effect that appellant's palm print was found on the inside of the vent window of Dr. Bagatelos' car, following the burglary, and also that one of appellant's fingerprints was found on a piece of glass inside Dr. Dwyer's car after the burglary.

Trial commenced July 5, 1961. The appellant elected to proceed in propria persona, although the court attempted to discourage him from doing so. After the prosecution had examined one witness, recess was taken and the court specifically directed all witnesses in the courtroom to return at 2:00 p. m. After the recess, the prosecution continued with its case, and then rested. Before adjournment, the appellant requested and was granted counsel. The court directed the jury to return the following morning. On July 6, 1961, appellant was ill and, although he had been brought to the courtroom, he had to be returned to jail before proceedings commenced. An assistant public defender was present to represent him. Two witnesses subpoenaed by appellant were present. The court set the matter over until the following morning and directed the jurors to return unless telephoned by the bailiff. The witnesses in court were not directed to ⊥724 return. On July 7, 1961, appellant, represented by counsel, was present and requested a continuance because two witnesses, subpoenaed on July 5th, were not present. Appellant's wife, who had also been subpoenaed, was present. The jury was excused and appellant was asked what he proposed to prove through the absent witnesses. In spite of advice from counsel and requests from the court, appellant refused to make an offer of proof other than to say he wanted his witnesses. The jury was returned and appellant's motion was denied. The appellant did not take the stand and did not offer any evidence.

[1, 2] Appellant contends that the court, of its own motion, should have directed any witnesses to return, and when this was not done, the continuance should have been granted. A motion for continuance is addressed to the sound discretion of the court. (People v. Carroll, 160 Cal.App.2d 6, 9, 324 P.2d 713.) There must be a showing that the testimony of the absent witness would be material, and that diligence has been exercised in an attempt to procure his attendance. (People v. Carroll, supra, 160 Cal.App.2d p. 9, 324 P.2d 713.) It must be shown that the facts to be established by the absent witness cannot otherwise be proved. (People v. Peters, 191 Cal.App.2d 581, 586, 12 Cal.Rptr. 745.)

[3] Where the party desiring a continuance in order to produce witnesses, fails to advise the court of the testimony which he expects them to give, the denial of the continuance is justified. (People v. Pearson, 151 Cal.App.2d 583, 586, 311 P.2d 927.)

Judgment affirmed.

DRAPER, P. J., and SALSMAN, J., concur.

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209 Cal.App.2d 30

⊥30 **George KING, Plaintiff and Appellant,**

v.

COUNTY OF MENDOCINO, Defendant and Respondent.

Civ. 20255.

District Court of Appeal, First District, Division 3, California.

Oct. 25, 1962.

Hearing Denied Dec. 19, 1962.

Action by motorist against county for injuries sustained in an accident. From an adverse judgment of the Superior Court, Mendocino County, Robert L. Winslow, J., the motorist appealed. The District Court of Appeal, Draper, P. J., held that motorist, who was injured in accident allegedly caused by loose material left on road by county, was not aggrieved by failure to instruct on Public Liability Act, which restricted recovery against county based on negligence to the limited form of negligence prescribed by the act.

Judgment affirmed.

1. Automobiles 🔑309(2)

Motorist, who was injured in accident allegedly caused by loose material left on road by county, was not aggrieved by failure to instruct on Public Liability Act, which restricted recovery against county based on negligence to the limited form of negligence prescribed by the act. West's Ann.Gov.Code, § 53051.

2. Municipal Corporations 🔑723

Recovery under Public Liability Act is based on negligence but is restricted to the limited form of negligence prescribed by the terms of the act. West's Ann.Gov. Code, § 53051.

3. Automobiles 🔑309(2)

Motorist's requested instruction concerning posting of certain highway signs by local authorities was properly denied in absence of a showing that a warning sign was required to be posted on road because of its condition on day of accident. West's Ann.Vehicle Code, § 21351.

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Philander Brooks Beadle, John T. Tully, San Francisco, for appellant.

Frank S. Petersen, Dist. Atty., of the County of Mendocino, Ukiah, Bell & Cox, Conrad L. Cox, Ukiah, for respondent.

⊥31 ⊥DRAPER, Presiding Justice.

This is a personal injury action against a county. The court instructed the jury only on negligence and refused instructions on the Public Liability Act (Gov.Code, § 53051). Verdict and judgment were for defendant, and plaintiff appeals. The principal issue is whether refusal to instruct on the Public Liability Act constitutes error prejudicial to plaintiff.

Plaintiff drove to his place of employment over a county road. On return trips, he traversed a down grade, at the top of which was a sign "Steep Grade, Use Low Gear", and which was also posted with a number of "Slow, Curve" signs. On the afternoon of the accident, October 29, 1958, a county road crew used a grader to clear loose rock and soil from a drainage ditch along the side of this road, and move it across the road and over its downhill edge. A thin layer of this material remained over the oil and gravel surface of the road. This is the normal method of clearing ditches used by both county and state in maintenance of mountain roads. After completion of this job, plaintiff drove along the road on his return from work. He traversed some 135 yards of the area on which work had been done and then, just below a curve, his truck struck the bank and overturned, injuring him. He attributes the accident to the loose material. Although plaintiff and his passenger testified that they were traveling in low gear at 15 miles per hour, there was evidence of an admission by plaintiff ⊥that he had been going 20–25 miles per hour ⊥32 and was in a higher gear.

[1] The original complaint was grounded solely on the Public Liability Act. After the Supreme Court disapproved the doctrine of governmental immunity (Muskopf v. Corning Hospital Dist., 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457), plaintiff amended his complaint to add a cause of action in general negligence.

[2] To support his view that he was aggrieved by the refusal of instructions on the Public Liability Act, plaintiff cites three cases (Kotronakis v. City & County of San Francisco, 192 Cal.App.2d 624, 13 Cal.Rptr. 709; Ngim v. City & County of San Francisco, 193 Cal.App.2d 138, 13 Cal.Rptr. 849; Akers v. City of Palo Alto, 194 Cal.App.2d 109, 14 Cal.Rptr. 767), which hold that, despite Muskopf, a county, city or school district still is entitled to the restrictions upon recovery against it imposed by the Public Liability Act. Recovery under that act is based on negligence (Pritchard v. Sully-Miller Contracting Co., 178 Cal.App.2d 246, 256, 2 Cal.Rptr. 830), but is restricted to the limited form of negligence prescribed by the terms of the act (Ngim v. City & County of San Francisco, supra, 193 Cal.App.2d at pp. 144–145, 13 Cal.Rptr. 849; see also Barrett v. City of San Jose, 161 Cal.App.2d 40, 325 P.2d 1026).

Here plaintiff had the benefit of instructions broadly defining negligence generally, without limitation to the terms of Section 53051. At most, the absence of these restrictive elements prejudiced defendant county. Clearly such lack did not aggrieve plaintiff, and he cannot complain.

[3] Plaintiff also asserts error in the refusal of his requested instruction in the

language of Vehicle Code, Section 465(b) (now § 21351). It stated that local authorities shall post such signs as are required by the code, but plaintiff offered no instruction as to when such signs are so required. Even now, he points to no requirement that a warning sign be posted on this road in its condition the day of the accident. If given his instruction would have been but a dangling, incomplete admonition, incomprehensible to the jury. It was properly refused.

Judgment affirmed.

SALSMAN and DEVINE, JJ., concur.

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208 Cal.App.2d 702

⊥702 ⊥**REGIE NATIONALE DES USINES RENAULT, BILLANCOURT (SEINE), FRANCE, Petitioner,**

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF SACRAMENTO, Respondent.

Civ. 10575.

District Court of Appeal, Third District, California.

Oct. 19, 1962.

Hearing Denied Dec. 12, 1962.

Proceeding on petition by French automobile manufacturer for order compelling Superior Court, Sacramento County, Leonard M. Friedman, J., to vacate its order denying manufacturer's motion to quash service of summons and complaint. The District Court of Appeal held that manufacturer, which sold its automobiles to a wholly-owned American subsidiary incorporated in New York which in turn sold to American distributors and ultimately, through retail dealers, to California customers, was "doing business" in California and was amenable to substituted service of process.

Petition denied.

1. Corporations 🔑642(4½)

French automobile manufacturer, which sold its automobiles to a wholly-owned American subsidiary incorporated in New York which in turn sold to American distributors and ultimately, through retail dealers, to California customers, was "doing business" in California and was amenable to substituted service of process. West's Ann.Corp.Code, §§ 6501, 6502.

2. Corporations 🔑642(4½)

Nonresident defendant's extensive sales and promotional contacts with state customers through nonexclusive, independent sales representatives may constitute "doing business" for purpose of substituted service of process. West's Ann.Corp.Code, §§ 6501, 6502.

Bronson, Bronson & McKinnon, San Francisco, for petitioner.

McCarthy & Crow, Sacramento, for respondent.

PER CURIAM.

By mandate, petitioner seeks an order of this court compelling the Superior Court in and for the County of Sacramento to set aside and vacate its order denying petitioner's motion to quash service of summons and complaint⊥on petitioner. This court ⊥703 issued its order to show cause and the matter was set for oral argument.

After full consideration of the petition, the points and authorities, and the arguments of respective counsel, we are satisfied that the memorandum opinion filed by the Honorable Leonard M. Friedman denying a like motion correctly states the law and we therefore adopt the same as the opinion of this court.

[1] "The court has concluded that defendant Regie Nationale des Usines Renault, Billancourt (Seine), France (hereinafter referred to elliptically as 'Regie') has had adequate contacts with California and California residents so that the maintenance of the suit against it does not offend our notions of fair play and substantial

justice (International Shoe Company v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95). It is, in other words, 'doing business' in California and is amenable to substituted service of process on the Secretary of State in the manner provided by Section 6501–6502 of the Corporations Code.

"Defendant Regie is a business entity owned by the French government. As an automobile manufacturer, it inaugurates a flow of its products to the California market. It sells its products to defendant Renault, Inc., a wholly-owned subsidiary incorporated in the State of New York. Renault, in turn, sells to various American distributors, who in turn sell to retail dealers. There is a chain of sales leading from defendant Regie to California consumers. The product is such that negligence in manufacture and inspection might well cause injury to California citizens, as is alleged by the plaintiff and by the cross-complainant here.

"Regie might choose to arrange its marketing process through a hierarcy of its own agents and employees. Then, by establishing agents in California to sell its products, it would undoubtedly be amenable to suit in this state. For reasons of its own it chooses to market its products through a wholly-owned American subsidiary and a network of independently-owned distributorships and dealerships. These choices on its part effect little, if any, alteration in the jurisdictional situation. The 'contacts' exist one way or the other and for precisely the same purposes. The differences are differences only in form and description.

[2] "Apparently, where the tort occurs within the state, extensive sales and promotional contacts with California consumers ⊥704 through nonexclusive, independent sales representatives may constitute 'doing business' (Cosper v. Smith & Wesson Arms Co., 53 Cal.2d 77, 346 P.2d 409). Here there are additional circumstances which, in composite, impel subjection to jurisdiction. These are: (a) the interest of this State in providing a forum for its residents; (b) the relative availability of evidence; (c) the relative burden of defense and prosecution in California rather than at some other place; (d) the ease of access to some alternative forum; (e) the extent to which the cause of action arises out of Regie's local activities. Fisher Governor Co. v. Superior Court, 53 Cal.2d 222, 225–226, 1 Cal.Rptr. 1.

"As regards 'fair play' it is obvious that if California rejects jurisdiction, Regie may successfully bar plaintiff and cross-complainant from access to the courts of all states of the Union, including New York. Cannon Manufacturing Co. v. Cudahy Co., 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634; see also Fisher Governor Co. v. Superior Court, supra. Regie's argument would, in effect, confine the claimants to the courts of the Republic of France. Fairness to Regie does not entail this disadvantage to the claimants.

"Renault, Inc., whether regarded as an individual corporate entity or as alter ego of Regie, is simply a medium through which the latter establishes its business contacts with the California public. As to the mechanics of process serving, Regie has received process via the California Secretary of State without reference to the 'presence' of Renault as its purported agent in California. Thus there is no point in deciding whether to respect the separate status of Renault or to regard it as merely the alter ego of Regie."

The order to show cause is discharged and the petition is denied.

ATLAS HEATING & VENTILATING CO., Ltd., Petitioner,
v.
SUPERIOR COURT, COUNTY OF ALAMEDA, Respondent,
Stanley L. SOWERS, Real Party in Interest.
Civ. 20721.

District Court of Appeal, First District, Division 1, California.
Oct. 22, 1962.
Hearing Granted Dec. 19, 1962.*

Proceeding on petition for writ of prohibition or certiorari to restrain Superior Court from enforcing its order for production of a statement. The District Court of Appeal, Sullivan, J., held that statement concerning motor vehicle accident obtained by insurer's casualty adjuster from driver of insured corporate vehicle for primary purpose of transmittal to insurer's attorneys to aid them in defending any litigation arising out of accident fell within scope of attorney-client privilege, and injured party, which could not locate the driver, was not entitled to production of such statement.

Peremptory writ of prohibition issued.

1. Discovery 🔑90

Statement concerning motor vehicle accident obtained by insurer's casualty adjuster from driver of insured corporate vehicle for primary purpose of transmittal to insurer's attorneys to aid them in defending any litigation arising out of accident fell within scope of attorney-client privilege, and injured party, which could not locate the driver, was not entitled to production of such statement. West's Ann. Code Civ.Proc. § 1881, subd. 2.

2. Discovery 🔑90

The report or statement, given by an employee of a corporate defendant in a personal injury case to his employer's insurer for predominant purpose of transmission to attorneys to aid them in defense of employer under the policy, falls within the attorney-client privilege and is immune from discovery. West's Ann.Code Civ.Proc. § 1881, subd. 2.

3. Discovery 🔑97(6)

Determination concerning facts asserted as a basis for attorney-client privilege is for the trial court in the first instance. West's Ann.Code Civ.Proc. § 1881, subd. 2.

4. Discovery 🔑97(1)

Party claiming the attorney-client privilege has the burden of establishing the facts requisite for its assertion. West's Ann. Code Civ.Proc. § 1881, subd. 2.

5. Discovery 🔑97(1)

Showing that driver of insured corporate truck was required to make a signed statement concerning accident as part of his duties as an employee, and that he intended the statement to be confidential, was not necessary to bring statement within scope of the attorney-client privilege. West's Ann.Code Civ.Proc. § 1881, subd. 2.

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Miller, Williams & Larson, San Francisco, for petitioner.

Smith, Parrish, Paduck & Clancy, Oakland, for real party in interest.

SULLIVAN, Justice.

Petitioner Atlas Heating & Ventilating Co., Ltd., hereafter referred to as Atlas, seeks a writ of prohibition or certiorari restraining the respondent superior court from enforcing its order for the production of a statement given by one of petitioner's employees in connection with an automobile accident.[1] We issued an alternative writ of prohibition.

[1] Sowers, the real party in interest herein, is the plaintiff and Atlas and its em-

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* Proceeding dismissed as moot Jan. 23, 1963.

[1] While the prayer of the petition before us is for a writ of prohibition to "prohibit permanently respondent from *issuing* its order to produce the statement of Richard Woehlre * * *" (emphasis added), it is clear from the statements of the petition and the record before us that said court has already issued its order for production and that petitioner seeks to restrain the *enforcement* of the order.

ployee, Richard Woehlre, are the defendants in an action for damages for personal injuries commenced in the respondent court. Woehlre is the driver of Atlas' truck which was involved in the accident and is alleged to have caused Sowers' injuries. On the day after the accident, one Buchanan, a casualty adjuster employed by the Aetna Insurance Company, petitioner's insurer, obtained from Woehlre a signed statement which is the subject of the controversy now before us.

Sowers moved in the respondent court for an order requiring the production of Woehlre's statement upon the grounds that such statement constituted or contained evidence, material and relevant to the pending action and was not privileged. Upon the hearing of such motion, the only evidence before the court was the declaration of Sowers' counsel in support of the motion and the declaration of Buchanan, the insurance adjuster, in opposition thereto. The court below granted the motion and ordered that Atlas produce for inspection by Sowers the above-mentioned statement of Woehlre.

The declaration of Edwin A. Clancy, Jr., counsel for Sowers, filed in support of the motion, stated as follows: that the allegations of agency and permissive use contained in Sowers' complaint were denied by Atlas; that Clancy had attempted to locate Woehlre through a private investigator but had been informed and therefore believed that Woehlre was unavailable for a deposition or the taking of a statement about the accident; that a deposition which was taken of one Rose, also an Atlas employee and Woehlre's superior, indicated that Rose had no knowledge of Woehlre's whereabouts and had not seen him for several months; and that Clancy himself had no statements from Woehlre and had had no contact with the latter, either directly or indirectly.

The declaration of Buchanan, filed in opposition to the motion, stated as follows: that he made an investigation of the accident on the day after its occurrence; that such investigation was pursuant to a policy of liability insurance issued by Aetna Insurance Company to Atlas under which Aetna agreed to pay on behalf of Atlas all sums which Atlas should become legally obligated to pay as damages because of bodily injury or death, sustained by any person and arising out of the ownership, maintenance or use of the vehicle involved in the accident; that on the day after the accident he obtained a statement from Woehlre "for the primary purpose of transmittal to the attorneys for * * * Atlas * * *" and that such statement was in fact transmitted to Atlas' attorneys; and that "[o]nly one original copy of said statement was made, and it was obtained for the primary purpose of aiding said attorneys in the course of their professional employment in defending any litigation arising out of said accident."

Petitioner contends that Woehlre's statement falls within the attorney-client privilege set forth in subdivision (2) of section 1881 of the Code of Civil Procedure, that it is therefore immune from discovery and inspection and that the enforcement by the respondent court of its order for such production is in excess of its jurisdiction. We conclude that these contentions must be upheld.

[2] It is now well settled that a report or statement given by an employee of a corporate defendant in a personal injury case to his employer's insurer for the predominant purpose of transmission to attorneys to aid them in defense of the employer under the policy falls within the attorney-client privilege and hence is immune from discovery. (Gene Compton's Corp. v. Superior Court (1962) 205 A.C.A. 421, 424–435, 23 Cal.Rptr. 250; Heffron v. Los Angeles Transit Lines (1959) 170 Cal.App.2d 709, 717–718, 339 P.2d 567, 74 A.L.R.2d 526; see also Holm v. Superior Court (1954) 42 Cal.2d 500, 506–510, 267 P.2d 1025, 268 P.2d 722; cf. New York Cas. Co. v. Superior Court (1938) 30 Cal.App.2d 130, 132–133, 85 P.2d 965.)

The question presented to us in the instant case is essentially the same as that decided by this court in Gene Compton's Corp., supra. In that case, the insurance carrier of the corporate defendant, in the course of investigating an accident on the insured's restaurant premises, obtained an accident report from the restaurant manager and in addition two signed statements, one from the manager and one from another employee on duty. There, as here, the investigation was made pursuant to the provisions of a policy of liability insurance in effect. There, as here, the accident report and signed statements were obtained for the sole purpose of being transmitted to the attorney to be selected by the carrier to represent the insured in defense of any claim. This court held that the signed statements, as well as the report, being within the attorney-client privilege, were immune from discovery and inspection and we, accordingly, issued a peremptory writ of prohibition preventing the trial court from giving effect to its order for their production. Mr. Justice Bray in his exhaustive opinion in Compton's makes it clear that it is immaterial whether or not litigation has been in fact commenced or the attorneys to whom the signed statements are intended to be transmitted have in fact been selected, at the time such statements are obtained. (See Gene Compton's Corp. v. Superior Court, supra, 205 A.C.A. 421, 428 fn. 1, 431, 431 fn. 2, 23 Cal.Rptr. 250.)

[3, 4] The case of Gene Compton's Corp. governs the instant matter. The declaration of Buchanan, the adjuster, summarized by us above clearly establishes that Woehlre's signed statement was obtained for the primary purpose of being transmitted to, and was in fact transmitted to, the attorneys for Atlas so as to enable them to defend any litigation arising out of the accident. This was not contradicted by the opposing party. While the determination concerning the facts asserted as a basis for the privilege is for the trial court in the first instance (Holm v. Superior Court, supra, 42 Cal. 2d 500, 507, 267 P.2d 1025, 268 P.2d 722) and while the party claiming the privilege has the burden of establishing the facts requisite for its assertion (Safeway Stores, Inc. v. Superior Court (1961) 193 Cal.App. 2d 270, 273, 14 Cal.Rptr. 243), the record before us convincingly demonstrates that the privilege was established without contradiction. "It is clear, therefore, that the trial court's ruling was not based upon any conflict in the evidence, but solely upon the erroneous determination of the question of law as to whether * * * statements of employees made for the purpose of being delivered, and delivered to the insurer for ultimate use by the attorney when selected to defend the insured after litigation ensues, are privileged." (Gene Compton's Corp. v. Superior Court, supra, 205 A.C.A. 421, 436, 23 Cal.Rptr. 250, 260.)

[5] The real party in interest contends that there was no showing that Woehlre was required to make the signed statement as part of his duties as an employee of Atlas and no showing that he intended the statement to be confidential. Real party in interest relies on Suezaki v. Superior Court (1962) 58 A.C. 169, 23 Cal.Rptr. 368, 373 P.2d 432. Under the cases establishing the rule of privilege in situations like the present one, no such showing, as advocated by the real party in interest, is required. In order to establish the privileged character of the statement it is only necessary to show that the insurer of the corporate defendant obtained it for the predominant purpose of transmittal to the insured's attorneys to aid them in defending against any claims. The Suezaki case does not hold to the contrary, does not deal with the instant problem, and is not here applicable.

On oral argument, the real party in interest urged that there was no showing that Woehlre was an employee of Atlas. This is an apparent afterthought and as a specious claim requires no extended consideration. The fair intendment of the declaration filed in support of the motion below, and the apparent position of the real party in interest in his written opposition filed in this court, is that Woehlre was Atlas' employee. Buchanan's statement that he believed Woehlre to be an employee was never disputed and at no time did the real party in interest negate an employer-employee relationship and attempt to effect production of Woehlre's signed statement as that of an independent witness, discoverable within the holding of Greyhound Corp. v. Superior Court (1961) 56 Cal.2d 355, 15 Cal.Rptr. 90, 364 P.2d 266.

Let a peremptory writ of prohibition issue prohibiting the respondent superior court from enforcing or otherwise giving effect to its order for production of the statement of Richard Woehlre herein referred to.

BRAY, P. J., and MOLINARI, J., concur.

208 Cal.App.2d 725

725 **Robert E. REID and Cecil E. Smith, Plaintiffs and Appellants,**

v.

STATE of California, acting by and through the DEPARTMENT OF PUBLIC WORKS, Division of Highways, et al., Defendants and Respondents.

Civ. 10471.

District Court of Appeal, Third District, California.

Oct. 22, 1962.

Proceeding on appeal from an order of the Superior Court, El Dorado County, Robert E. Roberts, J., awarding the state counsel fees for services rendered on property owners' appeal from the sustaining of a general demurrer in their unsuccessful action against the state challenging construction of freeway service road and condemnation of property in connection therewith. The District Court of Appeal, Pierce, J., held that argument, consideration and adverse ruling upon property owners' attack in previous appeal upon the constitutionality of statute allowing attorneys' fees to state became law of the case, and that remittitur directing that state recover "costs" contemplated an allowance by trial court for legal services rendered state on the appeal.

Affirmed.

1. Appeal and Error 🔑1097(1)

Adverse ruling upon property owners' attack upon the constitutionality of statute allowing attorneys' fees to state for legal services on appeal became law of the case precluding consideration of unconstitutionality issue on appeal from subsequent order awarding state counsel fees. West's Ann. Gov.Code, § 647.

2. Eminent Domain 🔑316

In property owners' unsuccessful action challenging construction of freeway service road and condemnation of property in connection therewith, remittitur directing that government recover "costs" included an allowance of attorneys' fees to state for services rendered on the appeal. West's Ann.Gov.Code, § 647.

3. Eminent Domain 🔑315

Provision for undertaking to be conditioned upon payment by plaintiff of all "costs" incurred by State in a proceeding to determine constitutionality contemplates inclusion under term "costs" allowance for legal services on appeal. West's Ann.Gov. Code, § 647.

See publication Words and Phrases for other judicial constructions and definitions.

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H. D. Jerrett, Sacramento, for appellants.

Robert E. Reed, Harry S. Fenton, Robert F. Carlson, Kenneth G. Nellis, Sacramento, for respondents.

PIERCE, Justice.

This appeal is from an order of the trial court awarding respondents printing costs for appellate briefs and counsel fees for services rendered in the case of Reid v. State ex rel. Dept. of Public Works, etc., 193 Cal.App.2d 799, 14 Cal.Rptr. 597.

The issue relating to printing costs has been settled by the parties. Appellants contend that the trial court was without authority to award counsel fees because (1) Government Code, section 647 is unconstitutional in that it is discriminatory and an unreasonable classification; and (2) even if constitutional, the remittitur issued by this court on the former appeal did not authorize the trial court to award counsel fees. Both contentions lack merit.

⊥726 ⊥[1] Appellants had the opportunity to and did attack the constitutionality of Government Code, section 647 in its allowance of attorneys' fees to the state on the former appeal. The question thus raised was considered and ruled upon by the court adversely and the holding is the law of the case. (Reid v. State ex rel. Dept. of Public Works, etc., supra; see also Vinnicombe v. State of California, 172 Cal.App.2d 54, 59, 60, 341 P.2d 705.)

[2, 3] Regarding the second contention, the remittitur contained the standard phrase "Respondents to recover costs." Said Government Code, section 647 provides in part: "The undertaking shall be conditioned upon payment by the plaintiff of all costs incurred by the State in the suit, including a reasonable counsel fee * * *." Such fee is thus within the concept of "costs" as defined in the statute. The allowance of attorneys' fees contemplated by said section includes an allowance by the trial court for legal services on appeal. (Rio Vista Gas Assn. v. State of California, 188 Cal.App.2d 555, 565, 10 Cal.Rptr. 559.)

The order appealed from is affirmed.

PEEK, P. J., and SCHOTTKY, J., concur.

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208 Cal.App.2d 783

⊥783 ⊥**In re John SPOLLINO, on Habeas Corpus.**

Cr. 8508.

District Court of Appeal, Second District,
Division 2, California.
Oct. 23, 1962.

Habeas corpus case. The District Court of Appeal, Fox, P. J., held that finding that divorced husband had partial ability to comply with child support order and that he failed and refused to comply with the order was not sufficient finding of ability to comply, and judgment that he was in contempt was therefore void.

Writ granted.

Habeas Corpus ⟹22(2)

Finding that divorced husband had partial ability to comply with child support order and that he failed and refused to comply with the order was not sufficient finding of ability to comply, judgment that he was in contempt was therefore void, and he was entitled to writ of habeas corpus.

Nicolas Ferrara, Los Angeles, for petitioner.

William B. McKesson, Dist. Atty. of Los Angeles County, Harry Wood and Robert J. Lord, Deputy Dist. Attys., for respondent.

FOX, Presiding Justice.

Spollino's wife secured an interlocutory decree of divorce in October 1960. Custody of their three children was awarded to her. Spollino was ordered to pay $10.00 per week per child for their support. Final judgment was entered in October 1961. In June 1962, an order to show cause re contempt was issued by the Superior Court based upon a certificate signed by Bernard Ramirez, an employee in the office of the trustee of the Superior Court, reciting that defendant was delinquent in his payments a total of $630.00. After the hearing

Spollino was found guilty of contempt on six counts and sentenced to five days in the county jail on each count, the sentences to run consecutively. The minute order states that "The court finds that the Defendant had knowledge of the order; that he had the *partial ability* to comply with said order and that he has wilfully failed and refused to comply with said order * * *" (Emphasis added.)

784 A petition for a writ of habeas corpus setting forth these facts was filed on behalf of Spollino. We issued the writ. The sheriff's return to the writ does not dispute these facts.

This court had a similar question before it in In re Michelena, 150 Cal.App.2d 377, 309 P.2d 861 (hear. den.). In that case the court found that petitioner "had the ability to comply with said order of court *to a greater extent*" than he did in fact comply. (Emphasis added.) In holding that such a finding was inadequate and that petitioner was entitled to his release, this court stated: "An adjudication of contempt cannot be sustained in the absence of an unequivocal finding of ability to comply with the court's order. [Citations.]

"No presumptions or intendments may be indulged in support of the contempt order and the findings and judgment are strictly construed to favor the accused [citations].

"In the instant matter, the finding of ability to comply with the court's order was qualified by the phrase 'to a greater extent'. This is a relative phrase, and not subject to interpretation with any exactitude. A finding of ability to comply 'to a greater extent' with an order requiring payment of specified monthly amounts is not a finding of ability to pay any specific delinquent monthly installment and is so vague, indefinite and uncertain as to leave to conjecture the amount, if any, which the petitioner had the ability to pay and is not a sufficient finding of ability to comply with the court's order to sustain the adjudication of contempt. [Citation.]"

In re Scroggin, 103 Cal.App.2d 281, 229 P.2d 489, is to the same effect. There the court, in a contempt proceeding, found that petitioner had the ability to make a *substantial payment* on a support order in an interlocutory decree of divorce. The court held that this was not a sufficient finding of ability to comply with the court's order and that the judgment of contempt was therefore void and ordered the petitioner discharged.

Under these authorities it is clear that the commitment in this case is void and that Spollino is entitled to be discharged. It is so ordered.

ASHBURN and HERNDON, JJ., concur.

BORCHERS BROS., a California corporation, Plaintiff and Appellant,

v.

BUCKEYE INCUBATOR COMPANY, a division of the Buckeye Corporation, a corporation, Defendant and Respondent. *

Civ. 20152.

District Court of Appeal, First District, Division 2, California.

Oct. 17, 1962.

Hearing Granted Dec. 12, 1962.

Action to foreclose a claim of lien for materials furnished for use on defendant's realty. The Superior Court, Santa Clara County, Byrl Salsman, J., dismissed the complaint against the owner of the realty on ground that the plaintiff had failed to give a pre-lien notice, and the plaintiff appealed. The District Court of Appeal, Shoemaker, J., held that statute which required that, except one under direct contract with owner or one performing actual labor for wages, every person furnishing labor or material for which lien otherwise can be claimed give notice not later than 15 days prior to filing of claim of lien, was not unconstitutional as unfairly discriminating between laborers and materialmen.

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* Opinion vacated 28 Cal.Rptr. 697, 379 P.2d 1.

Affirmed.

Mechanics' Liens ⟹3

Statute which required that, except one under direct contract with owner or one performing actual labor for wages, every person furnishing labor or materials for which lien otherwise could be claimed give written notice to owner and original contractor not later than 15 days prior to filing of claim of lien was not unconstitutional as unfairly discriminating between laborers and materialmen. West's Ann.Code Civ. Proc. § 1193; Cal.Rules of Court, rule 62 (a).

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Bohnett, Hill & Bohnett, by Thomas D. Collins, San Jose, for appellant.

Harold A. Slane, Harold Slane, Jr., Louis R. Hersh, Orlin C. Munns, by Louis R. Hersh, Glen Behymer, Los Angeles, amicus curiae in support of the contentions of the appellant.

Cottrell, Hofvendahl & Roessler, by Russell V. Roessler, John N. Norman, San Jose, for respondent.

SHOEMAKER, Justice.

The plaintiff, Borchers Bros., brought this suit to foreclose its claim of lien for materials furnished to defendants Pierce Manufacturing Co. and Thomas Pierce, for use on real property owned by defendant Buckeye Incubator Company. The complaint failed to allege that plaintiff had given the pre-lien notice required by Code of Civil Procedure, section 1193. Defendant Buckeye Incubator Company demurred generally to the complaint. Upon the sustaining of the demurrer, plaintiff failed to amend within the 10 days allowed by the court. An order dismissing the complaint as to Buckeye Incubator Company was then entered by the court. From this order, plaintiff appeals.

Appellant's sole argument for reversal is that the notice requirement of Code of Civil Procedure, section 1193, is unconstitutional because it unfairly discriminates between laborers and materialmen. The section complained of provides in part as follows: "(a) Except one under direct contract with the owner or one performing actual labor for wages, every person who furnishes labor, service, equipment or material for which a lien otherwise can be claimed under this chapter, must, as a necessary prerequisite to the validity of any claim of lien subsequently filed, cause to be given not later than 15 days prior to the filing of a claim of lien a written notice as prescribed by this section, to the owner or reputed owner and to the original contractor." Appellant points out that this provision does not require wage laborers to give the 15 days' notice, but it does require all other lien claimants (except those under direct contract with the owner) to do so. Appellant contends that the California Constitution places materialmen and laborers in the same class and bestows no preference to one group over another.

Appellant argues that the Legislature was without authority to create preferences between laborers and materialmen and thereby alter the classification established by the Constitution.

However, this court most recently has held the notice requirement of Code of Civil Procedure, section 1193, to be constitutional. In Alta Building Material Co. v. Cameron (1962) 202 A.C.A. 330, 20 Cal. Rptr. 713, the plaintiff, having failed to give the required pre-lien notice, brought suit in the municipal court to foreclose its claim of lien for materials furnished to a plastering contractor for use upon the defendants' real property. The municipal court held the notice requirement unconstitutional and gave judgment for the plaintiff. On appeal, the appellate department of the superior court held to the contrary and directed the municipal court to enter judgment in favor of defendants. This court then accepted transfer of the cause pursuant to rule 62(a) of the California Rules of Court. In holding Code of Civil Procedure, section 1193, subdivision (a), to be constitutional, we made reference to the Reliable Steel, Hellen, and Miltimore cases; Reliable Steel Supply Co. v. Croom, 181 Cal.App.2d Supp. 831, 5 Cal.Rptr. 310; Hellen v. Stephenson, 197 Cal.App.2d Supp. 863, 18 Cal.Rptr. 361; Miltimore v. Nofziger Bros. Lumber Co., 150 Cal. 790, 90 P. 114 (relied on by appellant), and thoroughly discussed the "discrimination" argument urged herein.

Appellant and the amicus curiae in support of his position have raised no issues which were not thoroughly considered by this court in the Alta case.

The order dismissing appellant's complaint as to Buckeye Incubator Company is affirmed.

KAUFMAN, P. J., and AGEE, J., concur.

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208 Cal.App.2d 780

780 **The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Benny Estrada AMADO, Defendant and Appellant.

Cr. 8210.

District Court of Appeal, Second District, Division 2, California.

Oct. 23, 1962.

Prosecution for possession of heroin. The Superior Court of Los Angeles County, David Coleman, J., entered a judgment of conviction. The defendant appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Herndon, J., held that the evidence sustained the conviction and the police officers, who had some information on defendant's alleged possession of narcotics and who were admitted into residence by consent of joint occupant had right, when they observed suspicious activities of defendant through partially open bedroom door, to enter bedroom and seize narcotics.

Judgment affirmed; purported appeal from order denying motion for new trial dismissed.

1. Municipal Corporations 🔑189(1)

Where police officers had received information from confidential informant, whose reliability was unknown, that defendant had narcotics at his residence, officers were in pursuit of both their right and their duty in going to defendant's residence for purpose of seeking an interview with him.

2. Searches and Seizures 🔑7(27)

Entry of police officers into defendant's residence was proper where consent had been given by joint occupant.

3. Searches and Seizures 🔑3(1)

Where police officers were lawfully within premises by consent of joint occupant, it was reasonable for officers in performance of their duties to investigate suspicious conduct of defendant and his companion which they had observed through partially open bedroom door, especially in view of brother's assertion that there were no other persons in building.

4. Searches and Seizures 🔑3(1)

Police officers who had information concerning defendant's possession of narcotics and who were let into his residence by permission of joint occupant and who saw suspicious activities of defendant through partially open door were not guilty of an unlawful search and seizure in walking through partially open door and seizing heroin. West's Ann.Health & Safety Code, § 11500.

5. Poisons 🔑9

Evidence sustained conviction for possession of heroin. West's Ann.Health & Safety Code, § 11500.

Howard E. Beckler, Hollywood, for appellant.

Stanley Mosk, Atty. Gen., George W. Kell, Deputy Atty. Gen., for respondent

⌊781 ⌊HERNDON, Justice.

This is an appeal by Benny Estrada Amado from a judgment convicting him of the possession of heroin in violation of section 11500 of the Health and Safety Code, and from the order denying his motion for a new trial. Appellant was also found to have suffered a prior conviction for the same offense and sentenced to state prison for the term prescribed by law. He advances only two contentions as the grounds upon which he seeks a reversal of the judgment: (1) that the incriminating evidence against him was obtained by means of an unlawful search and seizure; and (2) that certain of the testimony of the investigating police officers is inherently improbable.

[1] Three Los Angeles police officers testified that they had received information from various informants that the appellant was dealing in heroin. On August 24, 1961, at approximately 4 p. m. a confidential informant, whose reliability was unknown and whose identity the officers declined to reveal, advised the officers that appellant then had narcotics at his residence. At approximately 5 o'clock p. m. the officers arrived at appellant's residence for the purpose of seeking an interview with the suspect. Clearly this was in pursuit of both their right and their duty. (People v. Michael, 45 Cal.2d 751, 754, 290 P.2d 852; People v. Martin, 45 Cal.2d 755, 761, 290 P.2d 855.)

Upon arrival, the officers encountered appellant's brother who was seated upon the front steps. They identified themselves and stated the purpose of their call. The brother also identified himself and advised the officers that he lived in the house. He was then asked, "Can we go in the house and talk about it?" He answered, "Yes" or "Sure" and led the way inside. The brother was then asked whether appellant or anyone else was home at the time. He "shook his head in negative fashion". The officers, however, heard male voices coming from an adjoining bedroom, the door of which was partially open. One of the officers went to the door, looked inside and observed appellant and another man seated on the bed "cutting" heroin. The officer thereupon entered the bedroom and placed appellant under arrest. Appellant admitted his ownership of the narcotics and, upon being asked whether there were any more in the house, he produced from his pocket three condoms also containing heroin.

[2–4] Obviously, the entry of the officers into the residence was proper since consent thereto had been given by a joint occupant. (People v. Ransome, 180 Cal.App.2d 140, 145, 4 ⌊Cal.Rptr. 347; People v. Yancy, ⌊782 196 Cal.App.2d 665, 667, 16 Cal.Rptr. 766.) Indeed, appellant concedes that the officers were given permission to enter his residence, but contends that their investigation proceeded beyond the scope of their license. Once lawfully within the premises, it was entirely reasonable for the officers in the performance of their duties to investigate the suspicious conduct of appellant and his companion which they observed through the partially open door to the adjoining room, especially in view of the brother's assertion that there was no other person in the building. Moreover, a search implies a prying into hidden places for that which is concealed, and the assumption that the object searched for may have been concealed. (People v. Bly, 191 Cal.App.2d 352, 356, 12 Cal.Rptr. 542.)

[5] Appellant did not elect to take the witness stand, but his brother and sister gave testimony which in some respects contradicted that of the officers. The evidence supporting the judgment is clearly sufficient and in no sense is it inherently improbable.

Judgment affirmed; purported appeal from order denying motion for new trial dismissed.[1]

FOX, P. J., and ASHBURN, J., concur.

208 Cal.App.2d 567

⊥567 ⊥**The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

James Franklin TABB, Defendant and Appellant.

Cr. 7742.

District Court of Appeal, Second District, Division 1, California.

Oct. 16, 1962.

Hearing Denied Jan. 8, 1963.

Defendant was convicted in the Superior Court, Los Angeles County, Lewis Drucker, J., of unlawfully possessing heroin and he appealed from the judgment and an order denying his motion for new trial. The District Court of Appeal, Wood, J., held that evidence that police officers knew that a certain street intersection was a hangout for violators of narcotics laws, that defendant who they saw on the corner was a user of narcotics, and that defendant, when he looked toward their approaching police car put an object into his mouth and threw another object over his head was sufficient to support a finding of probable cause for arrest of defendant without a warrant.

Judgment and order denying motion for new trial affirmed.

1. Arrest ⇨63(4)

Knowledge by police officers that a location is a hangout for violators of narcotic laws may be considered in determining whether officers had probable cause for making an arrest without a warrant.

2. Arrest ⇨63(4)

Conduct by a person indicating an attempt to dispose of contraband by putting it into his mouth or throwing it away is a material factor in determining probable cause for arrest without a warrant.

3. Arrest ⇨63(4)

Evidence that police officers knew that a certain street intersection was a hangout for violators of narcotic laws, that defendant who they saw on the corner was a user of narcotics, and that defendant, when he looked toward their approaching police car put an object into his mouth and threw another object over his head was sufficient to support a finding of probable cause for arrest of defendant without a warrant. West's Ann.Pen.Code, § 836, subd. 1.

4. Criminal Law ⇨394.6(4)

Evidence sustained finding that a heroin capsule which officers found on the sidewalk near the place where they arrested defendant had been spat out by defendant after he attempted to swallow it, and that officers did not obtain the capsule illegally, by choking defendant in an attempt to prevent him from swallowing the pill.

5. Criminal Law ⇨232, 641(1)

Record failed to show defendant was not properly represented by counsel at preliminary examination and at trial, even though counsel did not require prosecution to show cause why defendant was arrested without a warrant.

◆

James Franklin Tabb, in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Peter Graber, Deputy Atty. Gen., for respondent.

⊥WOOD, Presiding Justice. ⊥568

Defendant was accused of unlawfully possessing heroin. He denied allegations of the information that he had been convicted twice previously of violating section 11500 of the Health and Safety Code. Trial by jury was waived. Upon stipulation, the case was sub-

[1] See section 1237 of the Penal Code as amended, statutes of 1961.

mitted upon the transcript of the preliminary examination, with the right to present additional evidence. Defendant was adjudged guilty. The allegations as to prior convictions were found to be true. Defendant was sentenced to state prison, and it was ordered that the sentence run concurrently with the sentence in another case. Defendant filed a notice of appeal. It will be assumed that the appeal is from the judgment and the order denying the motion for a new trial.

Appellant contends that the heroin, received in evidence, was obtained by illegal search and seizure, and that the evidence was insufficient to support the judgment.

Prior to the arrest on the occasion involved herein, Officers Crowe and Hannon knew that the defendant was a user of narcotics—Officer Crowe had arrested him previously, and the defendant had told Officer Hannon that he was a user of heroin.

On December 10, 1960, about noon, while police officers Crowe and Hannon were in a "black and white" police car, travelling south on Compton Avenue, in Los Angeles, near 56th Street, they saw six or seven persons on the sidewalk at the southeast corner of the intersection of those streets. The officers knew that the intersection was frequented by narcotic addicts. Officer Crowe, who was driving the car, drove it diagonally across the intersection to the curb at the southeast corner of the intersection where the persons were standing.

Officer Hannon testified that he thought that, as a result of such driving, one of the "hypes" would run or give them (the officers) probable cause to get narcotics; that as the car approached the corner, he saw the defendant standing on the corner, with his back toward the car; that when the defendant turned around (facing the car) he was holding his hands in front of him, about waist high; defendant looked at the officers and then, with his right hand, put something into his mouth; then, with his left hand, the defendant threw a blue object over his head; the object landed on the sidewalk ⊥569 at a⊥place about 7 feet from defendant; when the object was thrown the officers were in the car which was about 12 feet from the defendant; Officer Hannon (witness) jumped out of the car, picked up the object and noticed that it was a balloon which was "knotted" near the end; through a hole in the balloon he saw a capsule therein with white powder in it; at that time he noticed that Officer Crowe was holding the defendant "by the arms or by the shoulder," and that the defendant was coughing; the defendant choked hard and spat an object onto the sidewalk; the object was a capsule containing white powder; he (witness) wrapped the balloon and the capsule in paper, and later delivered them to the property section of the police department; neither of the officers choked or attempted to choke the defendant; after defendant was arrested he said to the officers: "I know you have got me dead bang, but don't arrest me because you know I am on parole"; then the defendant said that the officers should have arrested the man in the black shirt who was the dealer from whom he had just purchased the two caps for $6.00.

Officer Crowe testified that he stopped the police car abruptly at the southeast corner of the intersection and at that time, when he was about 10 feet from the defendant, he saw the defendant turn around, look at the car, and then make a throwing motion with his left hand; he (witness) got out of the car and took the defendant into custody; while he was arresting and handcuffing the defendant, the defendant was gagging and a white capsule dropped from defendant's mouth; the defendant said that he had just purchased the two caps from a person who had just walked around the corner; he (officer) had observed that a person wearing a black shirt had walked fast while going away from the corner; defendant said that he could not have swallowed the capsule, because he needs water in order to swallow a pill.

Defendant testified that while he was going into a liquor store to get whiskey he saw the officers come across the street to the place where he was; the police car stopped, and Officer Crowe ran and grabbed him around the neck; then, when that officer started choking him, the other officer (Hannon) grabbed defendant's right arm and put it behind defendant's back; one of the officers hit defendant's stomach; while an officer was choking him, Officer Crowe said, "Don't swallow it"; after one of the officers had handcuffed him, the other officer went to the front of the liquor store and came back ⌊570 with a balloon; he (defendant) did not throw the balloon and he did not know what happened—that a guy (wearing a black shirt) ran around the corner; the officers found another capsule near defendant while they were choking him; that capsule did not come from his mouth, and he had not seen it before; he had not purchased any narcotics, and he was not trying to do so—he had been talking to the guy who ran away; he did not tell the officers that he had just purchased the balloon, nor tell them that the man who ran away was a dealer; he had been taking the nalene test during a period of approximately two months preceding the arrest. Defendant testified further that he had been convicted twice of violating section 11500 of the Health and Safety Code.

In rebuttal, Officer Crowe testified that he did not place his hand around defendant's throat; and that neither of the officers hit defendant in the stomach.

The balloon and capsules were received in evidence. It was established that the capsules contained heroin. The officers did not have a warrant of arrest.

Appellant asserts that his arrest was illegal because the officers did not have a warrant of arrest or have probable cause to believe that he had committed a crime.

A peace officer may make an arrest without a warrant when he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence. (Pen.Code, § 836, subd. 1.) "Probable cause for an arrest is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused." (People v. Fischer, 49 Cal.2d 442, 446, 317 P.2d 967, 970.)

[1-3] The officers knew that said intersection was frequented by narcotic addicts. They had apprehended many such addicts at this corner. Knowlege by police officers that a location is a hangout for violators of narcotic laws may be considered in determining whether the officers had probable cause for making an arrest. (People v. Taylor, 174 Cal.App.2d 448, 451, 344 P.2d 837.) In the present case, the officers knew that defendant was a user of narcotics. As the car was approaching the corner, one of the officers saw defendant among those persons who were on the corner. The other officer recognized the defendant immediately after the car stopped. When defendant turned and looked toward the approaching police car, he put an object into his mouth and threw another object over his head. Conduct by a person indicating ⌊571 an attempt to dispose of contraband by putting it into his mouth or throwing it away is a material factor in determining probable cause. (See People v. Pendarvis, 178 Cal.App.2d 239, 2 Cal.Rptr. 824.) The evidence was sufficient to support a finding of probable cause.

The balloon, containing heroin, was not obtained as a result of a search. Officer Hannon, after seeing the defendant throw the balloon, picked it up from the sidewalk. No search of the defendant, or of any person or place, was involved in the matter of obtaining that evidence.

[4] Appellant asserts that the capsule, containing heroin, which came from his mouth was obtained illegally in that an officer choked him. The officers denied that they or either of them choked or hit the defendant. There was evidence that defendant put the capsule into his mouth, that he was coughing and gagging, and that he needed water in order to swallow a pill. The trial judge, while making statements just preceding the announcement of his decision, said that the defendant spat out the capsule. Such statement indicates that the judge found that an officer did not choke the de-

fendant. This case is factually distinguishable, of course, from cases cited by defendant wherein it was found that the conduct of the officers in obtaining the evidence amounted to brutality and it shocked the conscience. The evidence herein was sufficient to support a finding that the heroin, which defendant had put into his mouth, was not obtained illegally by the officers.

[5] Appellant also asserts that he spoke to his attorney (who represented him at the trial) regarding the matter of requiring the prosecution to show cause why defendant was arrested without a warrant. He asserts that he thought that his attorney was going to raise that issue. It seems that defendant is contending that he was not adequately represented by counsel at the trial. He did not advise the trial judge that he considered that he was not properly represented. The record shows that he was properly represented by counsel at the preliminary examination and at the trial.

The judgment and the order denying the motion for a new trial are affirmed.

FOURT and LILLIE, JJ., concur.

58 Cal.2d 580, 375 P.2d 425

⌊580 ⌊**AGGREGATES ASSOCIATED, INC.,**
Plaintiff and Respondent,
v.
Paul PACKWOOD, Defendant and Appellant.
S. F. 20716.

Supreme Court of California,
In Bank.
Oct. 24, 1962.

Action by creditor against debtor and against defendant, who posted a certified check in lieu of a performance bond, arising out of an alleged fraudulent transfer of property by contractor in fraud of creditors. From an adverse judgment of the Superior Court, Santa Clara County, Raymond G. Callaghan, J., the defendant appealed. The Supreme Court, Dooling, J. pro tem., held that where material to be salvaged was contractor's compensation under contract with city for demolition of twelve buildings, and defendant, who had posted a certified check in lieu of performance bond, was notified by city that if it did not make arrangements to complete demolition of last two buildings the city would take over and deduct costs from the certified check, agreement between contractor and defendant under which defendant was to be paid $5 per hour for supervising demolition charge and under which contractor transferred all right, title and interest in the buildings to the defendant, did not constitute a fraudulent conveyance of property to the defendant, who did not recover enough from salvaged materials to cover the cost of labor and his own salary.

Judgment reversed.

Opinion, 21 Cal.Rptr. 134, vacated.

1. Fraudulent Conveyances 🔑28

Where materials to be salvaged was contractor's compensation under contract with city for demolition of twelve buildings, and defendant, who had posted certified check in lieu of performance bond, was notified by city that if it did not make arrangements to complete demolition of last two buildings the city would take over and deduct costs from the certified check, agreement between contractor and defendant under which defendant was to be paid $5 per hour for supervising demolition charge and under which contractor transferred all right, title and interest in the buildings to the defendant, did not constitute a fraudulent conveyance of property to the defendant, who did not recover enough from salvaged materials to cover cost of labor and his own salary. West's Ann.Civ.Code, §§ 3439.02, 3439.04, 3439.07, 3440.

2. Fraudulent Conveyances 🔑295(1, 2)

Proof of fraud may be made by circumstantial evidence but actual fraud must be proved by clear and convincing evidence and where circumstances of transfer comport equally with theory of honesty and fair dealing, fraud in the making of a conveyance will not be found. West's Ann.Civ. Code, §§ 3439.04, 3439.07.

3. Fraudulent Conveyances 🔑183(1)

Where a transfer is only constructively fraudulent, and no actual fraud is involved, the grantee is entitled to credit for sums expended in paying other debts of the grantor. West's Ann.Civ.Code, §§ 3439.04, 3439.07.

4. Fraudulent Conveyances 🔑182(2)

Fraudulent grantee who has sold property fraudulently conveyed to him is liable to creditors of his grantor for the amount of the proceeds of such sale which he has converted to his own use. West's Ann.Civ. Code, §§ 3439.04, 3439.07.

5. Fraudulent Conveyances 🔑47

Sale of salvaged material from buildings by a contractor engaged in the razing of buildings cannot be classified as the sale of a "stock in trade" within the meaning of the bulk sales law. West's Ann.Civ.Code, § 3440.1.

See publication Words and Phrases for other judicial constructions and definitions.

Gilbert Moody and J. Hilary Cook, Turlock, for defendant and appellant.

Frederick S. Reinheimer, San Jose, for plaintiff and respondent.

⊥583 ⊥DOOLING, Justice pro tem.

Plaintiff recovered a judgment against defendants Smith and Packwood in the sum of $1,819.84 and Packwood has appealed.

Smith became indebted to plaintiff in this amount in 1957 and the judgment against Packwood was based upon findings that in 1959 Smith transferred certain property owned by him to Packwood and that this transfer was in fraud of Smith's creditors.

[1] In April 1959 Smith entered into a contract with the City of Turlock to demolish twelve buildings. By the terms of this contract Smith agreed to pay the city the sum of $1,452 and was to become the owner of "all materials composing buildings and other structures" to be demolished. The ⊥584 only⊥compensation to Smith provided by the contract was the transfer to him of these materials to be salvaged. The contract required Smith to furnish the city a performance bond of $10,000. Smith and Packwood entered into a written contract under which Packwood delivered to the city his certified check for $10,000 in lieu of the performance bond and Smith agreed to pay Packwood $3,000 in equal installments on May 18 and June 4, 1959.

In August of 1959 Smith had demolished all but two of the buildings. At that time Smith had failed to pay the premium on his workmen's compensation insurance and the policy was cancelled. The city attorney notified Packwood that if Packwood did not make satisfactory arrangements to take over and complete the job, the city would terminate Smith's contract and complete the demolition itself and compensate itself for the costs thereof from Packwood's certified check which it held as a performance bond. On August 18, 1959, Smith signed the agreement upon which the findings of fraudulent conveyance are based. By this writing Smith hired Packwood as his foreman on the demolition job and agreed to pay Packwood $5 per hour for each hour devoted to said employment. Smith further transferred to Packwood all his right, title and interest in "all buildings, improvements and property acquired by him or to be acquired by him" under Smith's contract with the city and authorized Packwood to sell the salvaged property, to pay Smith's debts incurred in performing the contract with the city, and to pay himself the $3,000 owed to him under their first agreement.

Packwood thereupon undertook the supervision of the demolition of the two remaining buildings, devoting thereto 164 hours. Smith remained on the job and kept the time of the employees. Packwood sold salvaged brick and two salvaged steel beams for a total of $6,627 and paid therefrom to Smith's creditors, who had furnished labor and materials on the demolition job, $5,914.[1] The remaining $713 did not fully pay Packwood for his 164 hours devoted to supervising the work of demolition, which at the agreed rate of $5 per hour amounted to $820, and Packwood has received no part of the $3,000 agreed to be paid him for furnishing the performance bond.

For a clear understanding of the questions involved, it⊥must be noted that under ⊥585 Smith's contract with the city his title to the salvaged materials only vested in Smith at the time that each building was actually demolished. Smith bound himself by his contract with the city to demolish the buildings and could only claim the benefits of the contract as he performed the services agreed upon. It cannot be claimed that Smith owned the buildings before demolition. Under the express terms of his contract with the city, Smith agreed "to receive and accept the materials composing buildings and other structures * * * as his own, to keep and dispose of the same in whatever legal manner he sees fit. * * *"

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[1] Included in this $5,914 was $500 paid to the City of Turlock for certain damages caused by the work of demolition and for some minor failures of complete performance.

It follows that if Packwood had not undertaken the completion of the contract and had permitted the city to terminate its contract with Smith, the material from the two undemolished buildings would never have become Smith's nor have become available to satisfy any of Smith's creditors, including plaintiff. Stated in another way, Packwood could only acquire title from Smith to the salvaged material from the two undemolished buildings under his August 18 contract with Smith by completing Smith's contract with the city to demolish these two buildings, and he could only demolish the two buildings by paying the cost of the labor and equipment required for such demolition. The plaintiff, if Smith himself had completed the contract, could only satisfy his debt out of the salvaged material after Smith had acquired title thereto, and Smith could only acquire title thereto when the material was taken from the buildings by their demolition. Since the plaintiff could not complain if Smith himself had paid for the cost of demolition out of the proceeds from the sale of the salvaged material, it is not easy to see how the plaintiff has been injured or can complain because Packwood, acting in place of Smith, paid for the cost of demolition of the same buildings out of the proceeds from such sales.

Plaintiff relies upon cases which hold that a fraudulent grantee is not entitled to reimbursement for outlays made in connection with the acquisiton of property in fraud of creditors. (E. g., Butler v. San Francisco Gas etc. Co., 168 Cal. 32, 141 P. 818; Burke v. Koch, 75 Cal. 356, 17 P. 228; Swinford v. Rogers, 23 Cal. 233; Goodwin v. Hammond, 13 Cal. 168.) These cases do not touch the primary question here insofar as the materials sold may have come from the two undemolished buildings and the proceeds therefrom may have been used to pay the cost of their demolition.
586 The City of Turlock had title to the property until these buildings were demolished. For either Smith or Packwood to acquire that outstanding title the buildings had to be demolished. To demolish the buildings the cost of demolition had to be paid. Packwood, by paying the creditors who had furnished labor annd equipment in the demolition, paid only the necessary expense of acquiring the city's title, not Smith's, and it could not be a fraud on Smith's creditors to acquire the city's title because his creditors could under no circumstances subject the city's title to the satisfaction of their claims against Smith.

A case nearly in point is Ackerman v. Merle, 137 Cal. 169, 69 P. 983. In that case, a fraudulent grantee took property from the creditor which was subject to a mortgage. The fraudulent grantee paid off the mortgage and the court held that the fraudulent grantee was entitled to credit for this payment. The court said at page 171, 69 P. at page 984: "Their [the creditors of the fraudulent grantee] rights in the property are not enlarged or extended by the fraudulent transfer. They can get nothing for the mere sake of punishing the fraudulent grantee, and are entitled in equity only to have such interest in the property applied to the satisfaction of their claims as has been fraudulently conveyed away." The court quoted with approval from Hamilton Nat. Bank v. Halstead, 134 N.Y. 520, 31 N.E. 900: "If the fraud had not been consummated, only the value of the property in excess of the mortgage could have been made available in payment of the claims of the creditors. As to that interest secured by the mortgage, no wrong was done them." Equally, it would seem no property in the salvaged materials could have been acquired without incurring the cost of demolition of the buildings, and a similar principle seems applicable.

The evidence is completely silent as to whether (with the exception of the one lot of salvaged brick, hereinafter discussed, which Packwood received before the execution of his contract with Smith on August 18, 1959, and which was sold by Packwood for $754.67) any of the salvaged material sold by Packwood came from buildings other than the two which were razed under

Packwood's supervision, or what amount of money was expended in the razing of these two buildings. These facts are material because Packwood, as we have seen, would clearly be entitled to set off against the amounts received by him from the sale of salvage from these two buildings the reasonable cost of razing them.

As to one lot of salvaged brick sold by ⌊587 Packwood ⌊for $754.67, the testimony shows that this was transferred to Packwood and removed from the job-site by him with Smith's consent before August 18, 1959. Since this transaction antedated the alleged fraudulent conveyance of August 18 and was a separate consummated conveyance from Smith to Packwood, it properly should be excluded from the total of $6,627 received by Packwood from the total sales of salvaged materials under the August 18 contract. This would reduce the amount received by Packwood under the conveyance of August 18 (which was alone attacked and which the findings alone find to have been fraudulent) to $5,872.33.

With these facts in mind, we proceed to a consideration of the further points made by the parties.

The trial court found: That the conveyance of August 18 was made with the actual intent of Packwood to defraud Smith's creditors (Civ.Code, § 3439.07); without Smith receiving a fair consideration from Packwood while Smith was insolvent (Civ.Code, § 3439.04); and without an immediate transfer of possession to Packwood (Civ.Code, § 3440).

[2] Packwood denied any intention to defraud plaintiff or any of Smith's creditors, and the finding of an actual intent to defraud must be supported by circumstantial evidence, if at all. Section 3439.07 requires "actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors." Packwood was not informed of plaintiff's claim against Smith until after the conveyance to him of August 18. He knew, of course, that Smith was having difficulties in completing the particular demolition job on which he was engaged and had actually failed to pay his workmen's compensation insurance premiums which precipitated the city's threat to cancel his contract with the city; but there could have been no actual intent to defraud Smith's creditors on the demolition job, who were the only creditors of Smith of whom Packwood is shown to have had any knowledge on August 18, 1959, when the conveyance to Packwood was made, because Packwood not only undertook to, but also actually did, pay the claims of all such creditors from the sale of the salvaged materials conveyed to him. Packwood had $10,000 of his own money at risk which the city was threatening to foreclose upon to complete the demolition work itself unless Packwood made an arrangement with Smith to complete this work which was satisfactory to the city. It is suggested by plaintiff that the court could infer that Packwood knew of the existence of other creditors either because he ⌊588 ⌊must have realized Smith's difficult financial position from Smith's willingness to pay him $3,000 for furnishing a $10,000 performance bond, or because before furnishing the bond he must have inquired of Smith about his financial condition and learned of the existence of Smith's outstanding debts. It is also suggested that the speed with which Smith executed the conveyance to Packwood is a badge of fraud from which the actual intent to defraud may be inferred. While it is true that proof of fraud may, and must often be, made by circumstantial evidence (Fross v. Wotton, 3 Cal.2d 384, 393, 44 P.2d 350), it remains true that actual fraud must be proved by clear and convincing evidence (United States Fid. & Guar. Co. v. Postel, 64 Cal.App.2d 567, 571, 149 P.2d 183), and that "where the circumstances of the transfer comport equally with the theory of honesty and fair dealing, fraud will not be found." (Hedden v. Waldeck, 9 Cal.2d 631, 636, 72 P.2d 114.) The speed of the conveyance was natural in view of the fact that Smith was advised by the city that his contract would be cancelled unless he made an arrangement satisfactory with the city to complete the job,

and that the proposed arrangement with Packwood was satisfactory to the city. No sinister inference can properly be drawn from the fact that Smith speedily acquiesced under these circumstances. The inference of actual knowledge of outstanding creditors of Smith from the circumstances surrounding the furnishing of the bond falls far short of the sort of proof required to establish actual fraud and rises no higher than mere surmise and conjecture.

Turning to the finding of Smith's insolvency, Civil Code, section 3439.02 provides: "A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." "Insolvency" is given in statutes and court decisions two distinct meanings: It may mean, as defined in section 3439.02, "the insufficiency of the entire property and assets of an individual to pay his debts," or it may mean that "even though the present fair salable value of his assets exceeds the amount of his debts, 'when he is unable to pay his debts from his own means as they become due.'" (Gaspar v. United Milk Prod. of Cal., 62 Cal.App.2d 546, 554, 144 P.2d 867 and cases cited.) As noted in Gaspar at p. 555, 144 P.2d at p. 872: "This confusion in the meaning to be given to the term 'insolvency' was one of the reasons for the drafting of the Uniform Fraudulent ⌊589 Conveyance Act. (See Commissioners' Prefatory Note, 9 Uniform Laws Annotated 326.)" While the evidence of Smith's current difficulties in the performance of the demolition contract with the City of Turlock might support a finding of his insolvency in the sense that he was unable to pay his debts as they came due, this fell short of proof that Smith was insolvent under the definition of the Uniform Fraudulent Conveyance Act which is set forth in section 3439.02 of our Civil Code above quoted. There was no proof offered of Smith's assets on August 18, 1959. The finding of his insolvency is therefore unsupported by the evidence. (Miller v. Keegan, 92 Cal.App.2d 846, 851–852, 207 P.2d 1073.) Civil Code, section 3439.04, requires both insolvency and the want of a fair consideration to render the transfer fraudulent. Thus the lack of evidence to support the finding of insolvency renders the finding of a lack of fair consideration unimportant. However, even disregarding the $3,000 owed to Packwood for furnishing the $10,000 bond, the sale of the material received under the transfer of August 18 netted only $5,872.33 and Packwood paid out to Smith's creditors more than that amount, $5,914. His $10,000 check was at stake and a transaction by which he netted nothing after paying Smith's creditors, except the salvaging of his $10,000 check, does not appear to bear any mark of unfairness. While Packwood retained $713 this was less than the $820 earned by Packwood for his services at $5 per hour under the August 18 agreement and there was no evidence that $5 per hour was not a reasonable compensation for those services. As hereinafter noticed this $713 was also less than the $754.67 received from the sale of brick transferred to Packwood by Smith before August 18, 1959.

Civil Code, section 3440, provides: "Every transfer of personal property * * * made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery followed by an actual and continued change of possession of the things transferred, is conclusively presumed fraudulent and void as against the transferor's creditors * * *." Packwood testified that, with the exception of the bricks previously referred to which he took from the job-site before August 18, 1959, and sold for $754.67, the rest of the salvaged material was left by him on the job-site until it was sold to third persons. As to any such material from buildings already demolished (and the record as noted does not show how much, if any, such material there was) to ⌊590 satisfy section 3440 Packwood was under the duty to take immediate delivery and possession. As to the material in the two undemolished buildings as above pointed out, no title vested in Smith, and hence none could vest in Packwood until the material was removed from the buildings in course of demolition. By analogy to the cases involving the sale of growing crops, while no delivery and possession could, or need be, taken by Packwood until the materials were removed from the buildings, upon their being removed from the buildings it became his duty as against Smith's creditors to take immediate possession of them at that time. In the analogous situation of the sale of unharvested crops, it has been held that while section 3440 has no application to such crops until harvested, immediate possession must be taken by the buyer to satisfy section 3440 when the crops are harvested. (O'Brien v. Ballou, 116 Cal. 318, 321, 48 P. 130; Westcott v. Nixon, 132 Cal.App. 490, 495, 23 P.2d 75.)

Since Smith was still on the job and Packwood was superintending the work for Smith in the performance of Smith's contract with the city, it appears that Smith's possession of the materials continued unchanged, and the failure of Packwood to take personal possession of the bricks supports the court's finding: "That the transfer * * * by * * * Smith to * * * Packwood * * * was not accompanied by an immediate change of possession and control of the property involved." We note again that while this finding is supported as to the materials acquired by Packwood under the August 18 contract those materials as above pointed out were sold for $5,872.33, and the salvaged bricks of which Packwood took possession prior to August 18 and sold for $754.67 cannot properly be included. Thus this finding is only supported as to materials sold for $5,872.33 and not as to materials sold for $6,627 as found by the court.

[3] The trial court gave judgment for $1,819.84, the full amount of plaintiff's claim, although admittedly Packwood paid out to Smith's creditors on the demolition job all but $713. Plaintiff attempts to justify this recovery on the ground that a fraudulent grantee is liable to the fraudulent grantor's creditors to the extent of any money which he may have received from the sale of the property fraudulently conveyed to him. The rule is not so broad as claimed by plaintiff. We have seen that in any event Packwood is entitled to credit in an indeterminate amount for the payments made by him for the actual cost of the demolition of the two buildings which were demolished after he assumed supervision under the August 18 agreement with Smith. It is also the general rule, to which we subscribe, that where the transfer is only constructively fraudulent, and no actual fraud is involved, the grantee is entitled to credit for sums expended in paying other debts of the grantor. (Adams v. Young, 200 Mass. 588, 86 N.E. 942 and cases cited on pp. 943–944; Leqve v. Stoppel, 64 Minn. 74, 66 N.W. 208, 212; New York Public Library v. Tilden, 39 Misc. 169, 79 N.Y.S. 161, 171–172; Diamond Coal Co. v. Carter Dry-Goods Co., 20 Ky. 1444, 49 S.W. 438, 440; see also 24 Am. Jur., pp. 276–277.) The rule is otherwise in the case of actual fraud. (37 C.J.S. Fraudulent Conveyances p. 1119 n. 22.) This distinction between constructive and actual fraud was pointed out in the case of Goodwin v. Hammond, supra, 13 Cal. 168, 170, one of the cases relied upon by plaintiff. Under the terms of section 3439.07 above quoted, actual intent to defraud is distinguished from "intent presumed in law," and since the only finding of fraud supported by the evidence is failure to take immediate delivery and possession, such fact only raises a presumption of fraud, i. e., the fraud so established is constructive and not actual. In view of this fact Packwood is entitled to credit for the payments made by him to all creditors on the job including those whose claims did not depend on the demolition of the last two buildings. This view is supported by the rule that except in bankruptcy proceedings the preference of one creditor over another

cannot be attacked. (See United States Fid. & Guar. Co. v. Postel, supra, 64 Cal. App.2d 567, 572, 149 P.2d 183.)

[4] The rule is settled, however, that the fraudulent grantee who has sold the property fraudulently conveyed to him is liable to the creditors of his grantor for the amount of the proceeds of such sale which he has converted to his own use. (Pedro v. Soares, 18 Cal.App.2d 600, 604, 64 P.2d 776; see also Hy-Lo Unit & Metal Products Co. v. Ryon, 21 Cal.App.2d 38, 43, 68 P.2d 393.) This rule might support the money judgment to the extent of the $713 actually retained by Packwood except for the following facts: 1. Packwood actually earned for his services under the August 18 contract $840, which is in excess of the $713 which he retained. 2. Packwood actually received $754.67 from the sale of bricks of which he took and retained possession before the August 18 agreement, and as to which there is no showing of fraud, actual or constructive. Disregarding, as we must, this amount of $754.67, ⊥592 Packwood actually expended in the ⊥payment of Smith's creditors $5914 and actually received less than that amount, $5872.-33, from the sale of salvaged material received under the August 18 agreement.

[5] Plaintiff further argues that the transfer of the material to be salvaged comes within the bulk sales law. (Civ. Code, § 3440.1) The trial court properly refused to so find. The sale of salvaged building material by a contractor engaged in the razing of buildings cannot be classified as the sale of "a stock in trade" within the meaning of this section. (See Phillips v. Byers, 189 Cal. 665, 668–672, 209 P. 557; Shasta Lumber Co. v. McCoy, 85 Cal.App. 468, 472–473, 259 P. 965.)

The claim that the contract to pay Packwood $3,000 for the $10,000 deposit in lieu of bond was usurious adds nothing to plaintiff's case. Packwood has received no part of the $3,000 and usury does not affect the right to recover the principal which is all that Packwood has received, when his $10,-000 check was returned by the city. (Campbell v. Realty Title Co., 20 Cal.2d 195, 196–197, 124 P.2d 810.)

The judgment against the appellant Packwood is reversed.

GIBSON, C. J., and TRAYNOR, SCHAUER, McCOMB, PETERS and WHITE, JJ., concur.

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58 Cal.2d 592, 375 P.2d 431

⊥ **Ben ROSNER, Plaintiff and Appellant,** ⊥592

v.

EDEN TOWNSHIP HOSPITAL DISTRICT et al., Defendants and Respondents.

S. F. 21108.

Supreme Court of California,
In Bank.
Oct. 24, 1962.

Proceeding by a doctor against a township hospital district and others to compel his admission to membership on the medical staff of the township hospital. The Superior Court, Alameda County, Cecil Mosbacher, J., denied the petition for the writ of mandate, and the doctor appealed. The Supreme Court, Gibson, C. J., held that even if doctor, due to criticism made by him relating to treatment of patients or hospital practices, had been "unable to get along with" some doctors or hospital personnel, that fact is not sufficient ground to exclude him from use of hospitals, and that evidence failed to sustain charge, as ground for doctor's exclusion from medical staff of township hospital, that doctor was not worthy in professional ethics.

Judgment reversed with directions.

Opinion, 21 Cal.Rptr. 655, vacated.

1. Physicians and Surgeons 🔑14(1)

Provision of Health and Safety Code that physicians and surgeons must be competent in their respective fields refers to doctors' ability to perform medical and surgical treatments and diagnoses in connection with which they seek to use hospital, not to doctors' general suitability for hospital practice as condition to membership in medical staff of hospital. West's Ann.Health & Safety Code, § 32128, subd. 2.

2. Hospitals 🔑6

Health and Safety Code provision authorizing hospital board of directors to adopt limitations on practice of medicine and surgery in hospital relates to regulation of such practice in hospital by doctors admitted to staff membership and does not authorize board to adopt standard of suitability for hospital practice as condition for admission to medical staff. West's Ann.Health & Safety Code, § 32128, subd. 5.

3. Hospitals 🔑6

Provision of Health and Safety Code that no duly licensed physician and surgeon shall be excluded from staff membership solely because he is licensed by one or other of boards mentioned in Business and Professions Code is to prevent discrimination against osteopaths with respect to hospital practice. West's Ann.Health & Safety Code, § 32128, subd. 5; West's Ann.Bus. & Prof.Code, § 2005.

4. Hospitals 🔑6

Even if doctor, due to criticism made by him relating to treatment of patients or hospital practices, has been "unable to get along with" some doctors or hospital personnel, that fact is not sufficient ground to exclude him from use of hospitals. West's Ann. Health & Safety Code, § 32128, subds. 2, 4, 5.

5. Hospitals 🔑6

Township hospital district could not be permitted to adopt, for exclusion of doctors from use of its hospital, standards which were so vague and ambiguous that they provided substantial danger of arbitrary discrimination in their application.

6. Hospitals 🔑6

Evidence failed to sustain charge, as ground for doctor's exclusion from medical staff of township hospital, that doctor was not worthy in professional ethics.

Robert R. Elledge, Modesta, and Harry Gonick, Oakland, for plaintiff and appellant.

J. W. Moroney, Hayward, for defendants and respondents.

Peart, Baraty & Hassard, Howard Hassard, San Francisco, Musick, Peeler & Garrett and James E. Ludlam, Los Angeles, as amici curiae on behalf of defendants and respondents.

GIBSON, Chief Justice. 594

Dr. Rosner, a physician and surgeon who specializes in thoracic surgery and is licensed to practice in California, appeals from a judgment denying his petition for a writ of mandate to compel his admission to membership on the medical staff of Eden Hospital, which is maintained by the Eden Township Hospital District, a governmental entity functioning under The Local Hospital District Law. (Health & Saf.Code, § 32000 et seq.)

The board of directors of Eden Township Hospital District based its exclusion of Dr. Rosner on the grounds that he was "not temperamentally suitable for hospital staff practice," that he was not worthy in professional ethics, and that he was not worthy in character. It was stipulated that "moral character" and "competence" with respect to "education, skill, and experience" were not in issue. In view of this stipulation the determination of unworthiness of character was outside the issues; moreover, it finds no support in the evidence. 595

With respect to temperamental suitability, the board found that Dr. Rosner was "unable to get along with" the chief of surgery at City of Hope Hospital, had "unpleasantries" at Patton State Hospital, was "unable to get along at" Bella Vista Hospital, had "trouble" or was "unable to get along with" anesthesiologists at two other hospitals, had disputes with his superiors at Corona Naval Hospital, and was "unable to get along with" the medical staff at Levine Hospital of Hayward.

Dr. Rosner had been accorded privileges in approximately 40 hospitals, and the record shows that in several of the hospitals there was friction resulting from disagreements as to treatment of patients, criticisms made by him to hospital officials of certain personnel and practices, or misunderstandings relating to his position and powers. Insofar as the merits of the controversies occurring at those hospitals can be determined from the record before us, Dr. Rosner appears in a more favorable light than the other medical personnel involved.

The evidence relating to the Levine Hospital, where he was employed immediately prior to applying for membership at Eden Hospital, may be summarized as follows: The Levine Hospital is owned by Drs. Samuel and Julius Levine, the latter of whom was also at one time chairman of the board of directors of Eden Hospital. About six months after Dr. Rosner came to Levine Hospital he told Dr. Samuel Levine that a nurse-anesthetist who had assisted him in an operation was incompetent, and Dr. Levine replied that she was highly recommended. Two days later a baby died as a result of an anesthetic given by the nurse, and Dr. Rosner stated to the Levines that the surgeon was responsible because he was in charge of the operation and that the Levines were also responsible because they had been informed that the nurse was incompetent. Subsequently Dr. Rosner, in reviewing the record of the operation, said to one of the Levines that the record "on its face" showed malpractice.

On another occasion there was an argument when Dr. Samuel Levine stated that it ⊥596 was too late to do anything for a patient who had suffered a gunshot wound and Dr. Rosner insisted that the patient be taken to the operating room and efforts made to save him. Dr. Rosner prevailed, and the patient survived and testified at the hearing concerning the argument.

Shortly after these occurrences, Dr. Rosner was told by Dr. Julius Levine that he would be "blocked" in the medical society and all the hospitals in the community.

The by-laws and regulations of the medical staff, adopted by the staff and approved by the board of directors, provide that patients in the hospital may be treated only by members of the staff, that an applicant for membership shall submit proof of worthiness of character, excellence of reputation as to professional ethics, and general suitability for hospital practice, and that the credentials committee in investigating the applicant shall determine his "characteristics of cooperation, apparent ability to get along with others, and general qualifications of personality which would insure in the opinion of the committee, that the applicant would be temperamentally and psychologically suited for cooperative staff hospital functions with other members of the Medical Staff and with other hospital personnel."

Section 32128 of the Health and Safety Code provides: "The rules of the hospital, established by the board of directors pursuant to this article, shall include: 1. Provision for the organization of physicians and surgeons and dentists licensed to practice in this State who are permitted to practice in the hospital into a formal medical staff, with appropriate officers and by-laws and with staff appointments on an annual basis; *2. Provision that membership on the medical staff shall be restricted to physicians and surgeons competent in their respective fields, worthy in character and in professional ethics,* * * * [emphasis added]; 3. Provision that the medical staff shall be self-governing with respect to the professional work performed in the hospital * * *; 4. Provision that accurate and complete medical records be prepared and maintained for all patients (medical records to include identification data, personal and family history, * * * and such other matters as the medical staff shall determine); and, 5. Such limitations with respect to the practice of medicine and surgery in the hosptial as the board of directors may find to be in the best interests of the public health and welfare; provided, that no duly licensed physician and surgeon shall be excluded from staff membership solely because he be licensed by one or the other of the boards mentioned in Section 2005 of the Business and Professions Code.[1]

⌊597 ⌊"Said rules of the hospital shall, insofar as consistent herewith, be in accord with and contain, minimum standards not less than the rules and standards of private or voluntary hospitals operating within the district."

[1] The code section does not refer to general suitability for hospital practice as a condition to membership in a medical staff, and such a requirement does not come within the provision of subdivision 2 that physicians and surgeons must be "competent in their respective fields." The quoted term refers only to the ability of doctors to perform the medical and surgical treatments and diagnoses in connection with which they seek to use the hospital; for example, whether a doctor seeking privileges with respect to thoracic surgery is competent to engage in such surgery. Subdivision 2 does not contain any language authorizing the board to adopt standards of fitness in addition to those enumerated therein.

[2] Nor does subdivision 5 of section 32128 authorize the board to adopt a standard of suitability for hospital practice as a condition for admission to the medical staff. Each of the first four subdivisions of the section relates to a different matter. The language of subdivision 5 authorizing the board to adopt limitations on the "practice of medicine and surgery in the hospital" relates to a fifth subject, namely, the regulation by the board of the practice of medicine and surgery in the hospital by doctors admitted to staff membership. The quoted language is not to be construed as permitting the board to adopt additional requirements as to the subject matters dealt with in the four preceding subdivisions and does not relate to admission to staff membership, the subject dealt with in subdivision 2. Where the Legislature has intended to permit the adoption of supplemental requirements with respect to a subject dealt with in the first four subdivisions, it has expressly said so, as is shown by subdivision 4, which specifies the information to be included in medical records and contains an express provision that additional information may be required.

[3] The fact that subdivision 5 is followed by a proviso prohibiting exclusion of a doctor from staff membership because of the type of license he holds does not militate against this construction of the subdivision. The proviso is not part of subdivision 5 but is a separate provision which limits any subdivision of the section to which its terms can be applied. Although the language of the proviso is directed toward the exclusion of doctors from staff membership (the subject dealt⌊with in subdivision 2), ⌊598 the general purpose of the proviso is broader, i. e., the prevention of discrimination against osteopaths with respect to hospital practice. Making the proviso part of subdivision 2 would not prevent discrimination against osteopaths by means of a regulation under subdivision 5 prohibiting the practice of osteopathy in the hospital. The position of the *proviso* after subdivision 5 does not show that the *subdivision* relates to membership on the medical staff but makes it clear that discrimination by a regulation under that subdivision is also prohibited.

[4] The refusal of access to a district hospital could, as a practical matter, have the effect of denying to a licensed doctor qualified to practice in California the right to fully exercise his profession. (See Wyatt v. Tahoe Forest Hosp. Dist., 174 Cal.App.2d 709, 715, 345 P.2d 93.) The fact that a doctor, due to criticisms made by him relating to treatment of patients or hospital practices, has been "unable to get along with" some doctors or hospital per-

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[1] Section 2005 of the Business and Professions Code refers to the Board of Medical Examiners and the Board of Osteopathic Examiners.

sonnel is not a sufficient ground to exclude him from the use of hospitals. Obviously physicians will not always agree as to the proper treatment for a patient or as to the proper practices in a hospital. The goal of providing high standards of medical care requires that physicians be permitted to assert their views when they feel that treatment of patients is improper or that negligent hospital practices are being followed. Considerations of harmony in the hospital must give way where the welfare of patients is involved, and a physician by making his objections known, whether or not tactfully done, should not be required to risk his right to practice medicine.

[5] Moreover, a hospital district should not be permitted to adopt standards for the exclusion of doctors from the use of its hospital which are so vague and ambiguous as to provide a substantial danger of arbitrary discrimination in their application. In asserting their views as to proper treatment and hospital practices, many physicians will become involved in a certain amount of dispute and friction, and a determination that such common occurrences have more than their usual significance and show temperamental unsuitability for hospital practice of one of the doctors is of necessity highly conjectural. In these circumstances there is a danger that the requirement of temperamental suitability will be applied as a subterfuge where considerations having no relevance to fitness are present. It may be noted that Dr. Rosner opposed election to the board of directors of a slate of candidates endorsed by members of ⊥599 the medical staff and that he has apparently testified for plaintiffs in malpractice cases.

[6] The determination of the board that Dr. Rosner was unworthy in professional ethics was based on findings as to his conduct in the hearings namely, that in his testimony he discussed medical and surgical problems of other doctors, going into needless detail on surgical procedures, and that he misrepresented the nature and extent of his prior hospital experience by speaking of harmonious relations at 23 hospitals when his experience at these hospitals was of a minimal nature. The only medical and surgical problems and procedures discussed by Dr. Rosner were those which led to friction with other doctors, and his testimony was in response to questions asked or in explanation of matters raised by the board's attorney. The finding as to the misrepresentation is of doubtful validity because the fact that Dr. Rosner's experience at the 23 hospitals was minimal does not indicate an absence of harmony. In any event there is no evidence that he misrepresented the nature or extent of his experience at the hospitals.

The judgment is reversed with directions to issue a writ of mandate compelling the board to admit Dr. Rosner to membership on the medical staff.

TRAYNOR, SCHAUER, McCOMB, PETERS, WHITE and TOBRINER, JJ., concur.

58 Cal.2d 599, 375 P.2d 435

⊥**BOARD OF DIRECTORS OF EDEN TOWNSHIP HOSPITAL DISTRICT, Petitioner,** ⊥59
v.
The SUPERIOR COURT OF ALAMEDA COUNTY, Respondent;
Wesley BILL, Real Party in Interest.
S. F. 21116.

Supreme Court of California,
In Bank.
Oct. 24, 1962.

A proceeding by the board of directors of a township hospital district for a writ of prohibition commanding the Superior Court of Alameda County to desist from further proceedings in an action by a patient against the township hospital district or in any other action to compel the hospital to permit a certain doctor to treat the patient in the township hospital after the patient had been admitted to the hospital. The Supreme Court held that directors of township hospital were not entitled to such a writ where Supreme Court, in action by doctor against district, concluded that directors had to admit doctor to hospital medical staff.

Order to show cause discharged, and application for writ of prohibition denied.

Prohibition 🔑7

Directors of township hospital were not entitled to writ prohibiting further proceedings in action by patient against township hospital district or in any other action to compel hospital to permit doctor to treat patient in hospital after patient had been admitted to hospital where Supreme Court, in action by doctor against district, concluded that directors had to admit doctor to hospital medical staff.

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J. W. Moroney, Hayward, for petitioner.

J. F. Coakley, Dist. Atty., and Richard H. Klippert, Deputy Dist. Atty., for respondent.

Gonick & Schmid and Harry Gonick, Oakland, for real party in interest.

600 PER CURIAM.

The Board of Directors of Eden Township Hospital District seeks a writ of prohibition commanding respondent court to desist from any further proceedings in an action by Wesley Bill against Eden Township Hospital District or in any action calculated to furnish the facilities of Eden Hospital to Dr. Ben Rosner.

Dr. Rosner, who is not a party to this proceeding, was denied admission to membership on the medical staff of Eden Hospital. Wesley Bill, one of his patients, was admitted to the hospital, and he obtained a preliminary injunction from respondent court compelling the hospital to permit Dr. Rosner to treat him. Three other patients of the doctor had previously obtained such injunctions.

The board's position is that, under the bylaws of the hospital, only members of the medical staff may treat patients in the hospital, that Dr. Rosner is not a member, and that therefore the board cannot be compelled to permit him to use its facilities. In Rosner v. Eden Township Hospital District, Cal., 25 Cal.Rptr. 551, 375 P.2d 431, it was concluded that the board must admit Dr. Rosner to membership on its staff.

The order to show cause heretofore issued is discharged, and the application for the writ of prohibition is denied.

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58 Cal.2d 577, 375 P.2d 436

Palmer A. BRINK et al., Plaintiffs and Appellants, 577

v.

ALLEGRO BUILDERS, INCORPORATED, Defendant and Respondent.

L. A. 26900.

Supreme Court of California.
Oct. 24, 1962.
As Modified Nov. 2 1962.

Proceeding on application for confirmation of an arbitration award. The Superior Court, Los Angeles County, Gordon L. Files, J., rendered judgment refusing to confirm the award and granting defendant's motion to vacate the award, and plaintiffs appealed. The Supreme Court, McComb, J., held that since the parties to a building contract had agreed that all questions as to rights and obligations arising under contract were subject to arbitration and that, in case of dispute and refusal of either party to arbitrate, the other party might proceed ex parte, upon refusal of contractor to arbitrate on ground that dispute was not arbitrable, owners could proceed unilaterally with ex parte arbitration before arbitrator selected by them without first obtaining court order enforcing the agreement to arbitrate.

Judgment reversed.

Opinion, 21 Cal.Rptr. 438, vacated.

1. Contracts 🔑292½

Where parties to building contract agreed that all questions as to rights and obligations arising under contract were subject to arbitration and that, in case of dispute and refusal of either party to arbitrate, other party might proceed ex parte, upon refusal of contractor to arbitrate on ground that dispute was not arbitrable, owners seeking arbitration could proceed unilaterally with ex parte arbitration before arbitrator selected by them without first obtaining court order enforcing agreement to arbitrate; any statement to contrary in Drake v. Stein, 116 Cal.App.2d 779, 254 P.2d 613, disapproved. West's Ann.Code Civ.Proc. § 1282.

2. Contracts 🔑285(2)

Where parties have agreed that all questions as to rights and obligations under agreement are subject to arbitration, all disputes pertaining to meaning, interpretation and application of any clause in agreement, even those disputes that prima facie appear to be without merit, are subject to arbitration.

3. Contracts 🔑292½

Where contract contains express provisions permitting one arbitrator to proceed upon refusal of either party to arbitrate, party not in default need not seek court aid in invoking arbitration clause. West's Ann.Code Civ.Proc. § 1282.

4. Contracts 🔑292½

Statutory procedure to enforce agreement to arbitrate by court order was designed to afford remedy where agreement does not provide for procedure upon refusal of either party to arbitrate or where contractual scheme has failed, and where contract provides for such contingency, statutory procedure need not be followed. West's Ann.Code Civ.Proc. § 1282.

Palmer A. Brink and Olive H. Brink, in pro. per.

Gang, Tyre, Rudin & Brown and Frank G. Wells, Los Angeles, as Amici Curiae on behalf of plaintiffs and appellants.

W. E. Kalbfleisch, Torrance, for defendant and respondent.

⊥McCOMB, Justice. ⊥57

From an order in favor of defendant, denying plaintiffs' application for the confirmation of an arbitration award, plaintiffs appeal.

Facts: Plaintiffs and defendant entered into a written contract in which defendant agreed to build a house on a lot owned by plaintiffs. Clause 26 of the contract reads, in part: "The following specified items are the sole responsibility of the Owner, and all charges or costs incurred shall be paid by the Owner over and above the contract price.

"(a) Grading of lot for level building site, removing all trees, debris, and other obstructions prior to start of construction."

The grading was done by a Mr. Valenzuela. Plaintiffs contend that defendant chose Mr. Valenzuela to do the work and that it was done defectively. They notified defendant that they felt it was responsible, and demanded that it repay them the amount given Mr. Valenzuela and also pay for the damages incurred.

On February 8, 1960, defendant took the initiative and made a written demand for arbitration of plaintiffs' "claims and accusations, either stated or inferred."

Thereafter defendant consulted an attorney, who advised that it had no responsibility under clause 26 of the contract. It then telephoned plaintiffs and sent a letter dated February 11, 1960, rescinding its demand for an arbitrator.

Plaintiffs, in a letter dated February 12, 1960, stated that they had been informed by telephone of defendant's intention to rescind but that since no letter had arrived, "we are appointing our arbitrator to be sure we are covered."

On February 16, 1960, plaintiffs informed defendant that they were proceeding to arbitration unilaterally, as provided by clause 15 of the contract, which reads: "As between the parties hereto, all questions as to the rights and obligations arising under the terms of the contract, the plans and specifications are subject to arbitration. In case of dispute either party hereto may make a demand for arbitration by filing ⌊579 such demand in writing with the other. One arbitrator may be agreed upon, otherwise there shall be three, one named in writing by each party within five days after demand is given, and a third chosen by the two appointed. Should either party refuse or neglect to appoint said arbitrator or to furnish the arbitrators with any papers or information demanded he or they are empowered by both parties to proceed ex parte. If there be one arbitrator his decision shall be binding; if there be three the decision of any two shall be binding. Such decision shall be a condition precedent to any right of legal action, and wherever permitted by law it may be filed in Court to carry it into effect * * *."

On February 20, 1960, an ex parte arbitration was held before the arbitrator chosen by plaintiffs. Defendant did not select an arbitrator, but did appear and present evidence at the hearing before plaintiffs' arbitrator, after making it clear that it did not thereby intend to waive its objections that the dispute was not within the arbitration clause. The arbitrator made an award in favor of plaintiffs, who then applied to the superior court for confirmation of the award. Confirmation was denied, and defendant's motion to vacate the award was granted.

[1] Question: *Where parties have agreed that in the event there is a dispute and either party refuses to arbitrate the other may unilaterally proceed to select an arbitrator, must the party seeking arbitration first resort to the superior court for an order enforcing the agreement to arbitrate?*

[2] *No.* Where the parties have agreed that all questions as to rights and obligations under an agreement are subject to arbitration, as in clause 15, supra, all disputes pertaining to the meaning, interpretation and application of any clause in the agreement, even those that prima facie appear to be without merit, are the subject of arbitration. (Cf. Posner v. Grunwald-Marx, Inc., 56 Cal.2d 169, 184, 14 Cal.Rptr. 297, 363 P.2d 313.)

[3] When a contract contains express provisions permitting one arbitrator to proceed, as in clause 15, supra, the party not in default is not compelled to seek court aid in invoking the arbitration clause. (Smith v. Campbell & Facciolla, Inc., 202 A.C.A. 169, 172 [2], 20 Cal.Rptr. 606 [hearing denied by the Supreme Court]; Kentucky River Mills v. Jackson, 206 F.2d 111, 119 [7–9] et seq.; 47 A.L.R.2d (1956) 1346–1347.)

At the time the dispute hereunder arose, section 1282 of ⌊580 the Code of Civil Procedure read in part: "A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition any superior court * * * for an order directing that such arbitration proceed in the manner provided for in such agreement."

[4] The statutory procedure to compel arbitration by court order was designed to afford a remedy where the parties have not provided for the contingency that has arisen or where the contractual scheme has failed. The contract in the instant case provides for the very contingency that has arisen; therefore, it is unnecessary to follow the statutory procedure.

Any statement in Drake v. Stein, 116 Cal. App.2d 779, 254 P.2d 613, contrary to the rule announced in this decision is disapproved.

The order is reversed.

GIBSON, C. J., and TRAYNOR, SCHAUER, PETERS, WHITE and TOBRINER, JJ., concur.

58 Cal.2d 601, 375 P.2d 439

⊥601 ⊥**TEITELBAUM FURS, INC., et al., Plaintiffs and Appellants,**

v.

The DOMINION INSURANCE COMPANY, Ltd., et al., Defendants and Appellants.

L. A. 26913.

Supreme Court of California,
In Bank.
Oct. 25, 1962.

Action by insured corporations to recover for alleged theft of furs. The Superior Court, A. A. Scott, J., rendered judgment on verdict for plaintiffs but granted defendants' motion for new trial and plaintiffs appealed and defendants cross-appealed. The Supreme Court, Traynor, J., held that insured corporations were collaterally estopped from recovering for loss resulting from alleged robbery, where president of corporations was convicted of conspiracy to commit grand theft, attempted grand theft, and filing of false and fraudulent insurance claim for the same loss and corporations were his mere alter egos.

Order denying defendants' motion for judgment notwithstanding verdict, and order granting new trial reversed; trial court directed to enter judgment for defendants.

Opinion, 21 Cal.Rptr. 671, vacated.

1. Judgment 🔑540, 725(1)

Doctrine of res judicata precludes parties or their privies from relitigating cause of action that has been finally determined by court of competent jurisdiction, and any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in subsequent lawsuit on different cause of action.

2. Judgment 🔑648

Doctrine of collateral estoppel is applicable in civil case to issues determined in previous criminal prosecution.

3. Judgment 🔑666

Doctrine of mutuality of estoppel as applied to limit scope of collateral estoppel has been abandoned in California.

4. Evidence 🔑207(4), 265(11)

Plea of guilty is admissible in subsequent civil action on independent ground that plea is admission, but such plea is not conclusive for purpose of applying doctrine of collateral estoppel.

5. Judgment 🔑751

Collateral estoppel applies to successive criminal trials.

6. Judgment 🔑648

Insured corporations were collaterally estopped from recovering against theft insurers for loss resulting from alleged robbery, where president of corporations was convicted of conspiracy to commit grand theft, attempted grand theft, and filing of false and fraudulent insurance claim for the same loss and corporations were mere alter egos of president. West's Ann.Pen.Code, § 17.

7. Judgment 🔑559

Criminal judgment that is subject to collateral attack on ground, for example, that it was obtained through knowing use of perjured testimony or suppression or evidence or that it has in effect been set aside by pardon based on defendant's innocence is not res judicata in subsequent action. West's Ann.Pen.Code, § 4900.

◆

Leland, Plattner & Kalik and Horace L. Kalik, Beverly Hills, for plaintiffs and appellants.

Thomas P. Menzies and James O. White, Jr., Los Angeles, for defendants and appellants.

⊥TRAYNOR, Justice. ⊥60

Alleging losses by robbery, plaintiff corporations brought this action to recover $244,510.90 under contracts of insurance with defendant insurers. The jury returned a verdict for plaintiffs, and the trial court granted defendants' motion for new trial on the ground that the evidence was insufficient to support the verdict. The trial court denied defendants' motion for judgment notwithstanding the verdict. Plaintiffs appeal from the order granting a new trial. Defendants appeal from the judgment.

We agree with defendants' contention that their plea of collateral estoppel defeats plaintiffs' action. In a criminal action that became final before the present action was commenced, Albert Teitelbaum, president of plaintiff corporations was convicted of conspiracy to commit grand theft, attempted grand theft, and the filing of a false and fraudulent insurance claim. The conviction was affirmed on appeal. (People v. Teitelbaum, 163 Cal.App.2d 184, 329 P.2d 157, petition for hearing denied Oct. 22, 1958, cert. den., 359 U.S. 206, 79 S.Ct. 604 ⊥738, 3 L.Ed.2d 759.) Plaintiff corporations concede that the claim in this case is for the same loss involved in the criminal conviction and that they are mere *alter egos* of Teitelbaum. The issue adjudicated adversely to plaintiffs in the criminal action is identical with the issue in this action: whether the alleged robbery occurred as plaintiffs contend or whether it was staged by Teitelbaum as defendants contend. By its verdict, the previous jury necessarily found against plaintiffs on this issue.

[1] The doctrine of res judicata has a double aspect: (1) it "precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction." (2) "Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action." (Bernhard v. Bank of America, 19 Cal.2d 807, 810, 122 P.2d 892, 894; see Taylor v. Hawkinson, 47 Cal.2d 893, 895–896, 306 P.2d 797.) In the present case, since plaintiffs' cause of action is different from that of the state in the criminal proceeding, we are concerned with the latter aspect, often termed collateral estoppel.

In the Bernhard case, supra, this court rejected the doctrine of mutuality of estoppel that had been applied to limit the scope of collateral estoppel, and held three questions to be pertinent in determining the validity of the plea. "Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" (19 Cal.2d at p. 813, 122 P.2d at p. 895.) The record in the present case provides affirmative answers to each of these questions.

Notwithstanding the apparent applicability of collateral estoppel, it is contended that the cases in this state do not indicate that a criminal conviction is conclusive in a subsequent civil action. Additionally, plaintiffs urge that the plea be rejected on the ground that since plaintiffs did not have the initiative in the criminal action and since Teitelbaum chose not to testify and was unable to utilize an important witness in the criminal proceeding, they did not have a full and complete day in court on the issue now sought to be foreclosed against them.

[2] The cases do not preclude the application of collateral ⊥estoppel in a civil 605 case to issues determined in a previous criminal prosecution. Those relied upon for the contrary proposition are either based upon the doctrine of mutuality of estoppel (Risdon v. Yates, 145 Cal. 210, 78 P. 641; Burbank v. McIntyre, 135 Cal.App. 482, 27 P.2d 400; Balestreiri v. Arques, 49 Cal.App.2d 664, 122 P.2d 277; American Fire etc. Service v. Williams, 171 Cal.App. 2d 397, 340 P.2d 644) or involve a prior acquittal (In re Anderson, 107 Cal.App.2d 670, 237 P.2d 720; People v. One 1950 Pontiac 2-door Coupe, 193 Cal.App.2d 216, 13 Cal.Rptr. 916) or involve the admissibility as an admission in a civil suit of a plea of guilty in a previous criminal action (Vaughn v. Jonas, 31 Cal.2d 586, 191 P.2d 432).

[3] Since the requirement of mutuality of estoppel was expressly abandoned in the Bernhard case, Risdon v. Yates, supra, and the cases following it are no longer authoritative.

In re Anderson, supra, rejected the plea as applied to a former acquittal on the ground that "'the difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata. The acquittal was "merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused."'" (107 Cal.App.2d 670, 672, 237 P.2d 720, 721; see Helvering v. Mitchell, 303 U.S. 391, 397, 58 S.Ct. 630, 82 L.Ed. 917; Annot. 18 A.L.R.2d 1287, 1315.)

[4] A plea of guilty is admissible in a subsequent civil action on the independent ground that it is an admission. It would not serve the policy underlying collateral estoppel, however, to make such a plea conclusive. "The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy." (Bernhard v. Bank of America, 19 Cal.2d 807, 811, 122 P.2d 892, 894.) "This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case." (Jorgensen v. Jorgensen, 32 Cal.2d 13, 18, 193 P.2d 728, 732.) When a plea of guilty has been entered in the prior action, no issues have been "drawn into controversy" by a "full presentation" of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation. Considerations of fairness to civil litigants and regard for the expeditious administration of criminal justice (see Vaughn v. Jonas, 31 Cal.2d 586, 594, 191 ⊥606 ⊥P.2d 432) combine to prohibit the application of collateral estoppel against a party who, having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action.

[5] Collateral estoppel applies to successive criminal trials (People v. Beltran, 94 Cal.App.2d 197, 203, 210 P.2d 238; People v. Majado, 22 Cal.App.2d 323, 326, 70 P.2d 1015; see People v. Joseph, 153 Cal.App.2d 548, 551, 314 P.2d 1004; Sealfon v. United States, 332 U.S. 575, 578, 68 S.Ct. 237, 92 L.Ed. 180; Annot. 147 A.L.R. 991, 992) and, although not widely adopted, has been applied in the better reasoned cases that have dealt with the problem here presented. (Eagle etc. Insur. Co. v. Heller, 149 Va. 82, 140 S.E. 314, 57 A.L.R. 490; Mineo v. Eureka etc. Insur. Co., 182 Pa. Super. 75, 125 A.2d 612; Austin v. United States, 7 Cir., 125 F.2d 816; see 25 So.Cal. L.Rev. 480; 40 Cal.L.Rev. 225; 50 Yale L.J. 499.) Thus it is significant that this court found support in Eagle etc. v. Heller, supra, in reaching its decision to abandon the requirement of mutuality of estoppel in the Bernhard case. To preclude a civil litigant from relitigating an issue previously found against him in a criminal prosecution is less severe than to preclude him from relitigating such an issue in successive civil trials, for there are rigorous safeguards against unjust conviction, including the requirements of proof beyond a reasonable doubt (Code Civ.Proc. § 2061) and of a unanimous verdict (Pen.Code, § 1164), the right to counsel (In re James, 38 Cal.2d 302, 240 P.2d 596), and a record paid for by the state on appeal (Cal.Rules of Court, rule 33). Stability of judgments and expeditious trials are served and no injustice done, when criminal defendants are estopped from relitigating issues determined in conformity with these safeguards.

[6] Plaintiffs contend, however, that in the absence of mutuality, collateral estoppel ought not be applied against a party who did not have the initiative in the previous action. (See Nevarov v. Caldwell, 161 Cal.App.2d 762, 327 P.2d 111; Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 Stan.L.Rev. 281, 313.) Although plaintiffs' president did not have the initiative in his criminal trial, he was afforded a full opportunity to litigate the issue of his guilt with all the safeguards afforded the criminal defendant, and since he was charged with felonies punishable in the state⊥prison (Pen.Code, § 17), he had every motive to make as vigorous and effective a defense as possible. Under these

circumstances, we hold that any issue necessarily decided in a prior criminal proceeding is conclusively determined as to the parties if it is involved in a subsequent civil action.

[7] It should be noted, however, that a criminal judgment that is subject to collateral attack on the ground, for example, that it was obtained through the knowing use of perjured testimony (Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9) or suppression of evidence (People v. Carter, 48 Cal.2d 737, 747, 312 P.2d 665), or that has in effect been set aside by a pardon based on the defendant's innocence (see Pen.Code, § 4900), is not res judicata in a subsequent action. (See Rest., Judgments, § 11.) Plaintiffs have advanced no grounds that would sustain a collateral attack on the judgment, but they contend that there are special reasons why collateral estoppel should not apply in this case. They point out that Teitelbaum chose not to take the stand in the criminal prosecution except for the limited purpose of denying an alleged admission, and contend that he was unable to secure the testimony of an alleged co-conspirator.

Teitelbaum's election not to testify in his own behalf in the criminal case was presumably made on the assumption that he would benefit thereby. His error, if any, in trial strategy would no more defeat the plea of collateral estoppel than the failure of a litigant to introduce relevant available evidence in any other situation.

Teitelbaum urged his inability to compel the testimony of the alleged co-conspirator on his appeal from the judgment in the criminal case, and it was determined that it did not warrant a reversal. *A fortiori*, it will not sustain a collateral attack upon the criminal judgment.

The order denying defendants' motion for judgment notwithstanding the verdict and the order granting a new trial are reversed and the trial court is directed to enter judgment for defendants. Defendants shall recover their costs on these appeals.

GIBSON, C. J., and McCOMB, PETERS, WHITE and TOBRINER, JJ., concur.

SCHAUER, J., concurs in the judgment.

58 Cal.2d 618, 375 P.2d 442

John F. BILYEU, Plaintiff and Appellant, 618

v.

STATE EMPLOYEES' RETIREMENT SYSTEM, Claimant and Appellant.

S. F. 20829.

Supreme Court of California,
In Bank.
Oct. 25, 1962.

Proceeding wherein the Superior Court, Fresno County, Edward L. Kellas, J., made an order allowing the State Employees' Retirement System a lien against a judgment obtained by a member of the system for personal injuries for disability benefits paid him by the retirement system, and cross-appeals were taken. The Supreme Court, Peters, J., held that legislature intended that lien of State Employees' Retirement System for actuarial equivalent of disability benefits extend to full amount of judgment not otherwise allocated to proper and stated purposes and extend to portions of judgment attributable to pain and suffering.

Reversed and remanded with directions.

Opinion 20 Cal.Rptr. 720 vacated.

1. States ⟹64.1(1)

Statutes governing State Employees' Retirement System, when deemed valid and proper legislation, constitute terms of employee's contract with state agency, and right of system to lien against employee's personal injury judgment to recover actuarial equivalent of its loss due to his disability retirement was required to have been deemed to be bargained for by system and to have determined, in part, payments which both employee and employer were required to pay. West's Ann.Gov.Code, §§ 21451, 21453, 21454; West's Ann.Const. art. 4, § 22a.

2. Constitutional Law ⚷208(1)

There is no constitutional requirement of uniform treatment, but only that there be reasonable basis for each classification.

3. Constitutional Law ⚷208(3)
States ⚷64.1(2)

Legitimate difference in inducements which state may or must hold out to obtain qualified personnel for positions as legislators and judges justify differences in amount of contribution to retirement as well as benefits received by them from retirement system as opposed to state employees generally, and classifications established pursuant to constitutional provision with respect to retirement and benefits were not arbitrary or unconstitutional. West's Ann.Gov.Code, §§ 20000 et seq., 21451, 21453, 21454; West's Ann.Const. art. 4, § 22a.

4. Constitutional Law ⚷140(2)
States ⚷64.1(2)

Statutory provisions granting to State Employees' Retirement System right of subrogation for actuarial equivalent of disability benefits paid and payable against judgment recovered from third party who negligently caused injuries could not be held to impair obligation of contract of employee where there had been no statutory changes since his employment. West's Ann.Gov.Code, §§ 20000 et seq., 21451, 21453, 21454; West's Ann.Const. art. 4, § 22a.

5. States ⚷64.1(2)

Statutory provisions granting to State Employees' Retirement System right of subrogation for actuarial equivalent of disability benefits paid and payable against judgment recovered from third party who negligently caused injuries could not be held an unlawful assignment of personal cause of action arising from tortious injury, and no constitutional provision prevented legislature from authorizing such subrogation with respect to public agency. West's Ann.Gov.Code, §§ 20000 et seq., 21451, 21453, 21454.

6. States ⚷64.1(6)

There was no constitutional basis upon which State Employees' Retirement System's lien for actuarial equivalent of disability benefits paid and payable against judgment from third party tortfeasor was required to be limited to payments accrued up to time of entry of judgment. West's Ann.Gov.Code, §§ 20000 et seq., 21451, 21453, 21454; West's Ann.Const. art. 4, § 22a.

7. Statutes ⚷194

Specific direction in statute was to be deemed to control over general direction.

8. States ⚷64.1(6)

Legislature intended that lien of State Employees' Retirement System for actuarial equivalent of disability benefits as against judgment recovered from third party who negligently caused disability extend to full amount of judgment not otherwise allocated to proper and stated purposes and extend to portions of judgment attributable to pain and suffering. West's Ann. Gov.Code, §§ 20000 et seq., 21451, 21452, 21453, 21454; West's Ann.Labor Code, §§ 3851–3864, 3856; St.1931, pp. 2370, 2371; West's Ann.Const. art. 4, § 22a.

◆

Oren, McCartney & Sells, Leland M. Edman and Donald E. Oren, Fresno, for plaintiff and appellant.

Stanley Mosk, Atty. Gen., and William J. Power, Deputy Atty. Gen., for claimant and appellant.

WHITE, Justice.

Both plaintiff, John F. Bilyeu, and claimant, the State Employees' Retirement System, appeal from an order of the trial court allowing the retirement system a lien against a judgment obtained by plaintiff for personal injuries caused by the negligence of a third party. The lien was allowed for benefits paid plaintiff by the retirement system, of which plaintiff is a member.

Plaintiff, a state highway patrolman, was injured in the line of duty. He commenced the instant action against the negligent tortfeasor and recovered a judgment of $62,271.11. He also applied for and received industrial disability benefits pursuant to section 4800 of the Labor Code, and the State Compensation Insurance Fund filed a claim of lien for the amount of those benefits. 621 (See Lab.Code, § 3856.) Plaintiff further applied for and was granted a disability retirement of $253.84 per month from the retirement system. The board of administration of the retirement system filed, in the instant action, pursuant to Government Code, sections 21451 et seq., notice of lien. After judgment was obtained by plaintiff the trial court allowed both the lien filed by the State Compensation Insurance Fund in the amount of $17,670.51, and the lien of the retirement system in an amount equivalent to the sum then already paid plaintiff pursuant to his disability retirement, $5,076.80. The retirement system claims, however, that it is entitled to a lien in the amount of $52,476.06, the actuarial equivalent of the benefits for which it became obligated to pay because of plaintiff's disability retirement. Plaintiff claims that the retirement system is not entitled to a lien in any amount, or that in any event it is entitled only to a lien in a reduced amount as hereinafter appears. The propriety of the lien filed by the State Compensation Insurance Fund is conceded and has not been placed in issue.

Authority for the creation of the State Employees' Retirement Act is found in our Constitution, article IV, section 22a, which provides as follows: "The Legislature shall have power to provide for the payment of retirement salaries to employees of the State who shall qualify therefor by service in the work of the State as provided by law. The Legislature shall have power to fix and from time to time change the requirements and conditions for retirement which shall include a minimum period of service, minimum attained age and minimum contribution of funds by such employees and such other conditions as the Legislature may prescribe, subject to the power of the Legislature to prescribe lesser requirements for retirement because of disability."

Pursuant to the aforesaid authority vested in it the Legislature has provided for retirement by the State Employees' Retirement Law. (Gov.Code, § 20000 et seq.) It has provided for the subrogation of members' claims in section 21451, which states: "If benefits are payable under this part because of an injury to or the death of a member and such injury or death is the proximate consequence of the act of a person other than his employer (the State or the employing contracting agency), the board may on behalf of this system recover from such person an amount which is the actuarial equivalent of the benefits which are provided by contributions of the State or contracting agency and for which this system is liable because 622 of such injury or death." It is provided in section 21453 of the Government Code that the proper agency, on behalf of the retirement system, may "* * * commence and prosecute actions, file liens, or intervene in court proceedings all in the same manner and to the same extent, provided in Chapter 5, Part 1, Division 4 of the Labor Code, for the state fund or employer, except that such recovery shall not be made from benefits payable under this part because of such injury or death. * * *" In section 21454 of the Government Code it is provided that "Any amount recovered by way of subrogation by the employer, workmen's compensation insurer or this system shall be applied first to the amounts which the employer or its insurer has paid or become obligated to pay. The balance of the amount recovered shall be paid by this system to the fund out of which the compensation of the injured or deceased member was paid * * *."

[1] It is at once manifest that the Legislature has provided, through the enactment of these provisions, for the recovery by the retirement system of the actuarial equivalent of benefits paid and payable to plaintiff (§ 21451), for the filing of a lien or intervening in a court proceeding to recover the amount of the actuarial equivalent (§ 21453), for the disbursement of that sum first to replenish amounts already paid or for which there is an existing obligation to pay, and for the payment of the balance to the fund from which plaintiff is compensated (§ 21454). If such enactments are deemed to be valid and proper legislation, then they constitute, with other provisions, the terms of plaintiff's contract of employment with the state agency by which he was employed. (Wallace v. Fresno, 42 Cal.2d 180, 265 P.2d 884; Kern v. City of Long Beach, 29 Cal.2d 848, 179 P.2d 799; Abbott v. City of Los Angeles, 178 Cal.App.2d 204, 3 Cal.Rptr. 127.) Plaintiff has, in legal effect, agreed that the retirement system may recover the actuarial equivalent of its loss due to his disability retirement, from a judgment recovered from the third party who negligently caused plaintiff's injuries and thus imposed the burden of the disability retirement payments on the retirement system. The right of such a recovery must be deemed to have been bargained for by the retirement system and to have determined, in part, the payments which both plaintiff and his employer were required to pay into the system in order to provide the disability retirement payments. No claim is made that the right of recovery was not equitably bargained for and|623 as a matter of contract law plaintiff cannot now be heard to complain.

[2, 3] Plaintiff contends, however, that the subrogation provisions deny him the equal protection of the laws and are otherwise unconstitutional. The claim of discrimination arises from the fact that the Legislature has not included all state employees, particularly legislators and judges, within a single act, but has provided for different and, plaintiff contends, more advantageous terms to such other employees. There is no constitutional requirement of uniform treatment, but only that there be a reasonable basis for each classification. In Sacramento Municipal Utility Dist. v. Pacific G. & E. Co., 20 Cal.2d 684, we said at page 693, 128 P.2d 529, at page 535: "Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous. [Citations.] A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it." (See also State of California, Subsequent Injuries Fund v. Ind. Acc. Com., 48 Cal.2d 365, 371, 310 P.2d 7.) Legislators and judges differ in many substantial respects from other state employees. They are constitutional officers, generally elected for relatively short terms, instead of being hired for indefinite periods with protection from arbitrary dismissal by the Civil Service Act. There is also a vast difference in the number of legislators and judges as compared to state employees generally. There is a difference in ages, and for that reason, as well as because of the nature of the work involved, the risk differs. There is a legitimate difference in the inducements which the state may or must hold out in order to obtain qualified personnel. Such distinctions and others justify differences in the amount of contribution to as well as benefits to be received from a retirement system. In any event it cannot be said that the classifications established pursuant to article IV, section 22a of the Constitution are arbitrary and therefore unconstitutional. (See Blumenthal v. Board of Medical Examiners, 57 A.C. 251, 256, 18 Cal.Rptr. 501, 368 P.2d 101; City of Walnut Creek v. Silveira, 47 Cal.2d 804, 811, 306 P.2d 453.)

[4] Plaintiff also argues that the subrogation provisions impair the obligation

of contract. But there have been no ⊥624 changes in the statutory provisions affecting his retirement benefits since his employment and, as we have heretofore pointed out, the employment contract provided for the very recovery which the retirement system here seeks to establish.

[5] Plaintiff next contends that the subrogation provisions constitute an unlawful assignment of a personal cause of action arising from a tortious injury. There are policy reasons why such assignments have not, in other instances, been permitted, but there is no constitutional prohibition which would prevent the Legislature from expressing a different policy and authorizing the instant assignment to a public agency. The very authority on which plaintiff relies in support of his contention, Fifield Manor v. Finston, 54 Cal. 2d 632, states at pages 639 and 640, 7 Cal. Rptr. 377, at page 381, 354 P.2d 1073, at page 1077, 78 A.L.R.2d 813: "Plaintiff has not cited to us any case in the California courts where a right of subrogation to a cause of action for tortious injury to the person has been recognized, *except in cases where such right of subrogation has been expressly granted by statute.* The Legislature where it has desired to give a right of subrogation in such cases, has done so in express language: * * * Government Code, § 21451, giving the State Retirement System a cause of action against a person causing a member's injury or death, to recover the actuarial equivalent of the benefits for which the system is liable because of such injury or death * * *." (Emphasis added.)

Plaintiff also contends that article IV, section 22a of the Constitution does not authorize the legislative requirement that a disabled member of the retirement system make additional contributions after he has become unable to work. However, the lien on plaintiff's judgment for moneys which the retirement system is paying him for the same disability is manifestly not an additional contribution, but instead a reimbursement.

[6] Plaintiff's final contention, based on statutory construction and constitutional grounds, is that if there is to be any subrogation it must be limited to the payments accrued up to the time of the entry of the judgment against the third party tortfeasor, and that in no event can it reach those portions of the judgment attributable to pain and suffering.

The constitutional basis upon which plaintiff predicates his challenge in this regard is not clear and as we view it, lacks substance. Manifestly it cannot be based on forfeiture because, as hereinbefore determined, the recovery by the retirement ⊥625 system was a bargained for consideration in the event the system became obligated for disability payments. Nor are there equitable reasons why the retirement system cannot assert its right. It is true that like any insurer it may profit in the event of plaintiff's and his spouse's early demise. But on the other hand it may lose in the event either or both enjoy a long life. Plaintiff is now 32 years of age. In 15 years he will have received from the retirement system an amount greater than the amount lienable by the system. In a short time thereafter he will have received an additional amount greater than his contributions to the retirement system and the system will be obligated for continuing payments to him or in a lesser amount to his spouse should she survive him. Such considerations, however, have all been resolved in the determination of the actuarial equivalent to which the retirement system is entitled under the contract of employment. The retirement system will be unable to recover that amount, however, as the judgment herein is insufficient to satisfy the lien.

Plaintiff has thus failed to demonstrate any sound constitutional basis upon which the lien of the retirement system must be limited to those amounts paid or obligated to be paid to him or in his behalf at the time of the judgment.

The further contention that the Legislature, apart from any constitutional limitation or restriction, intended to limit the lien of the retirement system to those amounts actually advanced at the time of the judgment is likewise without merit. It is based upon the provision contained in section 21453 of the Government Code that certain agencies in behalf of the retirement system may "* * * commence and prosecute actions, file liens, or intervene in court proceedings all in the same manner and to the same extent, provided in Chapter 5, Part 1, Division 4 of the Labor Code, for the state fund or employer * * *." A similar reference is contained in section 21452 of the Government Code. The Labor Code provisions to which reference is made contain sections 3851 through 3864, inclusive, and deal with subrogation by an employer of claims which an employee may have against third parties. Provision is made for survival of actions after death of an employee (§ 3851); employee's actions against third persons (§ 3852); notice to the other when actions are commenced by either employer or employee and joinder of actions (§ 3853); recovery by an employer in the amount for which ⌊626 he has become obligated, and payment over of any excess judgment to the employee (§ 3854); proof of an employer's damages in an action by an employee (§ 3855); reimbursement of an employer out of a judgment obtained by an employee, employer's lien for compensation paid, and attorneys' fees (§ 3856, § 3857); relief of employer from further compensation up to balance of employee's judgment above employer's lien (§ 3858); releases and settlements (§ 3859); notices of releases and settlements and employer's lien applicable to settlement (§ 3860); credit of amount of recovery by employee against employer's liability (§ 3861); employer's entitlement to writ of execution (§ 3862); no impairment of employee-attorney contract of employment (§ 3863); employer's liability as to third person (§ 3864). As noted an employer may be reimbursed from any recovery based on an employee's claim for the employer's expenses and attorney fees in perfecting such claim, and for compensation which has been paid to the employee. As to the balance of sums recovered section 3861 provides that the commission shall allow the employer a credit against his liability for future compensation due the employee.

It is contended that the Government Code provisions require construction and that such construction was intended to be supplied by the Labor Code provisions to which reference is made in the Government Code. Thus, it is claimed, the retirement system is entitled to its lien in the amount of $5,076.80 and the balance of the actuarial equivalent of $52,476.06 is recoverable by the retirement system only as a credit to be offset against future compensation payments as they fall due.

[7] There are several reasons why the plaintiff's contention must fail. In the first place section 21454 of the Government Code has expressly directed the disposition of the amounts recoverable. After providing for the reimbursement for current obligations the section further provides: "The balance of the amount recovered shall be paid by this system to the fund out of which the compensation of the injured or deceased member was paid * * *." The specific direction of section 21454 of the Government Code must be deemed to control over the general direction contained in section 21453 to the effect that recovery should be made in the manner and to the extent provided in the Labor Code provisions. (Neuwald v. Brock, 12 Cal.2d 662, 669, 86 P.2d 1047; Rose v. State of California, 19 Cal.2d 713, 723, 123 P.2d 505.) Nor do we believe that ⌊627 section 21453 contains a direction that the Labor Code provisions are determinative of the *disposition* to be made of amounts recoverable. It is stated therein that the proper agency may "* * * *commence and prosecute actions, file liens* or *intervene in court proceedings* all in the same manner and to the same extent" as provided in the Labor Code provisions. (Emphasis added.) These matters relate only to the manner in and the extent to which remedial action is to be taken. No

reference is made in section 21453 to the effect that the Labor Code provisions are to be resorted to in order to determine the disposition of the funds, once recovered. That direction is set forth in the immediately following section of the Government Code. Moreover, it is expressly provided in section 21451 of the Government Code that the retirement system is to recover "an amount which is the actuarial equivalent of the benefits" for which the system becomes liable. This connotes a sum of money which, when in the hands of the retirement system and the balances therefrom are properly invested, would produce the equivalent of the total probable compensation payable to plaintiff and his spouse based upon actuarial tables. If the retirement system is to receive this sum by installments each month it would never receive an "actuarial" equivalent even though it eventually received the whole sum, because it would never have sufficient possession and control of the fund to permit the contemplated usage thereof. Furthermore, in the event of the plaintiff's and his spouse's early demise the retirement system would never receive the total amount of money which, in its possession initially, would have constituted the "actuarial equivalent."

[8] From the foregoing it is manifest that the Legislature intended that the lien of the retirement system extend to the full amount of the judgment not otherwise allocated to proper and stated purposes. Only by such a construction can we give meaning to each of the pertinent provisions of the Government Code, and to those provisions of the Labor Code to the extent to which they are applicable. "The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.] Moreover, 'every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.' [Citation.] If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. [Citation.] Such purpose will not be sacrificed to a literal construction of any part of the act. [Citation.]" (Select Base Materials, Inc. v. Board of Equal., 51 Cal.2d 640, 645, 335 P.2d 672, 675.)

The further contention that at least those portions of the judgment attributable to pain and suffering are not recoverable by the retirement system, is likewise without legal basis. Although it does not appear that the precise contention has been previously made and resolved, we nevertheless are bound by our holding in an analogous and indistinguishable situation. In Jacobsen v. Industrial Acc. Com. (1931) 212 Cal. 440, 299 P. 66, an employer sought to assert its lien for workmen's compensation benefits against a judgment obtained by an employee against a third person. The applicable statute provided in part: "The court shall, on application, allow as a first lien against any judgment recovered by the employee the amount of the employer's expenditures for compensation." (Stats.1917, p. 879.) The court in that case held that the employer had waived its right to its lien. It also noted that in any event the lien would not extend to the elements of a judgment attributable to pain and suffering, and further stated at page 449, 299 P. at page 69 that the difficulties of segregating the elements of the employee's recovery "might well call for further legislative action on the subject." Such further legislation was not long in coming. Later in the same year the applicable statutory law was amended to provide that the lien attached to the "entire amount" of a judgment "for any damages." (Lab.Code, § 3856; Stats. 1931, ch. 1119, pp. 2370, 2371.) Thereafter in Heaton v. Kerlan (1946) 27 Cal.2d 716, 166 P.2d 857, 861, we stated: "Under the statute as amended, it is clear that the employer's lien attaches to the entire judgment and that it is no longer necessary to segregate the part thereof that represents damages for pain and suffering. Pacific Gas & Electric Co. v. Industrial Acc. Comm., 8 Cal.App.2d 499, 504, 47 P.2d 783." While the foregoing cases are concerned with workmen's compensation as provided for in the Labor Code, nevertheless, as we have seen, the "manner" and "extent" to which the retirement system may assert its lien is provided for in the same sections of the Labor Code. (Gov.Code, §§ 21452, 21453.)

For the foregoing reasons the order herein should be, and hereby is reversed and the cause remanded to the court below with directions to take further evidence if deemed necessary ⊥62 upon which to make a finding as to the amount of the actuarial equivalent of the lien of the retirement system, and for the entry of an order thereupon for the retirement system. The parties will bear their respective costs on appeal.

GIBSON, C. J., and TRAYNOR, SCHAUER, McCOMB and TOBRINER, JJ., concur.

PETERS, Justice (concurring).

Under existing law the main opinion is sound. The Legislature has spoken, and, under the facts, the determination is conclusive. But I feel impelled to call to the attention of the Legislature that the policy it has adopted may lead, and in the instant case has led, to inequitable results.

This plaintiff, a state employee, was injured in the course of his employment as a result of the negligence of a third person. He suffered serious and permanent injuries, and also suffered a substantial amount of pain and suffering. He brought a tort action against the third person, and, purely as a result of his efforts, recovered a $62,000 judgment for such injuries, including, presumably, a substantial award for pain and suffering. He received workmen's compensation and was compelled to retire because of his disability. He received and will receive retirement benefits. Because of the provisions of the Government Code referred to in the main opinion, the liens of the compensation carrier and of the State Employees' Retirement System will entirely consume the $62,000 judgment. As a result, plaintiff will receive no benefit at all from his tort action against the tort feasor. He will receive not one penny for his pain and suffering. So far as he is concerned, he should never have filed the tort action. In the future, there will be no inducement for state employees in the position of plaintiff to file such actions. This result would not seem to be in accord with sound public policy. But it is what the Legislature has now provided. I suggest that the problem involved requires further legislative study in order to determine whether or not the obvious injustices of the present law should be alleviated by proper legislative action.

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58 Cal.2d 608, 375 P.2d 449

⊥608 **Shelley R. COTHRAN, Individually and as Executor, etc., Plaintiff and Appellant,**

v.

SAN JOSE WATER WORKS, Defendant and Respondent.

S. F. 20730.

Supreme Court of California,
In Bank.
Oct. 25, 1962.

Action for damages allegedly caused by closing and occupancy by water company of public road which furnished access to mountain property. The Superior Court, Santa Clara County, Robert F. Peckham, J., sustained general demurrer and appeal was taken. The Supreme Court held that complaint failed to state cause of action on theory of inverse condemnation, where there was nothing to establish that defendant had devoted road to public use or that ordinary remedies at law and equity would not be available to plaintiff and it was alleged that barriers erected by company had been removed by county and new barriers had been erected by order of board of supervisors.

Affirmed.

Opinion 21 Cal.Rptr. 103 vacated.

1. Courts ⚷487(7)

Inasmuch as Supreme Court justice signed order granting hearing in case while he was within state of California, order was effective, although he was out of state when order was signed by three other members of court; overruling People v. Ruef, 14 Cal.App. 576, 114 P. 48.

2. Judgment ⚷210

Although general demurrer to first count of amended complaint was sustained without leave to amend, cause remained pending, where leave was granted to amend second count of complaint, and no final judgment of dismissal could be entered until after demurrer to amended complaint relating to such count had been sustained without leave to amend.

3. Appeal and Error ⚷870(5)

Order sustaining general demurrer to count of amended complaint without leave to amend foreclosed plaintiffs from proceeding further upon cause embraced in that count but such order was properly reviewable upon appeal from judgment subsequently entered. West's Ann.Code Civ. Proc. § 956.

4. Eminent Domain ⚷271

Doctrine of inverse condemnation rests upon theory that, after property has been devoted to public use by a defendant so that it would seriously interfere with service furnished by defendant to public if such use were discontinued, public policy dictates that such use should not be discontinued and that property owner's only relief in such situation is action for value of property taken and damages to his remaining property.

5. Eminent Domain ⚷266

To make doctrine of inverse condemnation applicable, property must in fact have been devoted to public use by defendant to extent that public interest would suffer by discontinuance of such use and doctrine can be properly applied only where public use has attached.

6. Pleading ⚷252(1)

Court was entitled to consider allegation that county had placed barriers across road in ruling on demurrer to count against water company for closing road, even though such allegation had been omitted from later pleadings where there was no explanation for omission.

7. Pleading ⚷252(1)

If verified complaint contains allegation which renders complaint vulnerable to demurrer, defect cannot be cured simply by omitting allegation without explanation in later pleading.

8. Eminent Domain ⚷293(1)

Complaint failed to state cause of action against water company on theory that company had by occupancy of road as part of reservoir system rendered plaintiffs' property valueless, where complaint failed to allege facts to show that road had been devoted to public use by defendant or that plaintiffs' ordinary remedies at law and equity would not be available to them and it appeared from complaint that barriers erected by company had been removed by county and new barriers had been erected by order of board of supervisors.

9. Eminent Domain ⚷293(1)

Complaint failed to state cause of action under doctrine of inverse condemnation on theory that water company had used portions of county road leading to plaintiffs' property as flume line, in absence of allegations as to what portion of road had been occupied by such flume line or allegation that such flume line interfered with free passage of traffic over road.

10. Pleading ⚷34(4)

Inasmuch as allegation contained in earlier pleadings was repeated in later pleadings and was not amended after demurrer was sustained, court was entitled to conclude that pleading had stated such allegation as strongly as possible in plaintiffs' favor.

11. Eminent Domain ⚷2(5)

Insofar as sanitary regulations might constitute proper exercise of police power of state, any damage caused to property owners by their enforcement was not compensable.

12. Eminent Domain 🔑271

Property owners had no right to recover from water company for legal or illegal acts of public officials on basis that, by constructing its reservoir below plaintiffs' property, water company brought about situation whereby public health authorities enforced sanitary regulations against use of plaintiffs' property.

13. Eminent Domain 🔑293(1)

Property owners failed to state cause of action on basis that by tortious conduct water company had prevented owners from making any beneficial use of property, where such conduct, if tortious and illegal, could at most have resulted in temporary interruption of beneficial use of property and not its permanent confiscation and there was no allegation of value of such use or of amount of damage suffered from interference with it.

Everett P. Rowe, San Jose, for plaintiff and appellant.

C. B. Leib, Leib & Leib, San Jose, Robert Minge Brown and McCutchen, Doyle, Brown & Enersen, San Francisco, for defendant and respondent.

⊥610 ⊥PER CURIAM.

Preliminarily we must decide the question whether this court has acquired jurisdiction to act upon the appeal herein. This question arises from the following circumstances. It is the uniform and long-established practice of this court to meet in conference at least once each week to discuss and consider whether to grant or deny petitions for hearing after decision in the District Courts of Appeal, petitions for rehearing, and petitions in original proceedings. However, if one of the justices for any reason cannot attend a particular conference, such justice not infrequently affixes his signature to orders granting such petitions as he may determine should be granted, either in advance of or following the conference which he is unable to attend. In this respect our practice follows the same pattern as that followed by this court in 1910 as explained in the statement of the court found in People v. Ruef, 14 Cal.App. 576, 621–623, 114 P. 48, 54.

Following this practice Mr. Justice Schauer, who was leaving the State of California for a vacation before the conference at which the petition for hearing in this case after its⊥decision in the District ⊥611 Court of Appeal was to be considered, signed the order granting a hearing before his departure. Three other justices of this court signed the same order following the consideration of the petition for hearing in conference and the order was filed. At the time that the order was signed by the other justices, Mr. Justice Schauer was outside of this state and he continued to be outside of its boundaries until after the time for action on the petition for hearing in this case had expired. This presents the question of the validity of the order under the decision of this court in People v. Ruef, supra, 14 Cal.App. 576, 623–632, 114 P. 48, 54.

In Ruef Justice Henshaw signed an order granting a hearing and then left the state and remained outside of the state until after the time within which this court could act upon the petition had expired. Three other justices signed the order after Justice Henshaw's departure from the state. In Ruef the court held that because of Justice Henshaw's absence from the state the order granting the hearing was void and the court therefore vacated it. The court relied upon cases holding that no state judge can validly perform any judicial action while he is outside the boundaries of his state and concluded that this rule required them to hold the order granting the hearing invalid even though Justice Henshaw was within the state when he signed the order. The court analogized the case of the absence of Justice Henshaw from the state when the other three signed the order to the case of a justice who might have signed such an order and then died or otherwise ceased to be a member of the court before the other justices had acted. The analogy is not exact since Justice Henshaw was still a member of the court when the order was signed by the other justices. The court treated the signing of the order by the four justices as a single judicial act and so felt compelled to hold that the order was void because Justice Henshaw was out of the state when this single judicial act was completed. The court might as well have concluded that realistically considered the act of Justice Henshaw in signing the order was his only judicial act and that that judicial act was performed while Justice Henshaw was in the State of California. Thus the manner in which the court approached Justice Henshaw's judicial conduct dictated the conclusion of the court, where another approach might as logically have led to the contrary conclusion. The court in Ruef found no distinction between Justice Henshaw signing the order while he was outside of the state, and Justice Henshaw signing the order while he was ⌊612 within the state and then leaving the state before the other justices signed the order. There is, in fact, a substantial difference between the two situations.

[1] Judicial logic should not be carried ruthlessly beyond the point of common sense. It should be the tool and not the master of judicial craftsmanship. The artificiality of the court's reasoning in Ruef becomes apparent upon a critical examination. If Justice Henshaw had remained in the State of California but had been absent from the other members of the court and entirely unaware of the fact that three other justices had signed the order it would, under the reasoning of the court in Ruef, nonetheless have become a valid order of the court, even though Justice Henshaw's concurrence with the other three would not have been a knowing concurrence at the time that the fourth justice signed the order, but would have derived its only effect from the fact that Justice Henshaw had previously signed the order and had not thereafter chosen to withdraw his signature. The only judicial action taken by Justice Henshaw under the supposed facts would have been his affixing of his signature to the order granting a hearing (unless we indulge in the pointless fiction that a justice can perform a judicial action without knowing that it is being performed). If this would be true had Justice Henshaw remained within the state until after the fourth justice signed the order we cannot agree that Justice Henshaw's leaving the state after affixing his signature to the order should lead to any different result. The critical question would appear to be whether Justice Henshaw was in the state when he signed the order and not whether he was within the state when the fourth signature was subscribed to it. The individual justice's judicial action is the signing of the order and when he takes that action if he is within the limits of the state he has the power to perform that judicial act. We have accordingly concluded that since Justice Schauer signed the order granting a hearing in this case while he was within the State of California the order was effective when signed by three other members of this court and that Justice Schauer's absence from the state when that was done does not affect its validity. Insofar as it is inconsistent with this conclusion the opinion of this court in People v. Ruef, supra, 14 Cal.App. 576, 623–632, 114 P. 48, 54, is overruled.

Turning to the merits, in this action the plaintiffs[1] seek ⌊613 to recover damages alleged to have been caused to their mountain property by the closing and occupancy by defendant San Jose Water Works of a public road which furnished access to said property (count I of the fourth amended complaint); and damages to said property by certain alleged tortious acts of defendant and certain alleged conduct of the public health authorities taken to protect the sanitary conditions of a reservoir operated and maintained by defendant below plaintiffs' property into which streams which flow through plaintiffs' property ultimately discharge their waters (sixth amended complaint).

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[1] Appellant appears both individually and as executor, therefore the plural "plaintiffs" will be used.

The court sustained a general demurrer to count I of the fourth amended complaint without leave to amend, and special demurrers to count II of said fourth amended complaint with leave to amend. Plaintiffs thereafter filed a fifth and sixth amended complaint based upon the cause of action attempted to be stated in count II of the fourth amended complaint. The court sustained a general demurrer to the sixth amended complaint without leave to amend and judgment was entered dismissing the action, from which this appeal is taken. The two causes of action proceed upon somewhat different theories and must be disposed of separately.

[2, 3] While the general demurrer to the first count of the fourth amended complaint was sustained without leave to amend, the cause remained pending because of the leave granted to amend the second count of this complaint, and no final judgment of dismissal was or could be entered until after the demurrer to the sixth amended complaint had been sustained without leave to amend. The order sustaining the general demurrer to count I of the fourth amended complaint without leave to amend foreclosed plaintiffs from proceeding further upon the cause of action embraced in that count. It seems clear that this order is properly reviewable upon appeal from the judgment subsequently entered under Code of Civil Procedure, section 956.[2]

We granted the hearing in this case to give consideration to the question whether the closing of a county road which (as alleged in the first count of the fourth amended complaint) cut off all access to the plaintiff's country property over such road would 614 give rise to a cause of action for damages to such property where the only other access to such property was over another more circuitous road which is so difficult and dangerous that a large portion of the public refuse to use it. We have concluded after a more careful consideration of the pleadings than was possible at the time of our granting the hearing that the pleadings do not properly present this question.

[4, 5] The plaintiffs throughout proceeded on the theory of inverse condemnation, i. e., that the defendant had by occupancy of the road in question for its public use as a part of a reservoir system for supplying water to the public and by the other acts alleged in the pleadings permanently damaged and rendered entirely valueless the property of the plaintiffs by reason of which they sought to recover from defendant the total value of the property. The doctrine of inverse condemnation rests upon the theory that after property has been devoted to a public use by a defendant so that it would seriously interfere with the service furnished by the defendant to the public if such use is discontinued public policy dictates that such use should not be discontinued and the property owner's only relief in such a situation is an action for the value of the property taken and the damages to his remaining property by way of inverse condemnation. (Hillside Water Co. v. Los Angeles, 10 Cal.2d 677, 688, 76 P.2d 681; Peabody v. City of Vallejo, 2 Cal.2d 351, 377–379, 40 P.2d 486.) To make this doctrine applicable, however, the property must in fact have been devoted to a public use by the defendant to the extent that the public interest would suffer by the discontinuance of such use. "The doctrine of inverse condemnation * * * can be properly applied only where a public use has attached." (Tulare Dist. v. Lindsay-Strathmore Dist., 3 Cal.2d 489, 533, 45 P.2d 972, 990.)

The first count of the fourth amended complaint fails to allege any facts to show that the road in question has been so devoted to a public use by the defendant that plaintiffs' ordinary remedies are not available to them, or that they would be entitled to proceed against the defendant under the doctrine of inverse condemnation on the theory that a public use has attached to such road so as to entitle plaintiffs to recover permanent damages to their property, which is the only relief that they are seeking in this action. In this respect the complaint alleges:

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[2] Code of Civil Procedure, section 956: "Upon an appeal from a judgment the court may review * * * any intermediate * * * order * * * which involves the merits or necessarily affects the judgment, or which substantially affects the rights of a party."

1. "That San Jose Water Works, its officers, agents and employees did on or about March 26, 1947, cause armed employees of San Jose Water Works to erect barbwire fences ⌊615 across said county road at Wright Station, and Call of the Wild, respectively. That said barbwire fences across said county road did stop all ingress and egress and access to said county road, from and to the real property, as above described." There is nothing in this allegation to establish that the defendant has devoted the road to a public use within the doctrine of the cited cases or that the ordinary remedies at law and equity would not be available to plaintiffs. Additionally plaintiffs alleged in an earlier supplemental complaint that pursuant to a resolution of the board of supervisors unanimously adopted on June 14, 1949, a copy of which is attached *in haec verba* to the supplemental complaint, "The County of Santa Clara, its officers, Road Commissioner and employees, did remove the aforesaid barbwire obstructions across said County road and did place new barriers across said County road at Wrights Station and Call of the Wild, respectively, marked, 'Road Closed by Order of the Board of Supervisors.'" [3]

[6-8] In subsequent pleadings, including the first count of the fourth amended complaint, the allegation above quoted was omitted without any explanation. The trial court was entitled to consider this allegation, however, in ruling on the demurrer to the first count of the fourth amended complaint under the settled rule that if a verified complaint contains an allegation which renders the complaint vulnerable to demurrer the defect cannot be cured simply by omitting the allegation without explanation in a later pleading. (Hardy v. Admiral Oil Co., 56 Cal.2d 836, 840, 16 Cal.Rptr. 894, 366 P.2d 310.) It thus sufficiently appears that whatever the legal effect of the original pleaded erection of barriers across said road in 1947 by defendant may have been, those barriers were removed by order of the board of supervisors in 1949, and the barriers thereafter installed were the responsibility of the board of supervisors and not of the defendant. Whatever rights the maintenance of such later installed barriers may have given plaintiffs obviously must be asserted against the county or its board of supervisors and not against the defendant water company.

⌊616 [9, 10] 2. The first count of the fourth amended complaint further alleges that defendants "have used portions of said county road as a flume line." Conceding that the use as a flume line is sufficient to constitute such a devotion to public use as to bring into play the doctrine that inverse condemnation for any damages caused thereby would be plaintiffs' only remedy, there is no allegation as to what portion of the road is occupied by such flume line and particularly no allegation that such flume line does or would interfere with the free passage of traffic over said road. Since the same allegation was contained in earlier pleadings and not amended after demurrer sustained the court was entitled to conclude that the pleading had stated this allegation as strongly as possible in plaintiffs' favor.

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[3] The resolution of the board of supervisors, as pleaded, reads: "On motion of Supervisor McKinnon, seconded by Supervisor Campbell, it is unanimously ordered that the County Surveyor and Road Commissioner be authorized and directed to take the proper steps to remove the barricades placed [sic] the Wrights Station Creek Road and that the Surveyor and Road Commissioner be authorized and directed to erect barricades across said road whenever necessary for the salety [sic] of the general public."

3. The general allegation that said county road "is now used in part as a flume line, and as reservoir land, for the exclusive benefit of San Jose Water Works" is subject to the same defect, since it is nowhere pleaded that such uses are of a character to obstruct the free passage of traffic over said road.

The other allegations of the first count of the fourth amended complaint are of acts of trespass and intimidation similar to those hereafter discussed in considering the sixth amended complaint.

[11, 12] One of the theories of the sixth amended complaint is that by constructing its reservoir below plaintiffs' property defendant has brought about a situation whereby the public health authorities have enforced certain sanitary regulations against the use of plaintiffs' property which have prevented plaintiffs from making any beneficial use of it. Insofar as any such regulations may constitute a proper exercise of the police power of the state any damage caused to plaintiffs by their enforcement, under settled principles, is not compensable. If any of such regulations exceed the police power or if the conduct of the public authorities is in any other respect illegal, relief must be sought against the public authorities. Plaintiffs have cited no authority, and we have found none, that would give plaintiffs any right to recover against defendant for the legal or illegal acts of public officials, simply because the defendant's lawful use of its own property has created a situation which the public officials, rightly or wrongly, believe justifies the enforcement of certain sanitary regulations in the use of plaintiffs' property.

[13] The other theory upon which this attempted cause ⊥617 of action rests is that by threats, intimidation, false arrests and threats of false arrest and other tortious conduct defendant has prevented the plaintiffs from making any beneficial use of their property. Properly pleaded this alleged conduct might support one or several causes of action, but not the only cause of action which plaintiffs have consistently attempted to state, i. e., that by such conduct defendant has permanently taken from plaintiffs all beneficial use of their property for which they are entitled to recover its full value by way of damages.

The only claim of damage alleged is: "That on or about March 1, 1946 said real property was worth the sum of $500,000.00"; and "That plaintiffs have been damaged in the sum of $500,000.00 by reason of the acts and conduct of Defendant." The theory is that by threats and intimidation which have prevented plaintiffs from using their property defendant has in fact permanently confiscated it; but all such acts if tortious and illegal could at most have resulted in the temporary interruption of the beneficial use of the property and not, as alleged by plaintiffs, in its permanent confiscation. There is no allegation of the value of such use or of the amount of damage suffered by plaintiffs from defendant's interference with such use. Having failed after five amendments to state a cause of action on the only theory as to which damages were alleged, and having failed to allege the amount of any damages to which they might properly be entitled on any theory legally open to them, plaintiffs had made it perfectly clear that they were attempting only to state a cause in inverse condemnation for the permanent confiscation of their property. Since they had failed to state a cause of action after repeated amendments and obviously could not state a cause of action on the only theory upon which they were relying, the court did not err in sustaining the demurrer to the sixth amended complaint without leave to amend. (Ruinello v. Murray, 36 Cal.2d 687, 690, 227 P.2d 251.)

Judgment affirmed.

McCOMB, J., concurs in the judgment.

DOOLING, J. pro tem., participated in place of TOBRINER, J., who deemed himself disqualified.

208 Cal.App.2d 718

718 ⊥**Ann EDE, Plaintiff and Respondent,**

v.

Russell S. EDE, Defendant and Appellant.

Civ. 20368.

District Court of Appeal, First District, Division 2, California.

Oct. 22, 1962.

Hearing Denied Dec. 19, 1962.

Action against former husband to recover amount paid by wife to federal government on back income tax liability incurred by husband and wife before divorce. From an adverse judgment of the Superior Court, Contra Costa County, Wakefield Taylor, J., the former husband appealed. The District Court of Appeal, Agee, J., held that under property settlement agreement whereby husband agreed to pay all of the "outstanding community bills", husband was obligated to pay back income taxes, when husband alleged no fraud, mistake, or accident but merely a lack of knowledge of existence of such obligation.

Judgment affirmed.

1. Contracts 🔑152

A contract which is clear and explicit will be interpreted and the intention of the parties ascertained solely from the language employed, if there is no charge of fraud, mistake, or accident. West's Ann. Civ.Code, § 1638.

2. Husband and Wife 🔑279(6)

Under property settlement agreement whereby husband agreed to pay all of "outstanding community bills", husband was obligated to pay back income tax liability incurred before divorce, when husband alleged no fraud, mistake, or accident but merely a lack of knowledge of existence of such obligation.

3. Contracts 🔑147(1)

A party's undisclosed unilateral intention to limit his liability under a contract is not binding upon the other party to the contract.

4. Contracts 🔑152

In interpreting an agreement, the inquiry is directed to the meaning of the words used, rather than to any undisclosed independent intention of the parties.

5. Contracts 🔑152

Unless a contract is ambiguous, its meaning must be determined from words used, and courts will not, because a more equitable result might be reached thereby, construe into the contract provisions that are not contained therein. West's Ann.Civ. Code, §§ 1638, 1639.

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Ferrario, Power & Morgan, Raymond A. Ferrario, Oakland, for appellant.

Carlson, Collins, Gordon & Bold, Grant G. Calhoun, Richmond, for respondent.

⊥AGEE, Justice. 719

On May 28, 1959, the federal government levied upon plaintiff for back income taxes incurred by her and her former husband, the defendant herein, for the years 1953 and 1954. She paid the amount of the levy, $4,016.49, and then recovered a judgment herein against defendant for the amount so paid. Defendant has appealed from such judgment.

On July 14, 1955, during the pendency of a divorce action between them, the parties executed a property settlement agreement whereby plaintiff received the family home and furnishings therein, two life insurance policies, balance due on a sale of real property, and an automobile. Defendant received three meat businesses operated under his name, one panel delivery truck, two automobiles, a house trailer, two life insurance policies, and a lot adjacent to the family home, including a shed thereon and the tools, equipment and implements stored therein. Provision was also made in the agreement for the support by defendant of plaintiff and their two children, aged 17 and 11 years, respectively, and the maintenance by defendant of two insurance policies on the lives of the two children.

The parties executed the agreement in the presence of each other and their respective attorneys, who signed the agreement as witnesses. The validity of the agreement is not questioned. The divorce became final in July, 1956.

The only issue on this appeal is the effect to be given clause 7 of the agreement, which provides as follows: "Party of the second part hereby agrees to pay all of the outstanding community bills incurred by the parties hereto up to and including the 14th day of February, 1955, save and except any indebtedness that may be due on that certain real property hereinabove transferred and conveyed to first party, and agrees to keep first party free and harmless from any and all claims of creditors for such indebtedness."

Following a nonjury trial, the court made findings that "at the time said agreement was entered into there were outstanding federal income taxes due and owing to the United States Government for the years 1953 and 1954 * * *," and that defendant has "failed and refused to pay said taxes or interest although demand had been made therefor," and that "plaintiff has been required to pay the same for said years * * *" These findings are not questioned.

Defendant's sole contention is that "the federal income taxes do not come within the meaning 'outstanding community bills' as used in Paragraph 7 of property settlement ⊥720 agreement dated July 14, 1955." He testified that he had no knowledge of the income tax delinquency at the time of the execution of the agreement. He does not claim that his wife had any such knowledge either. Defendant admitted that there was nothing said by anyone about what were the "community bills" he was to pay. The record is as follows: "Q. Was there any conversation that day between the four [defendant, plaintiff and their respective attorneys] as to what bills you [defendant] were to pay? A. No."

[1] The rule is well settled that: "If fraud, mistake, or accident is not charged, and a contract is clear and explicit, involves no absurdity, and contains no ambiguity or uncertainty, it will be interpreted and the intention of the parties ascertained solely from the language employed." (12 Cal.Jur.2d 330, § 121, "Language of Instrument.")

[2] In the instant case, there is no allegation or evidence of any fraud, mistake, or accident, but merely a lack of knowledge of the existence of a particular outstanding community obligation. Both parties were adequately represented by attorneys. By the terms of the agreement, defendant clearly and unequivocally assumed responsibility for all outstanding community debts, with the one exception specified in clause 7. There was no attempt made to describe or limit the debts which defendant was assuming.

Defendant's position is that "had he [defendant] known of this big delinquency that was going to be on this income tax he would not have given her [plaintiff] all of the property he did." However, it would have been a simple matter to specify or describe the nature of the bills which he was agreeing to pay. He demonstrates this by describing these bills as being "such outstanding bills as household, gas and lights, water bills and bills incurred at stores, around Oakland and Walnut Creek."

Section 1638 of the Civil Code provides: "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Section 1639 of the Civil Code provides: "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title."

Defendant, however, cites section 1636 of the Civil Code, which provides as follows: "A contract must be so interpreted as to give effect to the *mutual* intention of the parties as it existed at the time of contracting, so far as the same is ⊥721 ascertainable and lawful." (Emphasis ours.) He also quotes: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the *parties* intend to contract." (12 Cal.Jur.2d 330; italics ours.)

[3] There is no evidence whatsoever that plaintiff had any intention to limit "the outstanding community bills" to any particular type or class of debts. Certainly, the defendant's undisclosed unilateral intention to so limit his liability would not be binding upon plaintiff.

[4] Moreover, in interpreting the agreement, our inquiry is directed to the meaning of the *words used,* rather than any undisclosed independent intention of the parties. (See Barnhart Aircraft, Inc. v. Preston, 212 Cal. 19, 297 P. 20; Brant v. California Dairies, Inc., 4 Cal.2d 128, 48 P.2d 13.)

[5] Defendant complains that the result reached by the trial court is inequitable. In Southern California Gas Company v. Ventura Pipe Line Construction Company, 150 Cal.App.2d 253, 257, 309 P.2d 849, 852, the court quotes with approval from an Illinois case, Westinghouse Electric Elevator Co. v. La Salle Monroe Bldg. Corp., 395 Ill. 429, 70 N.E.2d 604, as follows: "'It is a general rule governing the construction of contracts that unless a contract is ambiguous, its meaning must be determined from the words used; and courts will not, because a more equitable result might be reached thereby, construe into the contract provisions that are not therein.'" Our Supreme Court, in Apra v. Aureguy, 55 Cal.2d 827, 830, 13 Cal.Rptr. 177, 361 P.2d 897, adopted and approved this same quotation.

We do not wish to be understood, from the foregoing, as inferring that the result reached below is inequitable. Plaintiff was left with two children, a home with a mortgage, a 1955 automobile, two small life insurance policies, and an undisclosed balance due on a sale of real property, plus $350 per month for the support of herself and children. From what appears in the agreement and the record, it could well be concluded that defendant was better able to pay the tax lien than was plaintiff. In any event, in our opinion, he agreed to do so and is bound by his agreement.

The appeal from the order denying a new trial is dismissed, it not being an appealable order.

Judgment affirmed.

KAUFMAN, P. J., and SHOEMAKER, J., concur.

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209 Cal.App.2d 134

Deane L. CIVILLE and Evelyn M. Civille, Plaintiffs and Respondents, 134

v.

Harry E. BULLIS, Defendant and Appellant,

Joseph Du Brow and Dr. Seymour Myers, Defendants and Respondents.

Civ. 26109.

District Court of Appeal, Second District, Division 4, California.

Oct. 30, 1962.

Action for rescission of contract of a sale of a business and for damages. From a judgment of the Superior Court of Los Angeles County, Julius V. Patrosso, J., the defendant appealed. The District Court of Appeal, Burke, P. J., held that where seller falsely represented that he had obtained from lessor an oral consent to assignment of ground leases and that the lessor had promised to furnish written assignments and the buyers relied thereon to their detriment, all the elements of fraud were present and buyers were entitled to rescind the contract and recover damages.

Judgment affirmed.

1. Fraud 🔑58(1)

A cause of action for fraud is proven when evidence discloses making of a false representation concerning a material fact, knowledge of defendant that representation was false or defendant lacked honest belief in its truth, or defendant made the statement in a positive manner not warranted by information which he possessed, statement was made with the intent to induce reliance and plaintiff justifiably relied thereon and suffered damages.

2. Fraud ⚷13(2, 3)

Where seller falsely represented that he had obtained from lessor oral consent to assignment of ground leases for car wash and that lessor had promised to furnish written assignments and the assignment constituted a material fact and the seller knew that the lessor had not consented to assign or promised to furnish written assignments, the seller could not assert that he reasonably believed in the truth of the representations nor that his misrepresentations were merely negligent. West's Ann. Civ.Code, § 1710, subd. 1.

3. Fraud ⚷22(1)

Where seller falsely represented he had obtained from lessor oral consent to assignment of ground leases for a car wash and that the lessor had promised to furnish written assignments and in reliance thereon the buyers made a substantial change of position to their detriment, "caveat emptor" was inapplicable and the buyers had no duty to investigate. West's Ann.Civ.Code, § 1710, subd. 1.

4. Fraud ⚷22(1), 36

Any possible "contributory negligence" of a buyer in a contract of sale is not a defense to intentional tort of fraud, and the mere existence of an opportunity to investigate or of sources of information will not preclude the buyer from relying upon the representations.

5. Sales ⚷38(1)

Where seller falsely represented that he had obtained from lessor oral consent to assignment of ground leases and that the lessor had promised to furnish written assignments and the buyers relied thereon to their detriment, all the elements of fraud were present and buyers were entitled to rescind the contract and recover damages. West's Ann.Civ.Code, § 1689, subd. 1.

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Frank De Marco, Jr., Los Angeles, for defendant and appellant.

Samuel Duskin and David S. Smith, Los Angeles, for plaintiffs and respondents.

⊥BURKE, Presiding Justice. ⊥135

This is an action for rescission of a contract of sale of a business and for damages brought by Deane L. Civille and Evelyn M. Civille (Buyers) upon alleged failure of consideration and fraud of Harry E. Bullis (Seller). Defendants and respondents Joseph DuBrow and Dr. Seymour Myers, encumbrancers of the business, took no part in this appeal.

The facts relative to the issues raised on this appeal viewed most favorably to Buyers are as follows:

Buyers and Seller negotiated for the purchase and sale of a car wash business in Encino, California. The written agreement of the parties was set forth in escrow instructions wherein Seller obligated himself to obtain for Buyers valid assignments of the leases to the premises. The leases prohibited assignment without the consent of the lessor. Seller had been⊥the lessee in ⊥136 the said leases which had enabled Seller to operate the car wash. The assignments were therefore essential in order to enable Buyers to operate the car wash business.

The first escrow agreement is dated November 28, 1958. On December 30, 1958, an amendment to the escrow instructions was signed whereby Seller obligated himself to furnish the lease assignments outside of escrow thereby enabling escrow to close, and further enabling Seller to obtain $10,000 deposited into escrow by Buyers. Buyers went into possession of the car wash business prior to close of escrow. They operated it, made repairs to machinery and expended other sums required in the operation of the business in the belief that their possession of the premises was justified under the promised assignment of the leases.

On April 8, 1959, Buyers served upon Seller a notice of rescission and abandoned the premises, whereupon Seller retook possession.

One of Buyers, Deane L. Civille, testified that Seller orally represented to him on numerous occasions, both before and after the close of escrow, that the lessor had consented to the assignment of the leases and had further promised to furnish written assignments to the leases.

Ronald Civille, son of Buyer, Deane L. Civille, testified that Seller told him that he had talked to the lessor and she agreed to assign the leases to Buyers. He further testified that Seller assured him there was nothing to worry about. Seller stated on numerous occasions that he had the assignments.

Mrs. Louise L. Sullivan, lessor of the real property where the car wash was situated, testified that at no time did she ever tell Seller she consented or would consent to assignment of the leases. She testified further that she would not consent to the assignments because of the lack of financial stability and strength of the proposed assignees (Buyers). Her testimony further disclosed that on or about April 22, 1959, Seller, through his attorney, offered her the sum of $10,000 to execute assignments of the leases if she would back-date the assignments to December 1958. She further testified Seller never even spoke to her about purported assignments to Buyers until April 22, 1959.

It was conceded by Seller that he never did obtain a consent to the assignment of the leases but he denied making the oral representations concerning the consent of the lessor to the assignment.

The trial court found there was a failure of consideration upon the Seller's admitted failure to deliver valid assignments of two leases to the business premises as promised by Seller in the contract of sale. Seller concedes for purposes of this appeal that the ultimate relief granted to Buyers may be justifiably granted upon a finding of failure of consideration.

The trial court further found Seller orally misrepresented to Buyers that oral consent to assign the leases had been obtained from the lessor and that written consents would be immediately forthcoming, thereby fraudulently inducing Buyers to change their position to their substantial injury.

Seller appeals only from that portion of the judgment which grants Buyers relief based upon allegations of fraudulent misrepresentation of facts in connection with the assignment of the leases to the business premises.

Seller contends that the record is entirely devoid of any substantial evidence upon which the court's finding of fraud may be based.

[1] A cause of action for fraud is proved when evidence discloses:

1) The making of a false representation concerning a material fact;

2) Knowledge of defendant that the representation was false, or defendant lacked honest belief in its truth, or defendant made the statement in a positive manner not warranted by the information which he possessed;

3) The statement was made with the intent to induce reliance; and

4) Plaintiff justifiably relied upon the false representation, thereby suffering damage. (Civil Code, §§ 1572, 1709 and 1710; Gagne v. Bertran, 43 Cal.2d 481, 487–488, 275 P.2d 15.)

[2] In this case Seller falsely represented that he had obtained from lessor oral consent to assignment of the ground leases and that lessor had promised to furnish written assignments. These facts were supported by evidence of Seller's own admission that the assignments were never consented to and by the testimony of lessor that he had made no such promises to Seller. Such representations were false affirmations of fact within the meaning of Civil Code, section 1710, subdivision 1. (Also see

Nathanson v. Murphy, 132 Cal.App.2d 363, 367, 282 P.2d 174.) Clearly the assignment of the leases constituted a material fact since it was an express condition in the contract of sale of the business. Seller knew that lessor had not consented to assign nor promised to furnish written assignments. ⊥138 Under such circumstances Seller⊥cannot assert that he reasonably believed in the truth of the representations nor that his misrepresentations were merely negligent. (See Horrell v. Santa Fe Tank & Tower Co., 117 Cal.App.2d 114, 119, 254 P.2d 893.)

In reliance on Seller's representations Buyers were induced to and did enter into the contract to purchase the car wash business. They were induced to and did release the $10,000 from the escrow. They assumed other obligations of the business, made repairs to machinery and expended other sums all in reliance on Seller's representations as to the consummation of the lease assignments. These facts show a substantial change of position by Buyers to their detriment.

[3, 4] Buyers were not required to investigate as to Seller's ability to obtain the lease assignments when Buyers had been assured that they had been consented to by the lessor. "Caveat emptor" is inapplicable. Under such circumstances as are present here there is no duty to investigate. Furthermore, any possible "contributory negligence" of the Buyer is not a defense to the intentional tort of fraud. (Seeger v. Odell, 18 Cal.2d 409, 415, 115 P.2d 977, 136 A.L.R. 1291; Anderson v. Thacher, 76 Cal.App.2d 50, 70, 172 P.2d 533.) Hence, the mere existence of an opportunity to investigate or of sources of information will not preclude the buyer from relying upon the representations. (Seeger v. Odell, supra; Lobdell v. Miller, 114 Cal.App.2d 328, 338, 250 P.2d 357.) Buyers' reliance was justifiable in this case.

[5] We hold that there is substantial evidence to establish that all of the elements of fraud are present in this case and that the fraud forms a proper basis for Buyers' cause of action to rescind the contract and for damages. (Civil Code, § 1689, subdivision 1.) The record discloses that both Seller and Buyers were in all respects accorded a fair trial. There is no basis for Seller's claim of prejudice or that the trial court erroneously excluded certain evidence.

The judgment is affirmed.

JEFFERSON and FORD,* JJ., concur.

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209 Cal.App.2d 13

⊥13 **In re ADOPTION of Klaus Dieter BACKHAUS, a Minor.**

Glenn L. WHISLER et al., Petitioners and Appellants,

v.

DEPT. OF SOCIAL WELFARE, Contestants and Respondents.

District Court of Appeal, Fifth District, California.
Oct. 24, 1962.

Adoption proceeding. From a judgment of the Superior Court, Kern County, W. L. Bradshaw, J., denying the adoption, the petitioners appealed. The District Court of Appeal, Brown, J., held that Superior Court has jurisdiction to review an unfavorable report of the department of social welfare as to suitability of prospective adoptive parents as an independent and separate step in adoption proceeding, and there is no requirement such review be made only at the time of, or as a part of, the hearing on the petition for adoption.

Judgment reversed.

1. Appeal and Error 🔑93

Order granting a motion for summary judgment is nonappealable.

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* Assigned by Chairman of Judicial Council.

2. Adoption 🔑4

Superior court has jurisdiction to review an unfavorable report of department of social welfare as to suitability of prospective adoptive parents as an independent and separate step in adoption proceeding, and there is no requirement such review be made only at time of, or as a part of, hearing on petition for adoption. West's Ann.Civ. Code, §§ 4, 226, 227.

3. Adoption 🔑3

General rule of statutory construction that statutes in derogation of common law are to be strictly construed does not apply to adoption statutes. West's Ann.Civ.Code, § 4.

4. Judgment 🔑180

Summary judgment procedure is applicable to adoption proceedings. West's Ann.Civ.Code, § 4; West's Ann.Code Civ. Proc. § 437c.

◆

Edwin W. Wilson, Bakersfield, for petitioners and appellants.

Stanley Mosk, Atty. Gen., and Norman L. Epstein, Deputy Atty. Gen., for contestants and respondents.

⌊15 BROWN, Justice.

[1] This is an appeal from a summary judgment denying a petition for adoption and from an order granting the motion therefor. The order is nonappealable and the attempted appeal therefrom must be dismissed (Hagen v. Fairchild, 204 A.C.A. 1, 21 Cal.Rptr. 923; Chilson v. P. G. Industries, 174 Cal.App.2d 613, 344 P.2d 868; Martelli v. Pollock, 162 Cal.App.2d 655, 328 P.2d 795). We have concluded that the judgment must be reversed.

Appellants Glen L. Whisler and Angela L. Whisler, petitioners below, are husband and wife, and reside in the County of Kern. Residing in their home with them at the time this controversy arose were a 9-month-old adopted female child and a 16-year-old niece of Mrs. Whisler. Petitioners initiated procedures for the adoption of a German born and domiciled male child, two years of age, and to secure his entrance into the United States for the purpose of adoption under former Adopted Orphans Immigration Law of the United States (8 U.S.C.A. § 1205, repealed by Public Law 87–301, para. 24(a) (2), effective September 26, 1961; now incorporated in the Immigration and Nationality Act (8 U.S.C.A. § 1101(b) (1) (6) and 8 U.S.C.A. § 1155(b)). In relevant part, the federal law creates an exception to the immigrant quota laws of this country and provides a method for conferring nonquota status on foreign-born children who may be brought to the United States for the purpose of adoption by its citizens. As applicable here, section 1101(b) (6) defines an "eligible" orphan as an alien child, under the age of 14 years, who has only one parent, incapable of providing care and that parent has in writing irrevocably released him for immigration and adoption. By section 1155 (b) it is provided that the Attorney General of the United States must be satisfied that the adopting parents will properly care for the child and that they "have complied with the preadoption requirements, if any, of the state of such child's proposed residence."

Complementing the federal law, the California Legislature delegated to the Department of Social Welfare the duty to investigate homes of persons applying to adopt foreign-born children and appropriated funds therefor (Stats.1959, ch. 2050, p. 4745).

The record discloses that the child who is the subject of ⌊16 this controversy was born out of wedlock in Karlsruhe, in the Federal Republic of Germany, on May 3, 1959. By operation of the German Youth Welfare Law of 1922, as amended in 1953, the Jugendamt (Juvenile authorities) become the official guardians of illegitimate children born in Germany. All proper steps having been taken, the child has been since birth and still is the official ward of the Jugendamt and has been cared for in St. Anthony Home in Karlsruhe. The consent of the Jugendamt and of a German Court are prerequisites to adoption of the child under German law. It is conceded that those consents have not yet been obtained. A consent of the mother of the child, satisfactory in form to the German law and to the law of California, has been given.

Pursuant to the duty imposed by California law, the Department of Social Welfare, hereinafter referred to as Department, investigated the suitability of the petitioners' home and made an unfavorable recommendation to the federal authorities which precluded entrance of the child into the United States under the exception to the federal immigration quota law.

Petitioners then filed with the Superior Court of Kern County, in which county they reside, a petition seeking a decree of adoption. The department filed in that proceeding an unfavorable report and adverse recommendation. Petitioners then filed a petition seeking a judicial review of, and an appeal from, the adverse report and a notice of motion to strike alleged extraneous matter contained therein. The department then noticed for hearing a motion for summary judgment or, in the alternative, an order suspending proceedings upon the grounds that:

> "(1) There is no jurisdiction to proceed on the merits of the instant petition for adoption, since (a) there is no jurisdiction over the subject of the petition; (b) the subject child is not free for adoption; and (c) the California Adoption Law contemplates a single, final decision; and (2) The requisite in section 227 of the Civil Code that a child proposed to be adopted must appear before the court cannot be satisfied at the present time."

Upon hearing, the court granted the motion for summary judgment and entered its judgment denying the adoption, predicated upon the conclusion that any further proceedings in the adoption matter "would be in excess of jurisdiction and in violation of applicable statutory provisions." Petitioners brought this appeal.

⊥17 ⊥The principal question to be answered by this court is whether the trial court erred in determining that it lacked jurisdiction *at this stage of the proceeding.*

The briefs present numerous arguments relating to jurisdiction of the court, or lack thereof, to *grant a decree of adoption* affecting the status of a child born, domiciled, and physically residing in Germany who cannot now appear in court and whose official guardian, an arm of a foreign nation, has not yet consented to the adoption, and cite statutory and case authority in support thereof. Arguments presaging a failure to meet all legal preadoption requirements at the time of final hearing of the petition for adoption are inapplicable to the problem before us. It must be remembered that petitioners are not now seeking a hearing for the purpose of procuring a decree of adoption; they are not, as the department suggests, vainly seeking a review by a state court of an unfavorable report rendered pursuant to the federal immigration law; they are seeking only a judicial review of an unfavorable departmental report which was filed in adoption proceedings then pending in a California court.

[2] The department urges, in support of the judgment, that an independent inquiry by the court into the suitability of petitioners' home by the court relates to the merits of the petition for adoption; that the court lacks jurisdiction to make any decision on the merits since the jurisdictional prerequisites to hearing the petition are lacking, i. e., the child may not appear before the court and certain consents which it claims are necessary to adoption by petitioners have not as yet been obtained. Restated briefly, the department's position is that judicial review of an unfavorable report made by one of its employees is an integral, inseparable part of hearing on the merits of the adoption petition. The position is unsound.

[3] Adoption proceedings are wholly statutory (Estate of Pierce, 32 Cal.2d 265, 268, 196 P.2d 1; In re Santos, 185 Cal. 127, 129, 195 P. 1055). The adoption statutes must be looked to as to the proceedings by which the adoption is to be effected (1 Am. Jur., Adoption of Children, § 25). The general rule of statutory construction that statutes in derogation of the common law are

to be strictly construed (Thompson v. Thompson, 218 U.S. 611, 31 S.Ct. 111, 54 L.Ed. 1180; Crawford, Statutory Construction, § 265) does not obtain in this state as to the provisions of the adoption statutes. The statutes governing adoption are ⌊18 found in the Civil Code, and section 4 of that code provides:

> "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

The philosophy there expressed has been carried into the decisional law of this state. In Adoption of Barnett, 54 Cal.2d 370, 6 Cal.Rptr. 562, 354 P.2d 18, our Supreme Court approved the rule of liberal construction of adoption statutes and expressly disapproved prior cases which adhered to the common law rule of strict construction. Pertinent language is found at page 377, 6 Cal.Rptr. at page 566, 354 P.2d at page 22 where the court quotes a statement taken from In re Santos, supra, 185 Cal. 127, 130, 195 P. 1055:

> "Wherever possible, such a construction should be given adoption laws as will sustain, rather than defeat, the object they have in view. * * * The main purpose of adoption statutes is the promotion of the welfare of children, bereft of the benefits of the home and care of their real parents, by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child."

We are here concerned with the statutes as they existed at the time the court made its order granting summary judgment, prior to the effective date of the 1961 amendments. The first paragraph of section 227 of the Civil Code provides, in relevant part, that any person desiring to adopt a child may petition the superior court of the county in which the petitioner resides. Such a petition was properly filed in this case. "The filing of the petition invokes action of the court. The adoption is affected by the decree of the court." (1 Am.Jur., Adoption of Children, § 30.)

The third paragraph of that section imposes upon the department, in an independent adoption, which this is, the duty to "ascertain whether the child is a proper subject for adoption and whether the proposed home is suitable for the child, prior to filing report with the court." By paragraph five of that section the department is under a duty to "submit to the court a full report of the facts disclosed by its inquiry with a recommendation regarding the granting of the petition." Paragraph seven of the same section provides that, if the findings of the department are unfavorable and its recommendation is that the petition be denied, the county ⌊19 clerk shall immediately refer the report to the superior court for review.

Neither section 226 nor any other statute governing adoption proceedings require that all of the statutory prerequisites to an effective adoption decree be satisfied at the time of such review. Nowhere in those statutes can be found a requirement that judicial review must be made as a part of, or concurrently with, a hearing held for the purpose of considering an adoption decree. Rather, the statute is plain and unambiguous in its terms. It confers upon the superior court the power to review an unfavorable report immediately after its receipt by the county clerk. But three prerequisites to the court's jurisdiction to review are contemplated: (1) there must be a petition for a decree of adoption on file with the superior court of the county in which the petitioners reside; (2) the department must have conducted its investigation and filed its report and recommendation with the county clerk; and (3) the report and recommendation must be unfavorable to the petitioners. All three elements concur in the case under consideration.

We cannot ingraft upon paragraph seven of section 226 the additional requirements that, at the time of judicial review, all consents required by the adoption statutes or by foreign law must have been obtained and the child must appear in court. We cannot supplement that paragraph by adding a provision that such review be made only at the time of, or as a part of, the hearing on the petition for adoption. Nor are we disposed to do so for we have no doubt that the Legislature intended judicial review of an unfavorable report to be a separate and distinct function of the court which may, but need not, be considered contemporaneously with the adoption petition.

The courts of this state have evinced a concern to further the spirit and purpose of adoption and have been loath to place a restriction or limitation upon the meaning of the Legislature which the statutory language will not support.

In Adoption of McDonald, 43 Cal.2d 447, 274 P.2d 860, the contention was made that the consent of a licensed adoption agency, to which the subject child had been relinquished, was a jurisdictional prerequisite to an adoption decree. The Supreme Court, in an exhaustive and well-reasoned opinion, rejected the contention on the basis that the adoption statutes as they then stood did not require such consent.

And in In re Kitchens, 116 Cal.App.2d 254, 253 P.2d 690, ⌊20 it was held that the consent of the Department of Social Welfare was a prerequisite to the decree allowing the adoption of a child which had been relinquished to the department. In Adoption of McDonald, supra, the court said:

> "In re Adoption of Kitchens, 116 Cal.App.2d 254, 253 P.2d 690, on which appellant relies, reads into the statute matters that are not there and fails to give effect to express provisions that are there. It would divest the Superior Court of the jurisdiction and responsibility expressly given it by the statutes and is therefore disapproved."

That statement is peculiarly fitted to the question before us. To accede to the department's position in this matter would require us to read into the statute restrictions or limitations which, as we have pointed out, are not there, and to divest the superior court of jurisdiction and responsibility to review an unfavorable departmental report as an independent and separate step in adoption procedure, when that jurisdiction is expressly given by the statute.

We are not required to, and will not, now indulge in speculation or conjecture as to whether the child can, or will, be brought to California under the nonquota status exception to the federal immigration law, or whether consents necessary to a legal adoption can, or will, be obtained. We here decide only that the court below has jurisdiction conferred by statute to review the department's report and make its own independent determination of the suitability of the home of petitioners for this adoption.

[4] The conclusion which we have reached effectively disposes of all contentions made by petitioners. However, we shall comment briefly on their contention that summary judgment procedure is not applicable to adoption proceedings. The answer is found in section 437c of the Code of Civil Procedure, which authorizes summary judgment. Prior to 1953 the area of permitted use of a motion for summary judgment was limited by the terms of that section to a narrow specified class of actions. By amendment in that year the scope of the action was expanded to include "any kind of action," and the word "action" was defined to include "all types of proceedings." The statutory definition embraces adoption proceedings.

The purported appeal from the order granting the motion for summary judgment is dismissed. The judgment is reversed.

CONLEY, P. J., and STONE, J., concur.

Margaret B. COOKE, Plaintiff and Appellant,

v.

Ann TSIPOUROGLOU and Andreas Tsipouroglou, Defendants and Respondents.

Civ. 26239.

District Court of Appeal, Second District, Division 4, California.

Oct. 29, 1962.

As Modified on Denial of Rehearing

Oct. 29, 1962

For Opinion on Hearing, see

31 Cal.Rptr. 60, 381 P.2d 940.

Action by passenger in automobile driven by her husband for injuries suffered in collision with defendants' vehicle. The Superior Court, Los Angeles County, James G. Whyte, J., denied recovery on the ground that the passenger was a joint owner of the automobile along with her husband and that the husband's negligence was therefore imputed to her, and the passenger appealed. The District Court of Appeal, Burke, P. J., held that determination of joint ownership was clearly erroneous in view of testimony that automobile had been purchased with community funds and was intended to be held as community property, notwithstanding that certificate of ownership of motor vehicle department showed ownership in names of the husband "or" the wife.

Reversed and remanded.

1. Negligence 🔑93(2)

In cases where automobile is jointly owned by husband and wife, negligence of driver-husband will be imputed to passenger-wife to bar her recovery in personal injury action against negligent third party. West's Ann.Vehicle Code, § 17150.

2. Negligence 🔑89(1)

Statute imposing vicarious liability upon owner whose automobile is operated negligently by permissive user applies to bar actions by owner against negligent third persons where owner would be vicariously liable to another as a defendant for permissive user's negligence. West's Ann. Vehicle Code, § 17150.

3. Negligence 🔑93(2)

In cases where automobile is community property, contributory negligence of driver-husband is not imputed to passenger-wife in view of fact that husband has management and control of community property and his use of such property is not dependent upon wife's consent.

4. Husband and Wife 🔑262(1)

There is a general presumption that all property acquired by husband and wife during marriage, other than property received by gift, bequest, devise or descent, is community property. West's Ann.Civ. Code, §§ 164, 683.

5. Joint Tenancy 🔑3

Joint tenancy in personalty can only be created by writing, and the intention to create such joint tenancy must be specifically set forth in the writing. West's Ann. Civ.Code, § 683.

6. Husband and Wife 🔑262(1)

General presumption that property acquired after marriage is community property is rebutted where married woman acquires personal property with another by an instrument in writing, and in such case married woman takes title as tenant in common unless different intention is expressed in instrument. West's Ann.Civ. Code, § 164.

7. Husband and Wife 🔑14(4)

Registration certificate issued by state motor vehicle department for automobile is not an "instrument in writing" within statutory provision allowing for acquisition by married woman of property as tenant in common when personalty is acquired by an instrument in writing. West's Ann.Civ. Code, § 164.

See publication Words and Phrases for other judicial constructions and definitions.

8. Husband and Wife 🔑14(1)

Regardless of form of instrument under which a husband and wife take and hold title to property, such instrument is not conclusive as to the property's status, and true status of such property may always be shown according to intention, understanding or agreement of parties.

9. Husband and Wife ⚷264

Absent showing that wife knew difference between community and separate property, wife's testimony that she and her husband had intended a joint tenancy in their automobile rather than a community property arrangement was insufficient to destroy effect of prior testimony that automobile had been purchased out of community funds.

10. Husband and Wife ⚷264

Determination that automobile was held by husband and wife as joint rather than community property was clearly erroneous in view of testimony that automobile had been purchased with community funds, notwithstanding that the registration certificate and certificate of ownership of motor vehicle department showed ownership in the names of the husband "or" the wife. West's Ann.Vehicle Code, § 17150; West's Ann.Civ.Code, §§ 164, 683.

◆

Oshman & Brownfield, Los Angeles, and Burton Marks, Beverly Hills, for plaintiff and appellant.

Schell & Delamer and Fred B. Belanger, Los Angeles, for defendants and respondents.

BURKE, Presiding Justice.

This is an action for personal injuries arising out of an automobile accident.

The plaintiff wife was denied recovery by the trial court because the negligence of her driver-husband was imputed to her as a joint owner.

At the time of the accident plaintiff, Margaret B. Cooke, and Gladys Lamphere were passengers in an automobile being operated by plaintiff's husband, Jack Edward Cooke, in Los Angeles County. The automobile was owned by plaintiff and her husband. The Cooke automobile collided with an automobile operated by defendant Ann Tsipouroglou.

Both plaintiff and Gladys Lamphere brought separate actions alleging negligence on the part of defendants and further alleging that both defendants were owners of the automobile operated by defendant Ann Tsipouroglou. The actions were consolidated for trial. Gladys Lamphere recovered a judgment against defendants.

After a trial without a jury the court made findings of fact and conclusions of law pertinent on this appeal as follows:

> "* * * defendant Ann Tsipouroglou was negligent * * * and her said negligence was a proximate cause of said collision.
>
> "* * * Jack Edward Cooke was negligent * * * and his said negligence was a proximate cause of said collision.
>
> "Said 1958 Lincoln automobile, in which plaintiff was riding at the time of said accident, was owned by said plaintiff and by said Jack Edward Cooke jointly and not as community property.
>
> "Said negligence of said Jack Edward Cooke is imputable to said plaintiff Margaret B. Cooke."

On appeal plaintiff makes two primary contentions. First it is claimed that the finding of joint ownership of the Cooke automobile is not supported by the evidence and is contrary to express presumptions in California law as to status of marital property.

Secondly, plaintiff argues that even assuming that the Cooke automobile was jointly owned, negligence should not be imputed to plaintiff in this case since the law contemplates imputation of negligence for the purpose of protecting innocent third persons only.

[1,2] First dealing with the latter contention of plaintiff, it appears settled in California that in cases where an automobile is jointly owned by husband and wife the negligence of the driver-husband will be

imputed to the passenger-wife to bar her recovery in a personal injury action against a negligent third party. (Vehicle Code § 17150; Mooren v. King, 182 Cal.App.2d 546, 552, 6 Cal.Rptr. 362; Rody v. Winn, 162 Cal.App.2d 35, 39–40, 327 P.2d 579.) The basis for this rule is Vehicle Code § 17150 which imposes vicarious liability upon an owner whose automobile is operated negligently by a permissive user. The statute is applied to bar actions by the owner against negligent third persons where the owner would be vicariously liable to another as a defendant for the permissive user's negligence. (Milgate v. Wraith, 19 Cal.2d 297, 299–300, 121 P.2d 10; also see Prosser on Torts, p. 300 and Restatement of Torts, § 485.)

[3] However, the opposite result obtains where the automobile is community property. In such case the contributory negligence of the driver-husband is not imputed to the passenger-wife because the husband has management and control of community property and his use of such property is not dependent upon the wife's consent (Lawson v. Lester, 191 Cal.App.2d 34, 36, 12 Cal.Rptr. 368.)

The remaining question in this case is whether the Cooke automobile was in fact owned by plaintiff and her husband as community property or as property held as joint tenants or tenants in common.

[4] Civil Code section 164 states the general presumption that all property acquired by husband and wife during marriage, other than property received by gift, bequest, devise or descent, is presumed to be community property. More specifically it is presumed that personalty acquired during coverture is community property. (Garten v. Garten, 140 Cal.App.2d 489, 495, 295 P.2d 23.) And all property acquired by purchase after marriage is presumed to be community property. (Wynn v. Wynn, 170 Cal.App.2d 484, 338 P.2d 930.)

[5] As provided in Civil Code section 683, a joint tenancy in personalty can only be created by a writing. The intention to create the joint tenancy must be specifically set forth in the writing. (Berl v. Rosenberg, 169 Cal.App.2d 125, 133, 336 P.2d 975; Estate of Hoefflin, 176 Cal.App.2d 619, 628, 1 Cal.Rptr. 642.)

At the trial in the instant case plaintiff testified that the automobile was purchased out of community funds—the joint earnings of Mr. and Mrs. Cooke. Plaintiff's husband, Mr. Cooke, testified that he intended that the car be held as community property and that it was purchased out of his and plaintiff's joint earnings.

The evidence produced by defendants on the issue of how title to the automobile was held consisted of certified copies of registration certificate and certificate of ownership of the department of motor vehicles showing ownership of the car in the names of "Jack or May [Margaret] Cooke."

Defendants assert that plaintiff and her husband acquired their ownership in the automobile by an instrument in writing which they conceive to consist of the prior owner's certificate of ownership, the application for transfer by new registered and legal owner (also admitted as evidence) and the other documents of the department of motor vehicles referred to above.

[6] Under Civil Code section 164 the general presumption that property acquired after marriage is community property is rebutted where a married woman acquires personal property with another by an instrument in writing. In such case the married woman takes title as a tenant in common, unless a different intention is expressed in the instrument.

[7] However, a registration certificate issued by the department of motor vehicles is not an "instrument in writing" within the provision of Civil Code section 164. (Lawson v. Lester, supra, 191 Cal.App.2d 34, 37, 12 Cal.Rptr. 368; Rody v. Winn, supra, 162 Cal.App.2d 35, 39, 327 P.2d 579; Pacific Tel. & Tel. Co. v. Wellman, 98 Cal. App.2d 151, 155, 219 P.2d 506.) The court in Estate of Inman, 148 Cal.App.2d 952, 957, 307 P.2d 953, held the fact that a regis-

tration certificate was in the wife's name alone did not create the presumption that the automobile was her separate property.

Wilcox v. Berry, 32 Cal.2d 189, 192, 195 P.2d 414, which defendant cites may be readily distinguished from the instant case. In the Wilcox case a husband and wife seeking to establish community property ownership of their automobile invoked the presumption of Civil Code section 164 that where property is acquired by an instrument in writing describing the conveyees as husband and wife, such property is presumed community property. The court held that the presumption did not apply where the title was taken and held in "Jess G. Berry and/or Violet A. Berry." In the instant case Mr. and Mrs. Cooke do not assert the form of any instrument as evidence of how they held title.

[8] Regardless of the form of instrument under which husband and wife take and hold title to property, it is not conclusive as to its status. The true status of such property may always be shown according to the intention, understanding or agreement of the parties. (Socol v. King, 36 Cal.2d 342, 345, 223 I .2d 627.)

[9] Defendant also claims as evidence supporting the joint ownership contention, testimony of plaintiff on cross-examination by defendants' counsel as follows:

> "Q Now as to the ownership of your automobile, Mrs. Cooke, your husband and yourself owned that automobile in joint tenancy; isn't that correct?
>
> "A. That is true.
>
> "[Plaintiff's counsel] That calls for a conclusion of the witness, your Honor. I object to it.
>
> "THE COURT. Overruled. The answer may stand.
>
> "Q The automobile was registered in both of your names?
>
> "A Right."

Absent some showing that Mrs. Cooke knew the difference between community and separate property, joint tenancy and tenancy in common, her statement that it was owned in joint tenancy is insufficient to rebut her testimony on direct that the automobile was owned by her husband and her and that it was purchased out of community funds. In order to destroy its character as community property under Civil Code section 164, it would be necessary that it be shown that she acquired an interest as her separate property by an instrument in writing. The various documents attendant to registering the car in the names of the husband *or* wife are insufficient for that purpose since they pertain solely to the matter of registration and transfer of registration. Nor do they satisfy the requirements of a writing expressly declaring property to be held in joint tenancy as required under Civil Code section 683.

[10] Accordingly, the evidence remaining on the issue of the status of the property is the testimony of both plaintiff and her husband that the car was purchased with community funds and that it was intended to be held as community property. Other evidence supporting the community property status is the general presumption of Civil Code section 164 that property acquired by husband and wife after marriage (with exceptions not relevant here) is presumed to be community property.

A finding by the trial court of joint ownership in the face of the overwhelming evidence that the automobile was in fact held as community property is clearly error. Because the case turns on the status of the property, such error is prejudicial to plaintiff and requires reversal.

As noted, supra, the contributory negligence of the husband-driver is not imputed to the passenger-wife to bar her recovery from a negligent third party where the automobile which the husband and wife occupied was owned by them as community property. Use of community property by the husband is not dependent upon the wife's consent since the husband has management and control over community property. (Lawson v. Lester, supra, 191 Cal.App.2d 34, 36, 12 Cal.Rptr. 368.)

The judgment is reversed and remanded to the trial court for trial of the issue of damages.

JEFFERSON and FORD,* JJ., concur.

208 Cal.App.2d 709

⌊709 ⌊**Application of Mabel May HOWARD for a Writ of Habeas Corpus.**

The PEOPLE of the State of California, Appellant,

v.

Mabel May HOWARD, Respondent.

Cr. 4114.

District Court of Appeal, First District, Division 1, California.

Oct. 22, 1962.

Hearing Denied Dec. 19, 1962.

Petition for writ of habeas corpus. The Superior Court, County of Lake, Ralph V. Devoto, J., entered order discharging petitioner from custody as the People appealed. The District Court of Appeal, Bray, P. J., held that motorist who was accused of drunk driving was not denied due process of law because officer refused her request for an opportunity to phone her doctor, who was almost two hours driving time away, to make a blood test when accused was released from jail within 20 minutes to half an hour thereafter and could have phoned her doctor then or could have had blood test made at the local hospital.

Reversed.

1. Criminal Law 🔑388

Accuracy of blood tests for purpose of determining intoxication are recognized and test may serve to exonerate as well as to convict. West's Ann.Vehicle Code, § 23102.

2. Constitutional Law 🔑262

Motorist who was charged with drunk driving was not denied due process of law because she was refused opportunity to phone her doctor, who was almost two hours driving time away, to make a blood test when she was released from jail 20 minutes to a half an hour after being brought there and could have phoned her doctor then or could have had test made at local hospital. West's Ann.Vehicle Code, § 23102.

3. Constitutional Law 🔑266

While prisoner charged with intoxication may insist upon obtaining his own doctor for blood test rather than another, availability of opportunity to obtain doctor whose test, because of time element, would be more valuable, may be considered in determining whether petitioner has actually been deprived of due process.

4. Arrest 🔑70

Person whose sobriety is in question has right to obtain blood test for alcohol.

Stanley Mosk, Atty. Gen. of the State of California, John S. McInerny, Robert R. Granucci, Deputies Atty. Gen., San Francisco, for appellant.

Robert C. Cook, Sacramento, for respondent.

⌊BRAY, Presiding Justice. ⌊710

The People appeal from an order upon return of writ of habeas corpus discharging petitioner from custody.

QUESTION PRESENTED.

Was petitioner denied due process of law in the refusal of her request that her physician be notified of her arrest so that he could give her a blood test?

RECORD.

On July 21, 1961, petitioner was arrested in Lower Lake, Lake County, by State Highway Patrol Officer Lee, who charged her with violation of section 23102, Vehicle Code (misdemeanor drunk driving).

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* Assigned by Chairman of Judicial Council.

She was booked at the county jail at Lakeport. A complaint was filed in the Justice Court of Lower Lake Judicial District charging her with violation of the above section. She was released on bail that night. On October 3 she filed in Lake ⊥711 County Superior Court a petition for writ of habeas corpus on the ground that she had been denied due process of law by the refusal of her request to be allowed a blood alcohol test by her own physician. After a hearing, the court ordered her discharge.

Petitioner was arrested at about 5:30 or 5:40 p. m. Her car was left at the place of arrest. Officer Lee first drove to the Howard residence. He then stopped by his own home where he picked up his wife to act as matron. Petitioner was booked at the Lakeport County Jail at approximately 7:30 p. m., almost two hours after the arrest. Prior to being booked petitioner made no requests of any nature. On being booked she requested that her personal physician, Dr. Charles B. Shaap, be brought to the county jail in order to give her a blood test. He lives and practices in Monte Rio, which is about 1 hour and 45 or 55 minutes driving time from Lakeport.

It is not clear from petitioner's testimony whether she claims that she asked to be permitted to call the doctor herself. The officer testified that she did not do so. The trial judge in his memorandum opinion intepreted her testimony as not requesting the use of the telephone herself. In any event, she made it clear that she desired that her physician be contacted for the purpose of having him come to Lakeport and make a blood test. She offered to pay the expenses in connection therewith. The officer refused petitioner's request because of the distance involved and the time elapsing since the arrest. Officer Lee testified that instead he offered to take petitioner to the Lakeside Hospital, 10 minutes from the county jail, where she could select a doctor of her own choice to give her a blood test. This offer she did not accept. Officer Lee testified further that petitioner, when told that they did not have the facilities to bring the doctor to Lakeport, replied that "she would fly him here." Petitioner testified that the officer did not mention offering to take her to the hospital. About 8:00 that evening she was released on bail. After her release, she made no effort to procure a blood test.

Dr. Carl Aagaard, an expert pathologist, testified concerning blood tests to determine the quantity of alcohol in the blood. He stated that a sample of blood taken 5 hours after the time to which the inquiry relates would still have probative value if the alcohol content in the blood had not reached zero.

DUE PROCESS.

The Attorney General contends that petitioner's request was unreasonable in that she was only entitled to a reasonable opportunity ⊥712 to procure a blood sample, and that her request that her physician, who was practically two hours driving time away, be contacted for this purpose, was unreasonable, particularly in view of the officer's offer to take her to the county hospital to get a doctor of her own choice; therefore, he contends, there was not a denial of due process.

In In re Newbern (1959) 175 Cal.App.2d 862, 866, 1 Cal.Rptr. 80, 83, 79 A.L.R.2d 901, the defendant asked the arresting officers for an intoximeter test and was informed that such tests were not given to a person arrested for being drunk in public view. He then requested that a private physician be brought in from the outside at his expense to take a sample of his blood to determine the percentage of alcohol in it. This request was denied. The court in holding that the refusal to permit the defendant to call a doctor was unreasonable and a denial of due process, said: "It is a matter of common knowledge that the intoxicating effect of alcohol diminishes with the passage of time. In a matter of a few hours an intoxicated person may 'sober up.' The efficacy of a blood test depends upon its being made as soon as possible after the time of the offense. To be of any probative value the test must be 'near' to the offense in point of time. If it is not taken promptly after the arrest, it proves nothing.

"While there is no duty or obligation on the law enforcement agencies to give a blood test under these circumstances, the arrested person, on his own behalf, should be entitled to a reasonable opportunity to attempt to procure a timely sample. To refuse him such reasonable opportunity is to deny him the only opportunity he has to defend himself against the charge."

[1] The courts of California have often pointed out that "the accuracy of blood tests for the purpose of determining intoxication have been recognized by many courts and the test 'may serve to exonerate, as well as to convict.' People v. Duroncelay, 48 Cal.2d 766, 772, 312 P.2d 690, 694." (McCormick v. Municipal Court (1961) 195 Cal.App.2d 819, 824, 16 Cal.Rptr. 211, 215.)

Similar facts compelled the court in People v. Dawson (1960) 184 Cal.App.2d Supp. 881, 882–883, 7 Cal.Rptr. 384, 385, to "hold that it was error to deny the defendant a reasonable opportunity to call a doctor of his own choice and at his own expense to give him a blood test at a time when he was suspected of being under the influence of intoxicating liquor." In Dawson the evidence indicated not that the defendant had ⌊713 requested to be permitted to call his own doctor but merely that he requested that his doctor be called.

In In re Koehne (1960) 54 Cal.2d 757, 8 Cal.Rptr. 435, 356 P.2d 179, the Supreme Court defined the necessary acts on the part of the accused in order to preserve his rights. There the defendant while on the way to the police station indicated that he wanted to be given a blood test. The arresting officer informed him that he could arrange at his (the defendant's) expense for the blood test when he arrived at the station. The court stated that there was no indication from the record that the defendant was in a position or was willing to bear the expense of calling his doctor. Nor did it appear that he made known his wishes at the time of "booking" at the jail but only on the way to the station when arrangements for the attendance of a doctor could not reasonably be made. The court in summary pointed out what would have been a reasonable request under the circumstances (p. 760, 8 Cal.Rptr. p. 437, 356 P.2d p. 181):

"While, as stated, one accused of being drunk is entitled to a reasonable opportunity to procure a timely sample of his blood at his own expense, it cannot be reasonably held that, even though such a request is made to the arresting officer, it is the latter's duty while escorting the prisoner to a police call box or otherwise at the scene of the arrest, to permit his prisoner to telephone a physician. The request should be made at the police station when the arrested person is 'booked' and where telephonic facilities for making such a call are available."

In the second Newbern case (1961) 55 Cal.2d 508, 11 Cal.Rptr. 551, 360 P.2d 47, the court pointed out that the defendant was asked on the way to the police station if he wished to have a blood test taken. He did not respond to the inquiry and only after he was in his cell did he request of four unidentified policemen that he be given a blood test. The court held that the availability of an opportunity is all that due process requires in the preservation of an accused's rights. (P. 511, 11 Cal.Rptr. 551, 553, 360 P.2d 47, 49.) The requests of persons of "unknown responsibilities when substantially more time had elapsed following the arrest" after refusing opportunities for a timely sampling of his blood cast considerable doubt on the defendant's good faith in making these claimed demands.

In McCormick v. Municipal Court, supra, 195 Cal.App.2d 819, 16 Cal.Rptr. 211, the defendant was given the opportunity at the jail to make one phone call, to an attorney, employer, or relative. He made a call to a family friend in order to obtain bail. ⌊714 It was his understanding that the police would also permit a call to a doctor. He was, however, not allowed another call. The trial court felt that because the defendant was given the privilege of making one phone call, he had been afforded the reasonable opportunity required by the law to summon a doctor for the blood sample. However, the appellate court ruled that the defendant had been deprived of a reasonable opportunity to obtain a timely sample of his blood. "The mandatory duty imposed by section 851.5 of the Penal Code, of requiring that an arrested person be permitted at booking to make at least one telephone call cannot *ipso facto* be equated with 'reasonable opportunity' to procure a physician. Whether an accused under the restraint of arrest and imprisonment is afforded a fair chance to obtain this type of evidence in his behalf at the only time in which it is available is a question of fact to be determined in each case."

[2] The Attorney General takes the position that it was unreasonable to want to call a doctor who was almost two hours distant for the reason that, as pointed out in the first Newbern case, supra (175 Cal.App. 2d at p. 866, 1 Cal.Rptr. at p. 83) a blood test taken too long after the arrest may not have any probative value because the alcohol content in the blood stream diminishes with time and "[i]n a matter of a few hours an intoxicated person may 'sober up.'"

Here petitioner testified that she was released from the county jail in from 20 minutes to a half hour after being brought there. She could have then phoned to her doctor, and had he come to Lakeport, the test would have been made not over a half hour later than had she contacted him before release, and within the time which Dr. Aagaard testified would have been of probative value. But, more important, if she were really serious about a blood test, she or her husband, who was with her at the jail, could have contacted a Lakeport doctor and have had a blood test long before her Monte Rio doctor could have arrived.

Petitioner made no attempt to avail herself of an opportunity which was still a reasonable one, to have a blood test taken. It is not reasonable to relieve her of a criminal charge in view of her failure to grasp the opportunity which was then hers. There is no showing that a blood test taken by her own doctor had she called him on release would not have had probative value. Dr. Aagaard testified that a blood test taken as much as 5 hours after the arrest would still have probative value, and had her doctor gone to Lakeport immediately ⌊715 after a call upon her release, any test that he might make would be within the 5 hour period. Perhaps in degree the value might not have been as great as if taken a half hour sooner, but would that difference in degree justify her being completely freed of the criminal charge? We do not think so, particularly as we have pointed out that the power was hers to obtain a blood test much earlier than her own doctor could make one.

[3] While, of course, a prisoner may insist upon obtaining his own doctor rather than selecting another, the availability of an opportunity to obtain a doctor whose test, because of the time element, would be more valuable, may be considered in determining whether actually the prisoner has been deprived of due process.

In the second Newbern case, supra, 55 Cal.2d 508, 511, 11 Cal.Rptr. 551, 360 P.2d 47, the court said that the availability of a reasonable opportunity to obtain a timely sampling of his blood is all that due process requires in the preservation of an accused's rights. As will appear from the discussion hereafter of the latest case on the subject, In re Martin, 58 A.C. 521, 24 Cal.Rptr. 833, 374 P.2d 801, petitioner had that opportunity, if not from the offer to take her to the nearby hospital, at least upon her early release from custody. In the second Newbern case, the court pointed out that possibly the defendant was not really interested in having his blood tested at or near the time of arrest. Such a conclusion might well be drawn concerning petitioner in the case at bench.

In Martin the defendant had been arrested for violation of section 23102, Vehicle Code (drunken driving). As the arresting officer was about to take him to the police station to be booked, Martin asked to be taken to the Los Angeles City Ambulance Center, a distance of two and a half blocks from the point of arrest, to allow him to be medically examined. The officer refused. On the authority of In re Koehne, supra, 54 Cal.2d 757, 760, 8 Cal.Rptr. 435, 356 P.2d 179, the Supreme Court held that the proper place for such a request to be made is at the time of booking at the police station and not before, and the refusal of a request prior to that time does not deprive the prisoner of due process. However, Martin made a similar request of the booking officer, which request was denied. The effect of this refusal is not discussed, the court apparently assuming that because the time Martin was in the station was only about 30 minutes (as in our case), Martin was then free to make his own arrangements for a blood test. At any rate the court apparently did ⊥716 not consider that the second refusal under the circumstances deprived the defendant of due process. The court did hold that Martin was so deprived, but only because of what happened after he was released from custody. He telephoned his doctor, who said that he could not perform the test because all private laboratories were then closed. Martin then went to the municipally-owned Receiving Hospital and asked the nurse on duty for a blood test. The nurse called the doctor in attendance who said he could give the test only if authorized by the police department to do so. Mrs. Martin phoned the police department for such authorization, which was denied. Mrs. Martin then called another hospital (apparently a private hospital) and was informed by the doctor in charge that the test could only be made on authorization of the police department. It was this refusal of the police department to enable Martin to obtain a blood test at these hospitals which the court held denied him due process as the refusals placed obstacles in Martin's efforts to obtain evidence. The significant part of the decision as it would apply to this case is the following: "* * * petitioner was released within minutes [30 minutes as in our case] after his 'booking' at the police station. *No meritorious claim can be made that he could not, at that time, have obtained a timely sampling if unhampered.*" (58 A.C. 524, 24 Cal.Rptr. p. 835, 374 P.2d p. 803; emphasis added.) In the instant case petitioner upon her release was in nowise hampered in any effort that she might have made to secure a blood test. But she made no such effort. Police involvement stopped with her release. (See Martin, supra, p. 524, 24 Cal.Rptr. p. 835, 374 P.2d p. 803.

[4] Where the sobriety of a person arrested is in question he has a right to obtain a blood test for alcohol. In the cases above cited holding that the particular defendant was denied due process, it was because the police made it impossible for the particular defendant to obtain such a test. In the second Newbern case, supra, no attempt was made by Newbern to secure such a test on his own. The court held that therefore there was no denial of due process.

Likewise, in the instant case, there was no denial of due process in the refusal to arrange for a blood test by petitioner's own doctor for two reasons: (1) Petitioner had ample opportunity to contact her doctor after her release; and (2) she was offered by the officer an ample opportunity to have a test taken by a doctor of her own choice at Lakeport. This is the exact opposite of the situation in the Martin case. In that case the police prevented the prisoner from getting a ⊥717 blood test; here they offered to help her get one and she prevented herself from getting one. Hence there was no denial of due process.

After all, the purpose of a blood test is to determine the alcohol content in the blood. All the doctor usually does is take a blood sample (a nurse can also take it), and turn it over to a laboratory for analysis. The laboratory makes the determination of the alcohol content—not the doctor. What difference can it make if one's own doctor or some other doctor or any doctor takes the blood sample? The analysis is not made by him but by a laboratory. It is the denial of the right to a blood test that would constitute denial of due process, not the denial of a request for one's own doctor to take the blood sample.

True, in many cases, a person wants his own doctor to administer a treatment or make a diagnosis. But here neither a treatment nor a diagnosis is involved. It is a simple matter of some doctor or nurse taking a sample of blood to turn over to a laboratory for analysis.

Under all the circumstances, petitioner was not denied due process. Petitioner contends that the prosecution has changed its theory on appeal from that in the court below. The record does not bear out this contention.

The order is reversed.

SULLIVAN and MOLINARI, JJ., concur.

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209 Cal.App.2d 112

⊥112 ⊥**Charles PAUL, as Director of Agriculture, Plaintiff and Appellant,**

v.

ALLIED DAIRYMEN, INC., Defendant and Respondent.

Civ. 147.

District Court of Appeal, Fifth District, California.

Oct. 29, 1962.

Suit by the Director of Agriculture to restrain dairymen from violating applicable minimum producer price regulations concerning dairy products. From a judgment of dismissal entered in the Superior Court of Tulare County, Harold V. Thompson, J., assigned by chairman of Judicial Council, the Director appealed. The District Court of Appeal, Conley, P. J., held that the trial court lacked authority to grant a judgment on the merits.

Judgment of dismissal reversed with directions.

1. Injunction 🔑151

Ultimate rights of parties are not determined in connection with an application for preliminary injunction.

2. Injunction 🔑128

Unless defendant defaults in pleading, it is improper to render a final decree granting a perpetual injunction on basis of evidence produced on the hearing of an application for a preliminary injunction.

3. Judgment 🔑15, 16

It is necessary to the validity of a judgment that the court should have jurisdiction of the questions which its judgment assumes to decide and jurisdiction to render a judgment for the particular remedy or relief which the judgment undertakes to grant.

4. Injunction 🔑157

In suit by Director of Agriculture to restrain dairymen from violating minimum producer price regulations concerning dairy products where hearing was solely on an application for a preliminary injunction and there was no stipulation that merits should be determined on the evidence, court lacked jurisdiction to grant a judgment on the merits notwithstanding that if trial court had made an order on application denying such injunction on sole ground that the state statute was unconstitutional, the court on appeal could have determined whether the preliminary injunction was properly denied and whether the statute was in fact unconstitutional. West's Ann.Agric.Code, §§ 1190 et seq., 4200 et seq.; 10 U.S.C.A. §§ 2301–2314; West's Ann.Const. art. 1, § 11; U.S.C.A. Const. Amend. 14.

5. Injunction 🔑152

Where the hearing before the trial court was solely on an application for a preliminary injunction, the trial judge had no right to dismiss the case on any statutory ground or because the complaint was "false, fictitious and sham." West's Ann. Code Civ.Proc. §§ 581, 581b.

6. Courts 🔑91(1)

While the United States Supreme Court has a final right to determine whether any specific state law violates the Constitution of the United States, construction of a state statute is a question to be determined conclusively by the state Supreme Court.

Stanley Mosk, Atty. Gen., John Fourt, Sanford N. Gruskin, Lawrence C. Doxsee, Deputies Atty. Gen., Sacramento, for plaintiff-appellant.

Emil Steck, Jr., Pasadena, for Dairy Institute of Cal., amicus curiæ, on behalf of plaintiff-appellant.

Walch, Griswold, Braden & Dittmar, S. C. Dittmar, Jr., Hanford, for defendant-respondent.

⊥114 ⊥CONLEY, Presiding Justice.

Involved on this appeal is the basic question whether the trial court committed prejudicial error in finally ruling on the merits of the suit on a preliminary injunction hearing and dismissing the case on the alleged ground of lack of jurisdiction.

The suit was brought by the Director of Agriculture of the State of California, Charles Paul, to restrain Allied Dairymen, Inc., defendant and respondent, from violating the applicable minimum producer price regulations concerning fluid milk and other dairy products. Allied Dairymen, Inc., is an association of producers whose farms are located in the southerly part of the San Joaquin Valley in the vicinity of the city of Tulare; it is organized under chapter 4 of division 6 of the Agricultural Code, and the nonprofit association is licensed by the state as a milk distributor.

On July 12, 1961, the Director of Agriculture (hereinafter referred to as Director) notified all milk distributors that California's minimum producer price regulations would be enforced without exception, noting that the United States District Court, Northern District of California, had previously enjoined him from enforcing minimum wholesale and minimum producer price regulations with respect to milk sold to agencies of the United States but that on July 3, 1961, the United States Supreme Court had stayed that portion of the district court's order which enjoined the enforcement of minimum producer price regulations (United States v. Warne (1960), D.C., 190 F.Supp. 645, review granted sub. nom., Paul v. United States (1962), 368 U.S. 965, 82 S.Ct. 437, 7 L.Ed.2d 394).

Under the California Milk Stabilization Act (Agr. Code, div. 6, ch. 17), originally enacted in 1935 to regulate California's dairy industry in order to place it upon a solid economic basis and to insure the payment to the producer of compensation sufficient to permit him successfully to carry on his farming venture, the Director established minimum producer prices (the prices at which distributors may purchase milk from producers) and minimum wholesale prices (the prices at which distributors may sell milk to retailers and others). In 1960 the United States brought two suits in the ⊥United States District Court, ⊥115 Northern District of California, to enjoin the Director and the Attorney General of California from enforcing the minimum wholesale price regulations with respect to milk purchased by the federal government at Oakland Army Terminal, Travis Air Force Base and Castle Air Force Base. A three-judge district court issued the requested injunction on two grounds: it concluded that the United States had acquired exclusive jurisdiction over these military bases, and it also found that the milk stabilization act conflicts with the Armed Services Procurement Act of 1947 (62 Stat. 21, 10 U.S.C.A. §§ 2301–2314). The Director and the Attorney General of California have appealed the district court's decision directly to the United States Supreme Court; the case is on the current calendar of the Supreme Court. An application for a stay on appeal of that portion of the district court's order which enjoined the enforcement of minimum producer price regulations was made to the Supreme

Court in July of 1961, the requested stay was unopposed, and, as already stated, it was granted by that court and became effective on July 3, 1961. The memorandum filed by the United States in response to the jurisdictional statement in that case contains the following significant language:

> "There is no longer any necessity for the Court to consider whether appellants can constitutionally enforce the established California minimum *producer* prices with respect to milk farmers selling to distributors for processing and ultimate resale to the United States. The federal government, while not conceding that California can regulate producer prices, over the objection of the federal government, where the milk is to be resold to the United States, has concluded as a matter of procurement policy not to assert immunity from these minimum prices but to accede to full compliance with those requirements. Accordingly, the United States now suggests that, without further briefing or argument, the Court remand the cause to the district court for a deletion of that part of the final order enjoining enforcement of the minimum producer price regulations as to milk sold to distributors for resale to the federal government.
>
> "The United States continues, however, to oppose any attempt by California to regulate the price at which *distributors* may sell milk or milk products to the military installations involved. In our view, the district court was clearly correct in enjoining enforcement of the minimum distributor prices because the sales between the distributors and the United ⊥116 States are consummated on territories under exclusive federal jurisdiction; so far as we are aware, all of these distributor sales take place on the federal enclaves. As to this aspect of the case, we submit, therefore, that the judgment below should be summarily affirmed."

On July 20, 1961, Allied Dairymen, Inc. (hereinafter referred to as Allied), from its office in Tulare sent a formal written offer to the Military Subsistence Supply Agency of the federal government in Los Angeles to supply milk and milk products to the government at Vandenberg Air Force Base, commencing September 1, 1961; this offer was accepted by the Military Subsistence Supply Agency a week later in Los Angeles, and Allied began performance of its sales contract on September 1, 1961. The contract provided for the delivery of milk and milk products to Vandenberg Air Force Base's commissary, dining hall no. 1, dining hall no. 2, hospital dining hall, in-flight kitchen and cold storage plant, on parcels of land acquired by the United States in about 1942 for military purposes. The air force base is located in the Ventura-Santa Barbara marketing area.

On August 31, 1961, the Director filed the complaint in this suit against Allied for a temporary restraining order, preliminary injunction and permanent injunction, alleging that Allied is a non-profit cooperative marketing association organized for the purpose of marketing milk, cream, and other dairy products, and licensed to engage in business as a distributor thereof and seeking to restrain it from doing business in California "* * * except in full compliance with the minimum producer price regulations promulgated by the Director of Agriculture * * *." Attention is called in the complaint to section 4280, subdivision (g), of the Agricultural Code, which requires that any stabilization and marketing plan shall contain provisions for prohibiting any distributor from engaging in what is specified as one of the unfair practices denounced therein, to wit:

> "The payment by a distributor to any producer, including any association of producers, or the receipt by a producer, including any association of

> producers, from a distributor, of a lesser price for any fluid milk or fluid cream or fluid skim milk which is distributed to any person, including agencies of the federal, state or local government, located upon property within the geographical limits of any marketing area for less than the minimum prices established by the director to be paid by distributors to producers for fluid milk, or the milk ⌊117 fat and skim milk contained therein, or fluid cream or fluid skim milk for said marketing area. The provisions of this section with respect to fluid milk shall apply whether or not such fluid milk is received by the distributor as whole milk, or as skim milk and fluid cream, or either, or as any other derivatives of such fluid milk which are reconstituted into such fluid milk, or fluid cream or fluid skim milk for market usage, and whether or not a fluid cream plan has been established for the marketing area."

The complaint alleges that said provision was contained in the applicable stabilization and marketing plan for fluid milk, Kings-Tulare marketing area, promulgated by the Director and initially effective September 16, 1960; that in July of 1961, the defendant submitted a formal bid accepted by the United States for the sale at the Vandenberg Air Force Base in Santa Barbara County of fluid milk in the following quantities at these specified prices:

Quantity	Size Container	Offering Price
300,000 gals.	Six gal.	.5350 per gal.
480,000 ½ gal. container	½ gal.	.2700 per ½ gal.
9,000 qt. container	qt.	.1400 per qt.
300,000 ½ pt. container	½ pt.	.0430 per ½ pt.

Paragraph IX of the complaint is as follows:

> "That the prices at which defendants have offered to sell the aforementioned fluid milk are so low that, when received by defendants, will be insufficient to pay the California producers of such milk the minimum prices for such fluid milk established by the Director of Agriculture in the Stabilization And Marketing Plan For Fluid Milk Kings-Tulare Marketing Area; that defendants are financially unable to make payment of the said minimum prices from sosurces [sic] other than the proceeds of the milk sales to Vandenberg Air Force Base, and as a result, said producers will receive from defendants for their fluid milk less than the minimum prices established by the Director of Agriculture to be paid to said producers, contrary to the provisions of Section 4280(g) of the Agricultural Code and Article V, Section A, paragraph 7, of the aforementioned stabilization and marketing plan; that said milk producers will be irreparably injured since the surety bond posted by the defendant Allied Dairymen, Inc. to assure payment of producers is in the sum of $5,000.00 and because the prospective loss to said producers will run in excess of the penal sum of said bond."

The pleading continues with the allegations that on August ⌊118 22, 1961, plaintiff demanded of defendant that it make provision for the payment of minimum producer prices for milk sold to the Vandenberg Air Force Base but that the defendant failed to comply; that defendant threatened to commence on September 1, 1961, to sell fluid milk pursuant to said agreement and that if this is done defendant will be unable to return to its California producers the minimum prices established by the Director of Agriculture.

Paragraphs XII, XIII and XIV of the complaint continue as follows:

> "That in the near future the United States will ask licensed distributors, including defendants, to submit bids for the sale of fluid milk for delivery to other of the 280 military installations of the United States located within the geographic boundaries of other marketing areas within the State of California; that unless restrained

> by this Court, defendants will cause a price war between distributors competing for annual federal sales of approximately thirty million gallons of milk; that said price war will cause irreparable annual losses to California dairymen of not less than six million dollars annually.
>
> "That if defendants Allied Dairymen, Inc. and Does One through Five, inclusive, are not restrained and enjoined from buying, handling, and selling fluid milk, and from otherwise doing business as a distributor of fluid milk within the State of California except in full compliance with the minimum producer price regulations promulgated by the Director of Agriculture pursuant to Chapter 17, Division 6, Agricultural Code, that immediate and irreparable injury will result to the California dairy industry and to the People of the State of California and will frustrate the legislative purposes and objectives of Chapter 17, Division, 6, Agricultural Code.
>
> "That this is a proper case for the issuance of an injunction under Section 4256 of the Agricultural Code."

The complaint prays for a temporary restraining order, a preliminary injunction and a permanent injunction "* * * enjoining and restraining defendants, their agents, servants, employees and all persons acting in concert and participation with them, and each of them, from purchasing, handling, and selling fluid milk within the State of California, and from otherwise doing business within the State of California, except in full compliance with the minimum producer price regulations promulgated by the Director of Agriculture pursuant to Chapter 6, Division 6, Agricultural Code," and the prayer contains the specific request in addition, as ⊥119 follows: "2. For⊥an order of this Court directing that defendants show ca[u]se, if any they have, at a time and place to be fixed by the Court, why a preliminary injunction should not issue as prayed for hereinabove." Costs of suit were also asked for and such other and further relief as might be deemed just and proper.

At the time of filing the complaint several declarations were also filed in support of the requested preliminary injunction, and on the same day the Superior Court of Tulare County issued an order to show cause requiring Allied to appear before the court on September 12, 1961, "* * * then and there[]to show cause, why it should not be restrained and enjoined during the pendency of this action from purchasing, handling, and selling fluid milk within the State of California, and from otherwise doing business within the State of California as a distributor of fluid milk, except in full compliance with the minimum producer price regulations promulgated by the Director of Agriculture * * *."

Beginning September 14, 1961, an extensive hearing was held by the court on the application for preliminary injunction. The evidence was concluded on September 19 and the matter submitted on briefs. Under date of December 26, 1961, the judge who heard the application for the preliminary injunction notified the clerk "* * * to enter judgment in favor of the defendant, Allied Dairymen, Inc., in the complaint for an injunction in the above-entitled action * * *." On February 20, 1962, findings of fact and conclusions of law and a judgment were filed. The judgment recites in part as follows:

> "*This cause came on for hearing* before the Court sitting without a jury on September 14, and 19, 1961, *on plaintiff's motion for preliminary injunction* * * *." (Emphasis added.)

The judgment provides:

> "WHEREFORE, by reason of the law and the findings of fact aforesaid, IT IS ORDERED, ADJUDGED, AND DECREED that judgment be entered dismissing the action by reason of the Court's lack of jurisdiction of the cause, and that defendant have

judgment against plaintiff in the sum of ——— as costs of suit."

In the meantime the defendant had filed a demurrer to the complaint, which was overruled by another judge, and had thereafter filed an answer in which there were set up a number of separate defenses; the second affirmative defense alleged that section 4280, subdivision (g), of the Agricultural Code of California violates the equal protection clause of the 14th Amendment to the Constitution of the United States in that it discriminates against nonprofit 120 agricultural cooperatives organized pursuant to chapter 17 of division 6 of the Agricultural Code of California licensed as distributors of fluid milk and in favor of other business organizations licensed as distributors of the same type of products; the third affirmative defense alleges that the same section and subsection of the Agricultural Code violates section 11, article I, of the Constitution of the State of California; the fourth affirmative defense makes the contention that the Vandenberg Air Force Base and the delivery points for milk thereon are within the exclusive legislative jurisdiction of the government of the United States and that said lands were acquired by the United States by purchase with the consent of the government of the State of California for the purpose of erection of forts, magazines, arsenals and other needful buildings and that the state has no jurisdiction over the area involved and therefore cannot control acts of citizens of California taking place thereon or acts preparatory thereto; the fifth affirmative defense maintains that the Vandenberg Air Force Base was purchased by the United States with the consent of the Legislature of the State of California for the purpose of erecting a fort, magazines, arsenals and other needful buildings and that the state has no jurisdiction over the territory involved; the sixth affirmative defense alleges the purchase of the Vandenberg Air Force Base by the United States with the consent of the Legislature of the State of California, that the base is a military installation and that the procurement of supplies therefor is governed by the Armed Forces Procurement Act of 1947, which provides for the purchase of milk by negotiated contract and further provides that when competitive bidding for supplies cannot be obtained that the procurement officer shall have the right to secure such supplies by negotiated contract and that division 6 of the Agricultural Code and section 4280, subdivision (g), of the same code, if enforced, would effectively stop competitive bidding; the seventh affirmative defense sets up the alleged fact that the plaintiff has consistently endeavored to enforce the provisions of division 6 of the Agricultural Code against only one class of distributors, namely, agricultural cooperatives, of which class the defendant is a member, that the means of enforcement is the filing of various law suits against agricultural cooperatives and the bringing of a multiplicity of actions against them, that during that time other distributors have engaged in the same conduct as agricultural cooperatives, that the plaintiff has known thereof and that the alleged discrimination against the cooperatives is in 121 violation of the 14th Amendment to the Constitution of the United States; the eighth affirmative defense alleges that the claimed discrimination against defendant and other agricultural cooperatives and in favor of other classes of distributors violates article I, section 11, of the Constitution of the State of California.

The hearing before the trial court was solely on an application for a preliminary injunction; it was not a motion for judgment on the pleadings (in fact, the only existent pleading at the time of the hearing was the complaint), nor a motion for summary judgment, and there is no stipulation in the record that the merits of the case should be determined on the evidence received on this preliminary hearing; instead of ruling on the motion for a preliminary injunction, the court took the matter in its own hands and dismissed the suit on a theory of lack of jurisdiction.

[1] It is elementary that the ultimate rights of the parties are not determined in connection with an application for preliminary injunction. In French Art Cleaners v. State Board, etc. Cleaners, 91 Cal. App.2d 890, 897, 206 P.2d 25, it is said:

> "The effect of a preliminary injunction is explained in 14 Cal.Jur., pp. 184–5 as follows: 'The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or should not be restrained from exercising the rights claimed by him. Indeed, when the cause is finally tried it may be found that the facts require a decision against the party prevailing on the preliminary application. *It therefore follows that an appellate court in passing upon the propriety of the issuance or dissolution of a preliminary injunction will not determine the merits of the case in advance of the trial*, and its decision as to the propriety of granting the writ is no intimation of what the judgment of the lower court should be at the final hearing; nor is it the law of the case in a subsequent appeal from the final judgment on the merits.' (Emphasis added.)"

(See also O'Shea v. Tile Layers Union, 155 Cal.App.2d 373, 378, 318 P.2d 102; Froomer v. Drollinger, 183 Cal.App.2d 787, 789, 7 Cal.Rptr. 268.)

[2] The general rule with respect to a decision on the merits in connection with an application for preliminary ⌊122 injunction is thus stated in 43 C.J.S. Injunctions § 213, page 946:

> "Unless defendant defaults in pleading, it is improper to render a final decree granting a perpetual injunction on the basis of the evidence produced on the hearing of an application for a preliminary injunction." (Citing Ruiz v. Alfonso, La.App., 1 So.2d 330.)

In the case of Anderson v. Joseph, 146 Cal.App.2d 450, 454, 303 P.2d 1053, 1055, the rule controlling such procedure is laid down in all stringency as follows:

> "In any event, unless based upon stipulation or other satisfactory showings submitting the cause on the merits, *the court was without jurisdiction to determine the merits upon the hearing of a motion for a temporary injunction and the orders purporting to do so are void.*" (Emphasis added.)

(See also 27 Cal.Jur.2d, Injunctions, § 10, pp. 114–115, as amended in 1962 Cum. Supp., p. 17, referring to p. 115, line 6 of the text.)

[3] The general rule with respect to jurisdiction stated in 49 C.J.S. Judgments § 19d on pages 49 and 50 is as follows:

> "It is necessary to the validity of a judgment that the court should have jurisdiction of the question which its judgment assumes to decide, and jurisdiction to render a judgment for the particular remedy or relief which the judgment undertakes to grant.
>
> "In addition to jurisdiction of the parties and the subject matter, it is necessary to the validity of a judgment that the court should have jurisdiction of the question which its judgment assumes to decide, and jurisdiction to render a judgment for the particular remedy or relief which the judgment undertakes to grant. Where the court does not have such jurisdiction, the judgment is void."

In Hunter v. Superior Court, 36 Cal.App. 2d 100, 112, 97 P.2d 492, 493, it is said:

> "Nullity of judgments results from a want of legally organized court or tribunal, want of jurisdiction over the subject-matter or parties *or want of power to grant the relief contained in the judgment.* [Citing authorities.]" (Emphasis added.)

(See also Jellen v. O'Brien, 89 Cal.App. 505, 264 P. 1115; Michel v. Williams, 13 Cal.App.2d 198, 56 P.2d 546; Grannis v. Superior Court, 146 Cal. 245, 79 P. 891; Ritchie v. Sayers, 4 Cir., 100 F. 520, 532.)

[4] Here the court lacked power or authority to grant a judgment on the merits in a proceeding which was devised and conducted for the sole purpose of passing on the question whether during the pendency 123 of the action and until a determination on the merits a preliminary injunction should issue to preserve the status quo.

It is no answer to the foregoing observation that if the trial court had in fact made an order on the application for preliminary injunction denying such injunction on the sole ground that the state statute was unconstitutional an appeal could have been taken from such order, and in such circumstances the court could have determined on appeal whether or not the preliminary injunction was properly denied on that basis and, incidentally, whether the statute in question was in fact unconstitutional. (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584–585, 72 S.Ct. 863, 96 L.Ed. 1153; Bomberger v. McKelvey, 35 Cal.2d 607, 612–613, 220 P.2d 729.) The trial judge made no order in this case on the application for preliminary injunction. Instead, he took a shortcut to an ultimate determination of the litigation when that question was not before the court and when it had no jurisdiction, properly speaking, so to act. Under our legal system we have time honored methods of procedure that cannot be by-passed or disregarded.

[5] It is equally clear that the trial judge had no right to dismiss the case on any statutory ground (Code Civ.Proc., §§ 581, 581b) or because the complaint was "false, fictitious and sham" (Lincoln v. Didak, 162 Cal.App.2d 625, 328 P.2d 498; Cunha v. Anglo California Nat. Bk., 34 Cal.App.2d 383, 388, 93 P.2d 572; Crowley v. Modern Faucet Mfg. Co., 44 Cal.2d 321, 324, 282 P.2d 33; Utz v. Aureguy, 109 Cal.App.2d 803, 806, 241 P.2d 639; Neal v. Bank of America, 93 Cal.App.2d 678, 682, 209 P.2d 825; McKenna v. Elliott & Horne Co., 118 Cal.App.2d 551, 555, 258 P.2d 528; Helvey v. Security-First Nat. Bk., 99 Cal.App.2d 149, 151, 221 P.2d 257). Even if there had been a motion to dismiss, there was no ground mentioned in sections 581 and 581b of the Code of Civil Procedure that would authorize such action, and most certainly it could not be contended that the complaint is false, fictitious or sham or that it constitutes an abuse of the process of the court.

[6] The trial court's belief that it had no jurisdiction of the case was erroneous. It does not follow, even if a state statute is unconstitutional, that the state court has no jurisdiction to hear and determine a suit in which the statute is invoked. An important act of the Legislature of the State of California is here involved as well as the entire administrative machinery set up by law to implement and enforce it. 124 The complaint itself, while centering upon the question of the effect of a pending contract for the sale of milk to the United States, is wider in scope than its application to the single contract, and there are questions other than the federal question involved in the litigation. While the United States Supreme Court has the final right to determine whether any specific state law violates the Constitution of the United States (11 Cal.Jur.2d, Constitutional Law, § 66, p. 391), it is equally true that the construction of a state statute is a question to be determined conclusively by the Supreme Court of California. (11 Cal.Jur.2d, Constitutional Law, § 67, p. 392.)

Without question, the state court is a proper forum for this litigation. If one of the special defenses set forth in the answer, namely, that the statute is unenforceable because it conflicts with the Constitution of the United States is sustained, then the specific relief prayed for against the federal government will not be available. But if that defense should be upheld and there is a denial in whole or in part of any remedy, this does not mean that the court lacks jurisdiction to try and determine the issues on the merits.

Furthermore, even if the statute in question is unconstitutional as to the federal government, it would not follow that it must otherwise fail.

> "Statutes may be unconstitutional and void as to their application to a part of their subject matter and valid as to other parts, or, to state the problem more concretely, they may be constitutional in operation with respect to some persons and states of fact and unconstitutional as to others." (11 Am.Jur., Constitutional Law, § 163, p. 857.)

> "Another class of cases in which a statute may be in part valid and in part invalid consists of laws enacted by a legislature in general terms, covering not only persons and property as to which the legislature clearly has the right to make regulations, but apparently applying also to individuals and property protected from such legislation. A law may be unconstitutional and void, in relation to particular cases, and yet valid to all intents and purposes in its application to other cases which differ from the former in material characteristics. In other words, where a statute has been passed by the legislature and, in relation to certain cases which it affects, some part of it is not within the competency of the legislative power or is repugnant to some provision of the Constitution such part may be adjudged void and of no avail, while all other parts of the act not obnoxious to the same objection may 125 be upheld as valid and have the force of law." (11 Am.Jur., Constitutional Law, § 164, pp. 858–859.)

If the Supreme Court of the United States should affirm the judgment of the district court in the case of United States v. Warne, supra, 190 F.Supp. 645, it would be the duty of the state court to hold that sales to the federal government by the defendant can not be controlled by the state law. If the United States Supreme Court reverses or modifies the judgment of the district court, the effect of such ruling would have an obviously important bearing on the ruling on the merits in the instant case. We resist the temptation to expatiate upon the constitutional questions involved as unnecessary to a decision herein.

The judgment of dismissal is reversed with directions to the trial court to make a ruling on plaintiff's application for a temporary injunction in due course.

BROWN, J., concurs.

STONE, J., being disqualified, did not participate.

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209 Cal.App.2d 101

Jose Jesus CHAVEZ, Plaintiff and Appellant, 101
v.
Charles P. SPRAGUE, M. D., Defendant and Respondent.

Civ. 6871.

District Court of Appeal, Fourth District, California.

Oct. 29, 1962.

Malpractice action by charity patient in county hospital against volunteer medical staff member who had exercised supervision over resident staff members during an operation. The Superior Court, San Bernardino County, Edward P. Fogg, J., held that the action was barred by reason of plaintiff's noncompliance with claim statute, requiring that notice be filed with county within 90 days of injury caused by county officer or employee in the course of his employment, and the plaintiff appealed. The District Court of Appeal, Griffin, P. J., held that member of volunteer medical staff was an "employee" of county within claim statute.

Affirmed.

1. Counties 🔑146

Claim statute, requiring that notice be filed with county within 90 days of injury by county officer or employee, operates as independent bar to action against public employee for torts arising out of negligence committed within course and scope of his employment, regardless of whether issue as to his status as public employee is pleaded in complaint or raised by answer. West's Ann.Gov.Code, §§ 801, 803.

2. Municipal Corporations 🔑741(1)

Claim statute, requiring that notice be filed within 90 days of injury by public officer or employee, is constitutional procedural requirement designed to protect public officers and employees from unfounded and harassing litigation. West's Ann.Gov. Code, §§ 801, 803.

3. Counties 🔑146

Plaintiff's ignorance of the nature of the employment of a county officer or employee, as explaining plaintiff's failure to file required notice with county within 90 days of injury by county officer or employee, is no legal excuse for noncompliance, and no exception except estoppel will be read into claim statutes. West's Ann.Gov.Code, §§ 801, 803.

4. Paupers 🔑48

County has responsibility to support and provide medical and hospital care for indigent sick residents of county. West's Ann.Gov.Code, §§ 29600, 29606, 29607; West's Ann.Welfare & Inst.Code, §§ 200, 203.

5. Master and Servant 🔑1

Fact that one is not paid monetary compensation for his services does not prevent him from occupying status of employee.

6. Counties 🔑146

Volunteer member on medical staff of county hospital, exercising supervision over resident staff members during operation, was "employee" of county for purposes of claim statute as it applied to bar malpractice action brought by charity patient. West's Ann.Gov.Code, §§ 801, 803, 29600, 29606, 29607; West's Ann.Welfare & Inst.Code, §§ 200, 203; West's Ann.Code Civ.Proc. § 597.

See publication Words and Phrases for other judicial constructions and definitions.

Harney, Ford & Schlottman, Los Angeles, for appellant.

Swing, Swing & Fisher, San Bernardino, for respondent.

⊥GRIFFIN, Presiding Justice ⊥103

This is a so-called malpractice action brought by plaintiff-appellant against defendant-respondent Dr. Charles P. Sprague (hereinafter referred to as defendant), et al, to recover damages for bodily injuries claimed to have been proximately caused by professional negligence on the part of defendant in the performance of a surgical operation known as a thyroidectomy while plaintiff was an indigent patient of the San Bernardino County Charity Hospital, said hospital being owned and operated by the County of San Bernardino in its governmental capacity. Plaintiff alleged these facts in his complaint, and also alleged that defendant and Does One through Ten were physicians and surgeons; that he engaged their services for the purpose of performing on him the operation described in the said charity hospital; that defendants, including Does One through Ten, were not employees or officers of said hospital and therefore no claim was required to be filed with them or the County of San Bernardino within 90 days of the injury, as required by Government Code, sections 1981 and 2003; that during the operation on plaintiff, defendants were donating their services to said hospital without receiving any monetary compensation or other consideration from said hospital; and that on November 22, 1957 they negligently performed the operation.

Defendant filed an answer denying generally these allegations and admitted that an operation was performed, but claimed that it was performed by other doctors sued as defendants Does One through Ten, employees of the County of San Bernardino, and that he only exercised supervision over them by virtue of his employment by the county as a member of the volunteer medical staff.

It was alleged in the answer, as a special defense, that defendant was a public employee of San Bernardino County 104 and was acting within the scope of his employment as such public employee, and no verified claim for such damages was presented in writing or otherwise, or filed with him within 90 days after the occurrence of the accident or injury complained of, nor was such a claim filed with the clerk of the legislative body of said county, and accordingly plaintiff's claim is barred by Government Code, section 1981 (now section 801).

In the pretrial conference order, all fictitious defendants were dismissed because they were not served with process. It was agreed that among the issues remaining were: (1) capacity and status of defendant as a public officer or employee of the County of San Bernardino at the time such operation was performed; (2) the relationship between defendant and each of the other persons who participated in the performance of such surgical operation; (3) the nature and extent of the participation, if any, by defendant in the performance of the surgical operation; and (4) whether noncompliance by plaintiff with the requirements of Government Code, sections 1981 and 2003, was a bar to the prosecution of the action.

At the trial, the court, upon stipulation of the parties, proceeded under Code of Civil Procedure, section 597, to trial of the special defense that the prosecution of the action was barred by reason of noncompliance by plaintiff with the claims provisions of Government Code, section 1981 and section 2003 (now section 803).

It appears from the pretrial statement that at all times here involved the San Bernardino County Charity Hospital was a public charitable hospital, owned and operated by the County of San Bernardino; that plaintiff was admitted thereto as a patient on November 20, 1957 for diagnosis and treatment of ailments; that plaintiff's ailments were diagnosed by employees of the County of San Bernardino and that such employees prescribed a surgical operation for the ailment from which plaintiff was then suffering; that at all times involved, Dr. S. Kase, Dr. M. Call and Dr. H. Dutro were physicians and surgeons employed by the County of San Bernardino, as resident, intern and anesthetist, respectively, at said hospital, and that they were, at all times mentioned, acting within the course and scope of their respective employments by said county; that on November 22, 1957, a surgical operation was in fact performed upon plaintiff by the said Dr. Kase, as indicated operator, and Dr. M. Call, as indicated first assistant, under an anesthetic administered by the said Dr. Dutro; that at all times during the performance of said surgical operation, 105 from the beginning of the skin incision until the skin incision was closed, defendant Dr. Sprague was personally present in the operating room where said operation was performed and observed the performance of said operation.

CLAIM STATUTE

After considering the question of whether Government Code, section 2003, was applicable under the pleadings and facts stated, the court held that section was applicable and was a proper defense to raise in the action and proceeded to determine the status of defendant as being a county employee within the meaning of that section.

The first question on this appeal to be determined is the correctness of this ruling. Plaintiff relies upon the case of Stewart v. McCollister, 37 Cal.2d 203, 231 P.2d 48 (decided May 15, 1951), based on section 1981 of the Government Code, holding in effect that compliance with the claims provisions of that section was not required unless the plaintiff, in his complaint, "claimed" (pleaded) that the defendant was a public officer or employee and that his negligence had occurred in the course of his public employment. Soon after this decision, the Legislature adopted Government Code, section 2003, which took effect on September 22, 1951, reading:

> "A cause of action against an employee of a district, county * * * for damages resulting from any negligence upon the part of such employee while acting within the course and scope of such employment shall be barred unless a written claim for such damages has been presented to the employing district, county * * * in the manner and within the period prescribed by law as a condition to maintaining an action therefor against such governmental entity."

[1] The cause of action in the instant case arose on November 22, 1957, and the complaint was filed on November 5, 1958. Had this cause of action arisen and been filed before the adoption of Government Code, section 2003, the facts would have brought it within the holding in Stewart v. McCollister, supra, 37 Cal.2d 203, 231 P.2d 48, but the immediate enactment thereafter of section 2003 fairly indicates a legislative intent as to county employees to make noncompliance a bar irrespective of whether the facts giving rise to the defense are pleaded in the complaint or the defense is raised specially by answer, i. e., where the provisions of section 2003 are applicable, that section operates as an independent bar to an action against a public employee for torts arising out of negligence committed within the course and scope of his employment, regardless 106 of whether the issue as to his status as a public employee is pleaded in the complaint or raised by the answer; that this is the purpose and the effect of the enactment of section 2003 in 1951, after the decision in the Stewart case is stated by the author in Procedure Before Trial (Cont.Ed.Bar), page 236, as follows:

> "Section 2003 was enacted to overcome the effect of Stewart v. McCollister, supra. * * * It has not yet been construed by the courts. However, it seems fairly clear that (1) section 2003 applies to all claims within its scope, irrespective of whether public employment allegations appear in the complaint; (2) compliance with section 2003 is a prerequisite to maintenance of an action, and where the comparable entity claim law so provides may be a prerequisite to commencement of such action, against an employee; (3) section 2003 is an additional requirement to section 1981, and in a proper case, both must be complied with; (4) since the time and manner of presentation of a claim under section 2003 depends on the terms of the applicable claim statute governing claims against the employing entity, section 2003 is inoperative if no such entity claim statute exists (such is the case with many cities and districts in relation to certain types of claims)."

Professor Van Alstyne, though opposed to claim statutes in general, has this to say, in 8 U.C.L.A. Law Review, page 516:

> "* * * in 1951 the legislature attempted to close the Stewart loophole by enacting section 2003 (now section 803) of the Government Code. This new section required a claim to be presented to the employing entity as a prerequisite to maintaining any action founded on negligence against the employee, and it was so drafted that its applicability did not depend upon whether 'it was claimed' that such negligence was in the course and scope of employment."

[2] Government Code, section 1981 (and by analogy section 2003) has been held to be a constitutional procedural requirement designed to protect public officers and employees from unfounded and harassing litigation. (Veriddo v. Renaud, 35 Cal.2d 263, 217 P.2d 647; Huffaker v. Decker, 77 Cal.App.2d 383, 175 P.2d 254.) Failure to comply with the claims procedure of Government Code, section 1981, is fatal to the maintenance of an action against an employee whenever Government Code, section 1981, is applicable. (Ward v. Jones, 39 Cal.2d 756, 249 P.2d 246; Rounds v. Brown, 121 Cal.App.2d 642, 263 P.2d 620; Henry v. City of Los Angeles, 114 Cal.App.2d 603,

250 P.2d 643.) A like rule applies whenever 107 Government Code, section 2003, is applicable. (Bossert v. Stokes, 179 Cal.App.2d 457, 3 Cal.Rptr. 884.)

The law Revision Commission, which advocates repeal of both sections 1981 and 2003, in its report upon the subject, recognizes this effect, and states it as one of the grounds for its recommendations, in Volume 3, California Law Revision Commission Reports, Recommendations and Studies, "A Study Relating to the Presentation of Claims Against Public Officers and Employees," at pages H–32 and H–33:

> "It should be recognized that personnel claims procedures tend to operate as a trap for the unwary plaintiff at least equally with, if not to a greater degree than, the entity claims procedures. * * in Stewart v. McCollister, the personnel claims procedure places in the hands of the negligent public employee 'the power to conceal the fact of his employment for the short period allowed for the filing of a verified claim, and then to render himself immune from his common law liability by alleging and proving that his alleged negligence occurred in the course of his public employment, and that no verified claim had been filed.'
>
> "The quoted language was used by the court in referring to Section 1981 (now Section 801) in support of the court's conclusion that it would not ascribe to the Legislature any intention to place such a 'nefarious device in the hands of the defendant.' *It is clear that the Legislature did that exact thing, however, by enacting the predecessor of what is now Section 803. A similar device exists in the hands of the defendant under the many charter claim provisions.*" (Emphasis ours.)

[3] Plaintiff argues that he did not know of the identity of and the function of defendant Dr. Sprague and the results of the surgery until many months after the date of surgery and after the time for filing a claim had expired, and that therefore he should be excused for such failure. There is no evidence of these claimed facts, nor pleading to support them. The claim provisions of both sections 2003 and 1981 (where applicable) are mandatory, and the alleged ignorance of plaintiff is not a legal excuse for his noncompliance. The courts have consistently declined to hold that any exception (except estoppel) should be read into the claims statutes. (Allen v. Los Angeles City Board of Education, 173 Cal.App.2d 126, 343 P.2d 170.)

EMPLOYEE RELATIONSHIP

[4] It is the responsibility of the county and the board of supervisors to support and provide medical and hospital care for the 108 indigent sick residents of the county. (Welf. & Inst. Code, sec. 200; Govt.Code, secs. 29600, 29606, 29607.) The board of supervisors is authorized to establish and maintain a county hospital and prescribe rules for its management, appoint a county physician and other necessary officers and employees thereof who shall hold office during the pleasure of the board. Welf. & Inst. Code, sec. 203; Forward v. County of San Diego, 189 Cal. 704, 209 P. 993.)

The duties and powers that are to be exercised by an individual, rather than the mere name that is assigned to his position, determine whether he is an employee or an officer. Under certain circumstances, an appointee may become neither an employee nor an officer in the ordinary sense, but may stand more in the position of an independent contractor. (40 Cal.Jur.2d sec. 12, p. 651.) It is the claim of plaintiff that defendant should be classified as an independent contractor. (Citing such authority as Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92, 52 L.R.A.,N.S. 505; Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258; Mayers v. Litow, 154 Cal.App.2d 413, 316 P.2d 351; Ware v. Culp, 24 Cal.App.2d 22, 74 P.2d 283; Konnoff v. Fraser, 62 Cal.App.2d 788, 145 P.2d 368.)

It is conceded that plaintiff was not a private patient of defendant. Plaintiff was referred to the county hospital as an outpatient by a private physician, a Dr. Taylor, on August 26, 1957. He was processed through social service and found eligible for free medical and hospital care as an indigent resident of that county. He was then admitted as an indigent patient. Plaintiff complained of his condition and it was studied by various members of the resident medical staff. He was seen in the medical clinic by a Dr. Navarre, an intern, and other doctors on the medical staff, in consultation with the resident staff. He was seen in the surgical clinic by Dr. Kase, a resident, in consultation with defendant and a Dr. Cram, two members of the volunteer surgical staff, and was scheduled for surgery in about 10 days. On November 20, 1957, he was admitted to the hospital and on November 22 an operation was performed on him by Dr. Kase, a resident, as the operating surgeon, and Dr. Call, an intern, as first assistant, both of whom were paid employees of the county, with defendant in attendance as supervisor and instructor, and designated as second assistant. The superintendent of the county hospital, Dr. Edward Varden, testified that he considered defendant Dr. Sprague to be a county employee in |109 rendering such service. Defendant did not manually perform any part of the surgical operation and had nothing to do with the postoperative care or treatment. He made no charge to plaintiff for his services. His sole function in this specific case was one of supervision and whatever teaching was incidental to the operation, which function he performed in his capacity as an appointed senior surgeon on the volunteer staff.

At all times while on service, defendant, as a senior surgeon, was subject to the direction and control of the superintendent, exercised through the chief of the surgical department, by virtue of his authority as the representative of the board of supervisors. The superintendent had the power and authority delegated to him by the board of supervisors to require defendant's attendance whenever his services were reasonably required by the county to treat its indigent patients, could discipline him for disobedience, and could suspend or remove him for cause.

The hospital, in addition to providing medical and hospital care for the indigent sick of the county, was also a teaching institution, engaged in teaching residents, interns, student nurses, clinical laboratory technicians, x-ray technicians and medical students. It also conducted a nurses training school for registered nurses at the hospital. It was headed by the superintendent, appointed by the board of supervisors, who served on a full-time basis and was paid by the county for his services and was responsible directly to the board of supervisors. He exercised control over all employees, including the volunteer medical staff. The superintendent, in exercising control over the volunteer staff, could determine whether they served or did not serve, and if they did not perform properly he could dismiss them. He had sole charge of the volunteer staff, exercised to some extent through the chief of staff, and had the specific power to discharge a senior surgeon. The degree of the superintendent's control over senior surgeons was not essentially different from his degree of control over the resident or house staff. The personnel who staffed and operated the hospital fell generally into two groups, those who were paid compensation for their services and those who were not. There were approximately 800 paid employees, of which 26 were members of the house medical staff, 10 being residents (resident physicians and surgeons) and 14 being interns. The medical staff of the hospital was divided generally into two branches, those who were paid compensation for their services, namely the residents and interns, called the resident or house |110 staff, and those who served without compensation, called the "volunteer" or visiting staff. The volunteer medical staff was composed of approximately 160 physicians and surgeons, each of whom contributed his services to the County of San Bernardino without monetary compensation. The value of such services to the County of San Bernardino was indicated to be a little over a half million dollars annually. The medical staff was headed by a chief of staff, appointed by the board of supervisors, who served without compensation. His functions were overseeing coordination of the clinical services of the hospital under the direction of the superintendent. The medical staff, both resident and volunteer, was further divided into departments of medicine, surgery, general practice, obstetrics and gynecology, and the tumor board. Each such department was in turn headed by a chief of staff of the department appointed by the board of supervisors and serving without compensation.

At all times here involved, the chief of staff of the department of surgery was to supervise the various techniques and activities which were carried on in the surgical department. The chief of surgery decided the calendar schedules for both senior and junior surgeons on the volunteer surgical staff. In addition to the chief, the department of surgery consisted of approximately 15 doctors of medicine, each of whom was appointed by the board of supervisors and served without compensation. The appointees to the department of surgery were classified as honorary, consultants, and active associates, the latter of whom were in turn classified as senior surgeons and junior surgeons. The function of a senior surgeon so appointed to the surgical staff was primarily to supervise and teach the resident staff and to perform such surgery as was beyond the ability and training of the resident staff.

Appointments to the volunteer medical staff were made as follows: An eligible licensed physician and surgeon submitted his written application to the superintendent. From the superintendent it went to the chief of the service and from there to the credentials committee, on through other committees, and ultimately it was submitted to the board of supervisors. If approved by the board of supervisors, such approval was endorsed upon the application and the applicant was thereby appointed to the volunteer staff and continued to serve thereafter from year to year by reappointment.

Only indigent ill of the County of San Bernardino were admitted to the county hospital for medical or hospital care. 111 Private physicians were not permitted to bring their private patients to the hospital for treatment. Members of the volunteer medical staff were not permitted to charge or collect for services rendered by them to the indigent patients accepted at the county hospital, and they were required to treat whichever patients were assigned to them. Patients admitted to the county hospital had no voice in the selection of their doctors, whether resident or volunteer, and members of the medical staff could not select the patients they desired to treat. A senior surgeon had no right to select those persons, consisting of residents or interns or others, who were to perform operations, but he, as a senior surgeon, was required to attend the operations. Assignments were made routinely by the chief of staff or by the chief of the appropriate department.

Defendant was appointed to the volunteer staff of the department of surgery and classified as a senior surgeon in 1943 by order of the board of supervisors, pursuant to a written application made by him. He continued his services under such appointment in the same capacity. Defendant was assigned to serve in the surgical department during the months of November and December of 1957.

It is clear from the record that no conventional contract of employment, express or implied, was entered into between plaintiff Chavez and defendant Dr. Sprague. Plaintiff was never at any time a *private* patient of defendant. Whatever services, if any, he received from defendant were received by him because he was accepted by the county as an indigent patient.

[5, 6] Considerable reliance is placed by plaintiff upon the fact that defendant did not receive monetary compensation from the County of San Bernardino for his services. The fact that a person is not paid monetary

compensation for his services does not prevent him from occupying the status of an employee. (Tucker v. Cooper, 172 Cal. 663, 158 P. 181; 32 Cal.Jur.2d sec. 8, p. 404.) In Yucaipa Farmers, etc. Ass'n v. Industrial Acc. Com., 55 Cal.App.2d 234, 130 P.2d 146, it was held that where a person performing work for another is subject to the order, control and direction of such other and is liable to be discharged for disobedience, he is not an "independent contractor" but an "employee." See also Robinson v. George, 16 Cal.2d 238, 244, 105 P.2d 914; Burlingham v. Gray, 22 Cal.2d 87, 99, 137 P.2d 9; Orlinoff v. Campbell, 91 Cal.App.2d 382, 205 P.2d 67; First Trust & Sav. Bank of Pasadena v. Costa, 83 Cal.App.2d 368, 188 P.2d 778. ⊥112 We conclude that there was sufficient evidence to support the court's finding that defendant was an employee of the county within the meaning of Government Code, section 2003.

Judgment affirmed.

SHEPARD and COUGHLIN, JJ., concur.

209 Cal.App.2d 867

⊥867 **The PEOPLE, Plaintiff and Respondent,**

v.

Clelland L. MARTIN and LaVerne Rauh, Defendants and Appellants.

Cr. 8116.

District Court of Appeal, Second District, Division 4, California.

Oct. 24, 1962.

Hearing Denied Dec. 19, 1962.

Convicted of issuing checks without sufficient funds, grand theft, forgery and conspiracy, two defendants appealed. The District Court of Appeal, Burke, P. J., held, inter alia, that crimes of issuing check without sufficient funds and grand theft constituted separate criminal offenses where bad checks were used as means of defrauding sellers and wrongfully obtaining possession of their property, but statute precluded court from imposing separate sentences for each offense where both were incident to objective of obtaining funds to cover previously issued bad checks, and defendants were to be sentenced only for offense of issuing bad checks, as that carried the greater penalty.

Judgments modified; purported appeal from order denying motions for new trial dismissed.

1. False Pretenses 🔑22

Arrangement whereby bank would give depositor immediate credit upon deposit of valid checks and charge interest on monthly basis for period of time it took to collect checks was not an arrangement meeting requirements of statute so as to form valid defense for issuing checks without sufficient funds. West's Ann.Pen.Code, § 476a.

2. Conspiracy 🔑28

Conspiracy is distinct from actual commission of offense forming object of conspiracy.

3. Conspiracy 🔑47
False Pretenses 🔑49(3)
Forgery 🔑44
Larceny 🔑65

Evidence sustained both charge of conspiracy and charges of substantive offenses of issuing checks without sufficient funds, grand theft, and forgery. West's Ann.Pen. Code, § 476a.

4. Criminal Law 🔑984

Crimes of issuing check without sufficient funds and grand theft constituted separate criminal offenses where bad checks were used as means of defrauding sellers and wrongfully obtaining possession of their property, but statute precluded separate sentences for each offense where both were incident to objective of obtaining funds to cover previously issued bad checks, and defendants were to be sentenced only for offense of issuing bad checks, as that carried the greater penalty. West's Ann. Pen.Code, §§ 476a, 489, 654.

5. Forgery ⚷34(1)

Crime of forgery does not require proof of who actually created forged instrument since it also involves making or alteration of document without authority or the uttering of such document with intent to defraud. West's Ann.Pen.Code, § 476a.

6. Forgery ⚷16

Three important factors are requisite to crime of forgery by uttering or passing forged instrument: (1) it must be uttered, published, passed, or attempted to be passed as true and genuine; (2) it must be known by person uttering or passing it to be false, altered, forged or counterfeited; (3) it must be with intent to prejudice, damage or defraud some person. West's Ann.Pen. Code, § 476a.

7. Forgery ⚷35

Proof of intention to defraud may consist of reasonable inferences drawn from affirmatively established facts, and signing of person's name without authority will imply the intent. West's Ann.Pen.Code, § 476a.

8. Forgery ⚷35

Evidence showing that both defendants were engaged in conspiracy to defraud warranted inference that forged documents were used with such intent. West's Ann. Pen.Code, § 476a.

◆

Taylor, Sherman & Heller, Los Angeles, for defendants and appellants.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Gilbert F. Nelson, Deputy Atty. Gen., for plaintiff and respondent.

⊥869 ⊥BURKE, Presiding Justice.

Defendants Clelland L. Martin, LaVerne Rauh and Joseph Stonehouse were jointly charged by indictment of the Grand Jury of Los Angeles County in 29 counts, certain of which charged the defendants with issuing checks without sufficient funds, others with grand theft, forgery and conspiracy. A jury found the defendants Martin and Rauh guilty on all counts as charged and acquitted defendant Joseph Stonehouse. Probation was denied and defendants were sentenced to state prison, sentences on all counts to run concurrently with each other. Defendants Martin and Rauh appeal from the judgments of conviction and purportedly appealed from the order of the court of January 5, 1962, denying their motions for new trial.

Defendant Martin was the sole owner of an automobile agency known as "Martin Motors" in Compton, California. Defendant Rauh was the general manager of the business and the acquitted defendant Joseph Stonehouse was the sales ma⊥nager. Martin ⊥870 maintained a checking account for his business in the Compton branch of the Bank of America. This account was opened October 27, 1959, and closed May 6, 1960. After April 25, 1960, Martin Motors was financially unable to continue and was no longer in business.

Martin Motors financed its car purchases with Universal CIT Corporation (CIT) in Inglewood under an over-all flooring contract covering the sales of both new and used automobiles. Under the contract CIT would finance the purchase of and take title to the cars until they were paid off.

The People's evidence relating to Count I, the conspiracy count, Counts II and IV, issuing checks without sufficient funds, and to Counts III and V, grand theft, may be summarized as follows:

On the 14th of April 1960 the sales manager of Martin Motors called the sales manager of another automobile agency and requested a dealer trade of one Rambler automobile for a different model of the same car. The other agency agreed to the trade, issued its check payable to Martin Motors for the car being purchased, and the bill of sale covering the car being traded by it. The check issued to Martin Motors was deposited in its account. The automobile delivered by the other agency was immediately put on the flooring contract by Martin Motors and financed by CIT. Martin Motors in turn issued a bill of sale of the car it traded and its check to the other agency.

The latter check was returned unpaid by reason of insufficient funds in the Martin Motors account on which it was drawn. Defendant Rauh advised the bookkeeper of the other agency that the check did not clear because the bank had confused the accounts and asked that it be put through a second time. However, the check was again returned by the bank unpaid.

On April 18 a similar dealer trade was made of automobiles between Martin Motors and the same automobile dealer and again cars and checks were exchanged with the same results; Martin Motors collected a good check in exchange for a bad one.

In proof of Counts VI through XVII, the People's evidence disclosed similar dealer trades between Martin Motors and other automobile agencies.

The People's evidence on Counts XVIII, XIX and XX involved a rather complicated dealer trade whereby another Rambler agency delivered a car that Martin Motors wanted together with invoice and bill of sale in exchange for a check 871 issued by the latter. Martin Motors sent a car together with invoice and bill of sale in exchange to the other agency and received a check covering that car. When it arrived the other agency was not satisfied with the condition of the car that it had received in the trade. Accordingly, it issued new papers and sold the car back to Martin Motors. In exchange for this rejected car the other agency got a new car from Martin Motors for which they issued a second check. Two checks were also received from Martin Motors, one for the new car furnished by the other agency and the other for the replacement for the rejected car. Both Martin Motors' checks failed to clear, whereas they collected on the checks issued by the other agency.

With respect to Counts XXI through XXIV, inclusive, Martin Motors completed two additional dealer trades on April 21, exchanging bills of sale, invoices and checks as had been done on the other occasions with the same results. On one of the cars involved in these counts no trust receipt was signed by Martin Motors disclosing to CIT that the car had already been sold by it with the result that CIT was never paid for that car. CIT charged it off to loss.

Counts XXV through XXIX concerned a dealer trade of foreign import cars which was handled in the same general manner that the cars in the other dealer trades had been handled and with the same results. However, no bills of sale accompanied delivery of the four cars being received from the other agency by Martin Motors. Four bills of sale were made out by Martin Motors and when delivered to CIT contained a purported signature of a representative of the other agency. However, the other agency denied ever having seen the bills of sale or ever having authorized anyone to execute them. Relying on the bills of sale CIT floored the cars for Martin Motors.

Defendant Rauh admitted that the bills of sale had been made up by her or under her direction and acknowledged that she had signed the trust receipts transferring the four automobiles in trust to CIT with the bills of sale attached. She stated that she could have signed the bills of sale but couldn't remember that she did do so; that if she did sign them she was instructed by some one to do so. A handwriting expert testified that he could not give a firm opinion that the writing involved in the signatures to the bills of sale was her handwriting.

The evidence showed that it was a practice of Martin Motors 872 to execute bills of sale for other agencies on cars being sold to them upon verbal authorization from representatives of the other agencies, which was usually secured over the telephone.

The transactions in the specific charges referred to above were dealer trades wherein a new car dealer trades automobiles with another new car dealer in order to satisfy a customer demand for a particular type of car or to maintain a balanced inventory.

The acquitted defendant Stonehouse was sales manager until April 16, 1960, at which time he was succeeded by Mr. Emery. Stonehouse testified that in January 1960 he had a discussion with defendant Martin in which he suggested that Martin go out and borrow operating capital and cut out his dealer trades; Martin stated he had to have these dealer trades in order to raise money. Defendant Rauh testified that she discussed with Martin the fact that their checks were being returned unpaid for insufficient funds; he told her to keep up the dealer trades. Defendant Martin testified that Stonehouse had stated to him he was going to try to cut down dealer trading and that he, Martin, asked Stonehouse not to do so; that he needed the trades and that any trades that came in he wanted to accept.

The evidence discloses that Martin Motors, acting through defendants Martin and Rauh by the issuance of checks in amounts in excess of funds on hand, was overdrawn in a total sum of $276,000 by the end of March 1960. Faced with a hopeless financial situation, the defendants attempted to secure funds to keep the business going at the expense of those who were transacting business with them, mainly through the method of dealer trades. In making these trades, Martin Motors would issue checks which at the time of their issuance they knew were not covered by sufficient funds in their account. The bank would give them credit on the checks they received from other dealers at the moment of their deposit under an arrangement whereby the bank would charge Martin Motors interest at 4 or 4½ per cent on the so-called "float." This float was in fact a temporary loan of the bank's money to Martin Motors to cover the two or three days that would normally be required for the bank to collect on the checks from the other dealers from the date of deposit to the date of collection. In their last few days of operation the bank refused to give immediate credit to Martin Motors on certain checks whose value they began to question. The number of dealer trades was constantly being increased, thus supplying 873 a continuous deposit of good checks in the Martin Motors account, and even though an increasing number of Martin Motors checks to the dealers were not being paid the appearance was given to their finance company, CIT, that they were conducting a responsible and profitable business. Financial statements prepared by their accountants which disclosed overdrafts were altered, under the direction of Martin and Rauh, to conceal these overdrafts. These financial statements were furnished to CIT and to American Motors, the manufacturer of Rambler automobiles, Martin Motors' principal source of supply.

Both Martin and Rauh admitted that they knew they were drawing checks against an account in which there were insufficient funds. When the checks to dealers started bouncing the dealers would be advised that there was some confusion in Martin Motors' bank accounts and to redeposit the checks a second time. In these transactions many persons were defrauded, numerous automobiles were acquired from other dealers without being paid for, and upon acquisition would be immediately put under flooring contract by CIT with the money thereon being advanced to Martin Motors. Having obtained a good title for the cars from the other dealers, albeit fraudulently, Martin Motors immediately passed title in trust to CIT thereby making it impossible, at least without a lawsuit, for the other dealers to re-acquire title to their automobiles. When this "house of cars" collapsed CIT promptly moved in and took possession of all the automobiles under flooring contracts but not without sustaining a substantial loss.

[1] Basically, defendants Martin and Rauh seek to escape conviction for issuing checks without sufficient funds upon the theory that it did not constitute a violation of section 476a of the Penal Code to issue a check at a time when Martin Motors had a credit arrangement with its bank under which such checks would be paid by the bank. The bank officer in charge of supervising the Martin Motors account categorically denied that there was any arrangement whereby checks would be paid if they exceeded the balance credited to the account or that there was any arrangement for credit. The only arrangement with the

bank was the one whereby it would give Martin Motors immediate credit in its account upon the deposit in the account of valid checks and charge interest on a monthly basis to Martin Motors for the period of time it took the bank to collect such checks. This is certainly not an arrangement for credit which would meet 874 the requirements of section 476a of the Penal Code. In fact, for many months, under the method of operation of Martin Motors both under its Bank of America account and even prior to that date under its former bank account with another bank, it was the custom for the bank to notify Martin Motors every morning around 10 o'clock of the total amount of checks presented for payment that morning at the bank in excess of the amount of money on deposit at that time in the Martin Motors account. Martin Motors would then have until 3 o'clock that afternoon within which to make a deposit sufficient to meet the overdraft. If the deposit was not sufficient, then the following morning the bank would return the unpaid checks to the banks presenting them for payment. Thus it can be seen that there was no arrangement under which any check of Martin Motors would be paid unless by the close of the day of its presentation Martin Motors made a deposit to cover it. On some occasions the telephone call in the morning would indicate an overdraft as high as $90,000 was apparent and Martin Motors would have until 3 o'clock that afternoon to deposit that amount. The clear intent on the part of defendants Martin and Rauh to cheat and defraud by criminal means and to obtain money and property by false pretenses is indicated by the extremes to which these defendants went in order to make it apparent to the bank they were depositing sufficient funds in the account to meet the required deposit and thus avoid the return of their worthless checks.

On April 16, 1960, defendant Martin exchanged checks for $7,500 with his new sales manager, Mr. Emery. Emery admitted that he knew his account did not have sufficient funds to cover these checks. Martin certainly knew he was in financial distress and both his checks to Emery and Emery's check to Martin Motors were returned unpaid.

On April 14 Emery gave Martin his check for $4,000 and in return Martin gave a Martin Motors check for $4,401.68 to Emery in an apparent attempt to conceal the transaction as a car purchase transaction. At the time of this exchange Emery had $8.15 in his bank account. On April 15 Martin gave Emery two checks amounting to $5,840. The checks were given to "Harry Mabe Used Cars" and both of the checks were apparently endorsed in that form. Martin asked Emery to deposit them in Emery's account which he did and they were paid to Emery's account although it was admitted by Emery that no such amount was owed to him. Martin admitted he endorsed the name of Harry Mabe Used Cars on the checks in his own handwriting. Martin further admitted that either he or 875 defendant Rauh wrote the signature of Harry Mabe on at least two other checks.

Martin attempted the sale of his Renault dealership for $25,000 to a David McGuire. McGuire paid Martin $17,500. He gave Martin a check for the balance in the amount of $7,500 and then stopped payment on this check. McGuire then made a demand upon Martin for the $17,500 that he had paid. Martin "refunded" McGuire with three checks in the total amount of $17,500, all of which failed to clear the bank. McGuire's checks did clear the banks and were paid to the Martin Motors account.

Defendant Rauh deposited a personal check for $700 in the Martin Motors account at a time when she admitted her own account in another bank was not sufficient to cover the check. On another occasion Martin deposited two of his ex-wife's checks in the sum of $9,500 to the Martin Motors account. He admitted he knew his ex-wife did not have the money in the bank to make the checks good.

It is obvious these transactions were but desperate attempts to conceal from the people with whom Martin was doing business that he was in fact hopelessly bankrupt. Further evidence of his state of mind was his flight on Sunday, April 24, the day before the business closed. He went to Las Vegas and while there cashed checks for $1,500 on the Martin Motors account. He kept this amount and used $350 of it to pay the services of an attorney. He then drove to Oklahoma City with his sales manager Emery and remained there for approximately two weeks. Before he left for Oklahoma City he had his son clear through his personal account a number of checks that constituted proceeds from the business of Martin Motors in the total sum of approximately $3,000. He took this money with him to Oklahoma City. He testified this money was used to finance his bankruptcy. Defendant Rauh, when she learned the business was about to go under on April 25 went to the mountains for a couple of days.

On appeal defendants Martin and Rauh contend the sentences imposed upon them on each of the 29 counts for which they were convicted are invalid as being contrary to section 654 of the Penal Code; that the crimes in question for which they were convicted constituted "one aggravated offense" as charged in the conspiracy count and occurred between the 14th day of April 1960 and the 30th day of April of that year.

[2] Conspiracy, however, is a distinct offense from the actual ⌊876 commission of the offenses forming the object of the conspiracy. In People v. Keene, 128 Cal.App. 2d 520, 529, 275 P.2d 804, the defendant was found guilty of 13 overt acts performed in pursuance of a conspiracy to forge checks. Sentences on certain counts of forgery of which he was also convicted were ordered to run concurrently to each other and consecutively with the sentence on conspiracy. It was held that conspiracy is a different crime from the substantive offense charged and that the imposition of sentences to run concurrently or consecutively, or both, was within the discretion of the trial judge. (See also People v. Garcia, 187 Cal.App.2d 93, 103–104, 9 Cal.Rptr. 493; and People v. Severino, 122 Cal.App.2d 172, 184, 264 P.2d 656.)

[3] In the instant case the evidence was clearly sufficient to sustain both the charge of conspiracy and the charges of substantive offenses set forth in the other counts.

[4] Defendants next contend the crime of issuing a check without sufficient funds and the crime of grand theft do not constitute separate criminal offenses and thus they argue that the defendants should not have been convicted of two offenses in connection with each transaction whereby through the issuance of a fictitious check they defrauded an automobile dealer of money or an automobile. However, in People v. Freedman, 111 Cal.App.2d 611, 614, 245 P.2d 45, 47, it is made clear that the offense of issuing a check without sufficient funds, in this instance to acquire airline tickets, is complete when the check is issued with intent to defraud even though no one may be defrauded thereby. The court declared: "Grand theft is a separate offense * * * which involves the element of loss or detriment. The former offense may be committed without committing the latter. The grand thefts were not committed by the same acts as were the offenses of issuing the checks. It is the singleness of the act which determines whether section 654 [of the Penal Code] applies. [Citations.] Obtaining the airline tickets were acts separate from the issuance of the checks with intent to defraud. Section 654 has no application." The same situation applies to the separate acts of defendants in the case before us in issuing bad checks and by that means defrauding the sellers and wrongfully obtaining possession of their property. Two separate crimes were committed in each instance.

In Neal v. State of California, 55 Cal.2d 11, 18, 9 Cal.Rptr. 607, 611, 357 P.2d 839, 843, the court declared, "Punishment for two offenses arising from the same act is prohibited by the ⌊877 constitutional and common law rule against multiple punishment for necessarily included offenses [citation] and by Penal Code section 654, which provides that 'an act or omission which is made punishable in different ways by different provisions of this code may be punishable under either of such provisions, but in no case can it be punished under more than one.'" The court pointed out that under this rule a person could not be punished for two offenses arising from the same act where one offense is a necessarily included offense in the other offense committed.

The court further noted that the proscription of section 654, Penal Code, against multiple punishment of a single act, however, is not limited to necessarily included offenses and thus, as was said in People v. Knowles, 35 Cal.2d 175, 187, 217 P.2d 1, 8, "If a course of criminal conduct causes the commission of more than one offense, each of which can be committed without committing any other, the applicability of section 654 will depend upon whether a separate and distinct act can be established as the basis of each conviction, or whether a single act has been so committed that more than one statute has been violated. * * * It is the singleness of the act and not of the offense that is determinative."

In the Neal case, supra, the court further stated (9 Cal.Rptr. 611, p. 19, 357 P.2d p. 843), "Insofar as only a single act is charged as the basis for the conviction, however, the defendant can be punished only once. [Citing case.] * * * Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."

Applying this rule to the facts in the case at bench, we believe that while two distinct offenses were committed in each transaction and therefore the defendants were properly convicted of each offense the provisions of section 654 preclude the court from imposing separate sentences for each offense since as we view the evidence the two offenses in each instance (issuing the checks with insufficient funds and grand theft) were incident to but one objective, the immediate obtaining of funds with which to cover previously issued bad checks.

While the facts in this case are similar to those presented to the court in People v. Freedman, supra, 111 Cal.App.2d 611, 245 P.2d 45, the issue raised in that case was confined to the question of whether one or two separate offenses had been committed ⌊878 with no emphasis placed upon the question of double punishment for a single purpose course of criminal conduct. Under the application of the rule in the Neal case, supra, the defendants in the case at bench should not have been sentenced on each of the two offenses involved in each transaction. The trial court was fully aware of the complexity of this problem under section 654, and at the time of sentencing defendants noted under certain decisions the courts have indicated that the procedure of the trial court should be to sentence the defendant on the crime that carries the heaviest penalty and to dismiss the other. However, as the trial court pointed out, if it were to dismiss one charge and sentence defendants on the other, should there be a reversal on appeal on the charge on which they were sentenced, on retrial defendants could not be retried on the charge which had been dismissed.

In order, therefore, to protect the interests of the People the court imposed a like sentence on each charge with all of the charges to run concurrently with each other. In doing so the trial judge made it clear that he considered the two counts involved in each dealer trade (of issuing checks without sufficient funds and of grand theft) as constituting only one transaction. We concur in this view. The offenses involved in each transaction were incident to one objective and therefore the defendants should only have been sentenced for the offense which carries the heavier penalty.

The maximum penalty under section 476a, Penal Code, for issuing checks with insufficient funds is fourteen years in state prison, whereas the maximum penalty for grand theft under section 489, Penal Code, is ten years in state prison. Therefore the judgment of the trial court should be modified by striking out that portion thereof directing defendants be imprisoned for the offenses of grand theft as was done in the case of People v. Brown, 200 A.C.A. 110, 117, 19 Cal.Rptr. 36.

[5, 6] Defendants assert the evidence was insufficient to support the four counts of forgery of the bills of sale involved in Counts XXV through XXVIII. The crime of forgery does not require proof of who actually created the forged instrument since it also involves the making or alteration of a document without authority or the uttering (making use) of such document with intent to defraud. To constitute forgery by uttering or passing a forged instrument, as defined in section 470 of the Penal Code, three important factors are requisite: (1) It must be uttered, published, passed, or attempted to be passed, as true and genuine; (2) It must be ⊥879 known by the person uttering or passing it to be false, altered, forged or counterfeited; (3) It must be with intent to prejudice, damage or defraud some person. (People v. Hellman, 189 Cal.App.2d 777, 778–779, 11 Cal.Rptr. 433.)

[7] The proof of intention to defraud may consist of reasonable inferences drawn from affirmatively established facts. (People v. Sinshiemer, 182 Cal.App.2d 103, 109, 5 Cal.Rptr. 740.) The signing of the person's name without authority will imply the intent. (People v. Weitz, 42 Cal.2d 338, 350, 267 P.2d 295.)

[8] Here, defendant Rauh knew bills of sale did not accompany the Triumph automobiles involved, admitted they were prepared in the office of Martin Motors, admitted she prepared the trust receipts transferring title of the cars to CIT with the four bills of sale attached and states she could have signed the bills of sale but did not recall if she did. There is no question but what the bills of sale were in fact forged by some one and that both defendants Martin and Rauh knew of their false nature. Defendant Martin was not directly connected with the actual forgery of these bills of sale. He did not handle them directly. However, it was clearly shown that both defendants were engaged in a conspiracy to defraud and under such circumstances the inferences are clear that these forged documents were used with an intent to defraud. As stated in People v. Keller, 124 Cal.App. 673, 676, 12 P.2d 1066, it was not necessary to produce evidence connecting the defendant directly with the actual acts of forgery. "Where the evidence produced at the trial reasonably tends to prove the existence of such conspiracy and the connection of appellant therewith, the acts of any one of the conspirators may properly be admitted as evidence against each member of the confederacy." (124 Cal.App. 673, 676, 12 P.2d 1066, 1067.)

As a final argument defendants contend that a necessary element of conspiracy is an agreement to commit an offense prohibited by statute; that since defendants committed no substantive offenses the crime of conspiracy could not be proven. They admit that such argument has no validity if it is found they were properly convicted of substantive offenses, and of the latter there can be no doubt.

The judgments are modified by striking out that portion thereof directing defendants be imprisoned for the offenses of grand theft under Counts III, V, X, XII, XV, XVII, XX, XXII and XXIV and as modified are affirmed. The purported ⊥880 appeal from the order denying motions for new trial is dismissed.

JEFFERSON and FORD *, JJ., concur.

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* Assigned by Chairman of Judicial Council.

209 Cal.App.2d 199

⊥199 ⊥**The PEOPLE, Plaintiff and Respondent,**

v.

Ralph J. COLEMAN, Defendant and Appellant.

Cr. 7831.

District Court of Appeal, Second District, Division 3, California.

Nov. 1, 1962.

Defendant was convicted in the Superior Court of Los Angeles County, Herbert V. Walker, J., of burglary with two prior convictions of felony, and defendant appealed. The District Court of Appeal held that evidence sustained burglary conviction of defendant, who paid bill at automobile body shop, drove away shortly before shop was locked up for night, and was found shortly thereafter hiding behind filing cabinet in office, but finding that defendant had suffered former convictions was stricken where defendant admitted them on the stand but they were not otherwise proved.

Finding that defendant suffered former convictions stricken; otherwise judgment and order denying motion for new trial affirmed.

1. Burglary 🔑41(1)

Evidence sustained burglary conviction of defendant who paid bill at automobile body shop, drove away shortly before shop was locked up for night, and was found shortly thereafter hiding behind filing cabinet in office.

2. Criminal Law 🔑1202(7)

Finding that allegation of former convictions was true would be stricken where they were admitted by defendant on stand but were not otherwise proved.

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Ralph J. Coleman, appellant, in pro per.

No appearance for respondent.

⊥200 ⊥PER CURIAM.

Ralph J. Coleman, charged by information with burglary, with two prior convictions of felony, which he denied, was convicted in a nonjury trial and sentenced to state prison. He appeals in propria persona from the judgment and from an order denying his motion for new trial. He requested appointment of counsel on the appeal; we read the record, determined that the appeal is frivolous and denied the application. Defendant was so advised, was given time to file a brief and none has been filed.

[1] There was evidence of the following facts. Defendant had his car in a body shop for repair. He paid his bill with a check for $11, which was payable to him, and drove away shortly before the shop was locked up for the night, at about 6 p. m. Shortly thereafter the foreman returned and found defendant in the office, hiding behind a filing cabinet. Defendant had removed his socks and covered his hands with them. The office was ransacked, but nothing was missing. There was a hole in the roof estimated to be about 18 by 20 inches. In the dust, leading from the hole to the stairway down into the shop, there was a single pair of footprints. There was evidence that the clothing defendant was wearing while at the shop, and which was recovered from his apartment by the police, was dusty and wrinkled. Defendant testified he was drunk in the shop, went to sleep in the toilet and awoke to find the shop locked up. He was looking for the $11 check, which he feared was not cashable. However, it was cashed upon presentation. Defendant testified he had a sock covering his left hand but none covering the right hand. He did not want to leave fingerprints, because of his criminal record.

Upon the stand, upon cross-examination, defendant admitted the prior convictions of felony. He jumped bail in the present case and was in jail in Denver for a crime he was charged with there when he was located and was returned to California.

In view of the evidence that defendant was not in the shop when it was locked up for the night, it was a reasonable inference that he entered the shop through the hole in the roof with intent to commit theft.

[2] The case was tried without error and defendant was justly convicted. The court found the allegation of the former convictions to be true. Although defendant admitted them on the stand they were not otherwise proved. Therefore, the finding with respect to the former convictions should be ⊥201 stricken. (People v. Hamm, 145 Cal.App.2d 242, 302 P.2d 345; People v. Carrow, 207 Cal. 366, 278 P. 857.)

The finding that defendant had suffered the former convictions is stricken from the judgment; otherwise the judgment and the order denying motion for new trial are affirmed.

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209 Cal.App.2d 131

⊥131 **⊥Irving LEWIN, transacting business under the firm name and style of Spee-Dee Delivery, Plaintiff and Appellant,**

v.

MERCK & CO., Inc., a corporation, etc., Defendant and Respondent.

Civ. 20492.

District Court of Appeal, First District, Division 3, California.

Oct. 30, 1962.

Action by motor carrier to recover from shipper the alleged difference between minimum rates for transportation services as established by public utilities commission, and amount paid by shipper for services rendered by carrier at shipper's request. The Superior Court, County of San Francisco, Byron Arnold, J., sustained a demurrer on the ground that the complaint contained several causes of action not separately stated, and the plaintiff appealed from the judgment of dismissal. The District Court of Appeal, Salsman, J., held that portion of complaint stating that shipper became indebted to motor carrier for the difference between the rates for services and the amount paid was a common count of quantum meruit for past services, and statement of separate cause of action for each shipment was not required, although plural terms "rates" and "services" were used.

Reversed.

1. Pleading ⚷52(2)

Portion of complaint stating that shipper became indebted to motor carrier for the difference between minimum rates for transportation services as established by public utilities commission and amount paid by shipper for services rendered at shipper's request was a common count of quantum meruit for past services, and statement of separate cause of action for each shipment was not required, although plural terms "rates" and "services" were used in the complaint.

2. Pleading ⚷317(6)

Statute providing for bill of particulars is designed to afford ready relief to defendant in need of further information concerning details of account upon which he has been sued. West's Ann.Code Civ.Proc. § 454.

3. Pleading ⚷51

Paragraph V of complaint stating that public utilities commission had directed motor carrier to collect undercharges mentioned in paragraph IV, which was a common count of quantum meruit for past services rendered by carrier to shipper, was not attempt to state cause of action separate from that alleged in paragraph IV but was at most a redundant statement in nature of surplusage and did not render the properly stated common count objectionable as being joined with defectively pleaded special count.

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Frank J. Mahoney, San Francisco, for appellant.

Chickering & Gregory, San Francisco, for respondent.

⊥132⊥ SALSMAN, Justice.

The trial court sustained defendant's demurrer to plaintiff's complaint on the ground that the complaint contained several causes of action not separately stated; plaintiff declined to amend and appeals from the judgment of dismissal.

After common introductory and identifying statements the complaint alleged: "IV. That within two years last past defendant became indebted to plaintiff, at the City and County of San Francisco, State of California, in the sum of $6097.50 which amount represents the difference between the minimum rates for transportation services as established by the Public Utilities Commission of the State of California and the amount paid to plaintiff by defendant for transportation services rendered by plaintiff to defendant at defendant's special instance and request. V. That the Public Utilities Commission of the State of California has directed plaintiff to collect the aforesaid undercharges." These paragraphs are then followed by allegations of demand for payment, non-payment, and a prayer for the balance alleged to be due.

[1] The argument in support of the demurrer is based upon the use by the pleader of the plural terms "rates" and "services" in paragraph IV, the contention being that this discloses there were several distinct shipments of goods, and that each shipment gives rise to a separate cause of action which must be separately stated. (U. S. v. Louisville & Nashville R. R., 6 Cir., 221 F.2d 698; Bushwick McPhilben Corp. v. Bush Terminals, D.C., 8 F.Supp. 684.) We cannot agree.

Paragraph IV of the complaint is the common count of quantum meruit, for past services, and is a form of pleading long sanctioned in this State. (Freeborn, Goodwin, et al. v. Glazer, 10 Cal. 337; Wilkins v. Stidger, 22 Cal. 231; Weitzenkorn v. Lesser, 40 Cal.2d 778, 256 P.2d 947.) In Weitzenkorn v. Lesser, supra, it is said at pages 792–793, 256 P.2d at page 958: " 'This form of pleading, a common count, by long continued practice is not subject to attack by general demurrer or by a special demurrer for uncertainty.' Auckland v. Conlin, 203 Cal. 776, 778, 265 P. 946; Pike v. Zadig, 171 Cal. 273, 276, 152 P. 923; Abadie v. Carrillo, 32 Cal. 172, 175. Nor is it subject to special demurrer on the ground of ambiguity or unintelligibility. Pleasant v. Samuels, 114 Cal. 34, 38, 45 P. 998; see, generally, King, The Use of the Common Counts in California, 14 So.Cal.L.Rev. 288, 306. Although an allegation of the promise to pay was essential to an action of assumpsit ⊥133 in common law pleading Shipman, Common-Law Pleading, 3d Ed., p. 258, it is unnecessary as a part of the common count under the code system of pleading. Gregory v. Clarbrough's Executors, 129 Cal. 475, 478, 62 P. 72; Wilkins v. Stidger, 22 Cal. 231, 235 [83 Am.Dec. 64]."

[2] Defendant contends the pleading provides him with insufficient notice and hence makes it difficult to answer. This objection may be addressed with equal force to any common count. Code of Civil Procedure, section 454, providing for a bill of particulars, is designed to afford ready relief to a defendant in need of further information concerning the details of an account upon which he has been sued. (Pike v. Zadig, 171 Cal. 273, 277, 152 P. 923; Pleasant v. Samuels, 114 Cal. 34, 38, 45 P. 998, 2 Witkin, Calif.Procedure, p. 1222.)

[3] We see no merit in defendant's further contention that by paragraph V of the complaint plaintiff has attempted to state a cause of action based upon an order of the Public Utilities Commission and hence having joined a common count with a defectively pleaded special count, the complaint is demurrable. Paragraph V of the complaint does not appear to us to be an attempt to state a separate cause of action. At most it is an unnecessary and redundant statement in the nature of surplusage and hence subject to a motion to strike, but it does not render the properly stated common count subject to demurrer. (Haggerty v.

Warner, 115 Cal.App.2d 468, 475, 252 P.2d 373; McFarland v. Holcomb, 123 Cal. 84, 55 P. 761; 2 Witkin, Calif.Procedure, p. 1243.)

Judgment reversed.

DRAPER, P. J., and DEVINE, J., concur.

209 Cal.App.2d 152

|152 |**CITY OF BANNING, a municipal corporation, Plaintiff and Respondent,**

v.

DESERT OUTDOOR ADVERTISING, INC., a California corporation, Defendant and Appellant.

Civ. 6866.

District Court of Appeal, Fourth District, California.

Oct. 30, 1962.

Hearing Denied Dec. 26, 1962.

Action by city against outdoor advertising company to enjoin maintenance of billboard signs in violation of city setback ordinance. From a judgment of the Superior Court of Riverside County, S. Thomas Bucciarelli, J., in favor of the city, the company appealed. The District Court of Appeal, Coughlin, J., held that the evidence of the outdoor advertising company did not establish as a matter of law that the enforcement proceedings against it were the result of an intentional or purposeful discrimination even though other violators were not prosecuted.

Judgment affirmed.

1. Constitutional Law 🔑209

Constitutional provisions, guaranteeing equal protection of law, guard against discrimination resulting from unequal enforcement of valid statute as well as from unequal application of law occasioned by express terms of statute which is invalid for this reason.

2. Constitutional Law 🔑211

Unequal application of valid statute to those who are entitled to be treated alike is not a denial of equal protection unless there is shown to be present in treatment an element of intentional or purposeful discrimination.

3. Constitutional Law 🔑211

To establish unlawful inequality in enforcement of valid statute there must be showing of clear and intentional discrimination which is not presumed.

4. Constitutional Law 🔑48

Good faith of those enforcing law and validity of action in enforcement of statute are presumed and burden of proving discrimination in enforcement is upon complaining party.

5. Constitutional Law 🔑249, 250

Mere showing of failure to institute prosecution or proceeding with respect to other known violations does not require finding that prosecution or enforcement proceeding in question was prompted by intentional or purposeful discrimination.

6. Constitutional Law 🔑250

Fact that one guilty person is prosecuted, while others who are equally guilty are not, is not a denial of equal protection of law, as Constitution does not guarantee equality of protection in commission of crime.

7. Injunction 🔑128

Evidence of outdoor advertising company, being prosecuted by city for violation of setback ordinance, did not establish that enforcement proceedings against it were the result of intentional or purposeful discrimination, even though other known violators of ordinance were not prosecuted.

8. Appeal and Error 🔑996

Inference of whether there was intentional and purposeful discrimination in enforcement of law was for trial court to draw, and appellate court was concluded by its decision thereon.

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Young, Prenner & Hews and Arthur N. Hews, Los Angeles, for appellant.

Kenneth B. Husby, City Atty., for respondent.

⊥153 ⊥COUGHLIN, Justice.

This is an action by the City of Banning, the plaintiff and respondent herein, against Desert Outdoor Advertising, Inc., a corporation, the defendant and appellant herein, to enjoin the maintenance of a billboard sign located 4 feet from an abutting roadway, in violation of a city ordinance establishing a 20 foot setback for all buildings or structures. The sole issue on appeal is whether the evidence establishes, as a matter of law, that enforcement of the subject ordinance against the defendant, under the facts in this case, is discriminatory and prohibited by the constitutional provisions guaranteeing equal protection of the law.

The defendant is engaged in the business of outdoor advertising; in the course thereof constructed the sign in question;⊥154 and also constructed six other signs, three of which are in violation of the ordinance.

The complaint to enjoin the defendant from maintaining the subject sign was filed on March 18, 1960. At that time there were 46 other signs in the city located in violation of the setback ordinance; 30 thereof advertised "products on the property"; 8 were over 25 square feet in area; 15 were between 10 and 25 square feet; and 23 were under 10 square feet. The record does not contain a description of the subject sign. However, it appears that there was a variation in degree as to the different violations. On January 3, 1961, the defendant caused written notices to be served on the city attorney, each councilman, and the mayor, advising them of these 46 setback violations. By personal appearance before the council and mayor in September and October of 1960, the defendant, through its president, "told them the signs were in violation." In its answer, the defendant alleged that the ordinance in question "is being unconstitutionally, inequitably and unjustly enforced," in that the City's officials have refused to enforce its provisions against any person other than the defendant. On the issue thus raised, the trial court found: "It is not true that the enforcement of the provisions of * * * [the ordinance in question] * * by the plaintiff, or its officials, has been with intentional or purposeful discrimination." This finding was in response to the rule of law hereinafter noted.

[1–4] It is an accepted principle that the constitutional provisions guaranteeing equal protection of the law guard against discrimination resulting from an unequal enforcement of a valid statute, as well as from an unequal application of the law occasioned by the express terms of a statute invalid for this reason. (Snowden v. Hughes, 321 U.S. 1, 7, 64 S.Ct. 397, 401, 88 L.Ed. 497; Sunday Lake Iron Co. v. Wakefield Tp., 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154; Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; Brock v. Superior Court, 12 Cal.2d 605, 610, 86 P.2d 805; Downing v. Cal. State Board of Pharmacy, 85 Cal.App.2d 30, 36, 192 P.2d 39.) However, the enforcement of a statute "resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." (Snowden v. Hughes, supra, 321 U.S. 1, 8, 64 S.Ct. 397, 401; cf. People v. Harris, 182 Cal.App.2d Supp. 837, 842, 5 Cal.Rptr. 852;⊥155 People v. Winters, 171 Cal.App.2d Supp. 876, 883, 342 P.2d 538; Yanke v. State Dept. of Public Health, 162 Cal.App.2d 600, 605, 328 P.2d 556; People v. Amdur, 123 Cal.App.2d Supp. 951, 969, 971, 267 P.2d 445; People v. Gordon, 105 Cal.App.2d 711, 721, 234 P.2d 287; Wade v. City & County of San Francisco, 82 Cal.App.2d 337, 338, 186 P.2d 181. To establish an unlawful inequality in enforcement "there must be a showing of 'clear and intentional discrimination.'" (Snowden v. Hughes, supra, 321 U.S. 1, 8, 64 S.Ct. 397, 401.) A discriminatory intent or purpose is not presumed. (Snowden v. Hughes, supra, 321 U.S. 1, 8, 64 S.Ct. 397, 401; Tarrance v. Florida, 188 U.S. 519, 520, 23 S.Ct. 402, 403, 47 L.Ed. 572; People v. Harris, supra, 182 Cal.App.2d Supp. 837, 842, 5 Cal.Rptr. 852; People v. Winters, supra, 171 Cal.App.2d Supp. 876, 883, 342 P.2d

538.) To the contrary, the good faith of those enforcing the law and the validity of their action in the premises are presumed. (Sunday Lake Iron Co. v. Wakefield Tp., supra, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154.) The burden of proving discrimination is upon the complaining party. (Sunday Lake Iron Co. v. Wakefield Tp., supra, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154.)

[5, 6] In a prosecution or law enforcement proceeding arising out of the violation of a statute, the mere showing of a failure to institute such a prosecution or proceeding with respect to other known violations does not require a finding that the prosecution or enforcement proceeding in question was prompted by intentional or purposeful discrimination. (Mackay Telegraph & Cable Co. v. City of Little Rock, 250 U.S. 94, 39 S.Ct. 428, 430, 63 L.Ed. 863; People v. Winters, supra, 171 Cal.App.2d Supp. 876, 886, 5 Cal.Rptr. 852; People v. Flanders, 140 Cal.App.2d 765, 767, 769, 296 P.2d 13; People v. Gordon, supra, 105 Cal.App.2d 711, 720–722, 234 P.2d 287; People v. Hess, 104 Cal.App.2d 642, 685, 234 P.2d 65; People v. Oreck, 74 Cal.App.2d 215, 221, 168 P.2d 186; People v. Darcy, 59 Cal.App.2d 342, 351–353, 139 P.2d 118; People v. Montgomery, 47 Cal.App.2d 1, 13–14, 117 P.2d 437.) "It is not a denial of equal protection that one guilty person is prosecuted while others equally guilty are not." (People v. Hess, supra, 104 Cal.App.2d 642, 685, 234 P.2d 65, 92; People v. Oreck, supra, 74 Cal.App.2d 215, 222, 168 P.2d 186.) The Constitution does not guarantee equality of protection in the commission of a crime. (People v. Flanders, supra, 140 Cal.App. 765, 769, 296 P.2d 13.) Neither rule nor reason directs that because some persons escape prosecution, others who violate the ⊥156 law⊥should not be prosecuted. (People v. Darcy, supra, 59 Cal.App.2d 342, 353, 139 P.2d 118.) The protection afforded is against unlawful discrimination which uses law enforcement as its vehicle.

[7, 8] Applying the foregoing principles to the case at bar, it is apparent that the evidence herein does not establish as a matter of law that the instant enforcement proceeding was the result of an intentional or purposeful discrimination. Even though it be assumed that the fact of nonprosecution of all other known violators, under the circumstances in this case, would support an inference that the prosecution of the defendant was prompted by an intentional and purposeful discrimination against it, nevertheless, the trial court was not required to draw this inference; the authority to do so was vested in it exclusively; and, in determining the sufficiency of the evidence to sustain a questioned finding, this court is concluded by its decision. (Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868; Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 602, 86 P.2d 829; Coutts v. Grant, 184 Cal.App.2d 255, 257, 261, 7 Cal.Rptr. 431; Marshall v. Parkes, 181 Cal.App.2d 650, 655, 5 Cal.Rptr. 657.) On the other hand, the non-existence of an intentional or purposeful discrimination against the defendant is inferentially supported by the fact that, although three other signs maintained by it were in violation of the ordinance, no prosecution or enforcement proceedings had been brought on account thereof.

The defendant contends that the decision in Wade v. City & County of San Francisco, supra, 82 Cal.App.2d 337, 186 P.2d 181, 182, controls the decision in the case at bar and requires a reversal. In the cited case the allegations of a complaint that a particular ordinance was being enforced against the plaintiffs and no others "with intent to discriminate against plaintiffs and the plaintiffs' said business," were tested by demurrer and were held sufficient to establish a violation of the equal protection clause. Basic to the decision in the cited case was the specific allegation of an intent to discriminate. Contrary to the defendant's contention, this decision is not authority for the proposition that proof of enforcement of an ordinance against one individual and no others per se establishes an intentional or purposeful discrimination.

In other jurisdictions it has been held that the failure to enforce zoning regulations generally does not preclude their enforcement in a specific instance. (Flinn v. Treadwell, 120 Colo. 117, 207 P.2d 967, 969; 157 Leigh v. City of Wichita, 148 Kan. 607, 83 P.2d 644, 648, 119 A.L.R. 1503; City of St. Louis v. Friedman, 358 Mo. 681, 216 S.W.2d 475, 479; Appeal of Valicenti, 298 Pa. 276, 148 A. 308; State v. Cain, 40 Wash.2d 216, 242 P.2d 505, 510.)

The allegations of the defendant's separate defense were not established as a matter of law and their contention to the contrary is without merit.

The judgment is affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

Hearing denied; SCHAUER and PETERS, JJ., dissenting.

207 Cal.App.2d Supp. 899

899 **FRESNO LOAN AND THRIFT, a corporation, Plaintiff and Respondent,**

v.

Kenneth ROBERTS and Betty J. Roberts, et al., Defendants and Appellants.

Civ. 104.

Appellate Department, Superior Court,
Fresno County, California.
June 4, 1962.

Action to recover amount due under a retail installment contract which had been assigned to plaintiff and for attorney fees provided for in the contract. The Municipal Court, Fresno Judicial District, Cecil E. Eager, J., entered judgment for plaintiff and defendants appealed. The Superior Court, Appellate Department, Goldstein, J., held that assignee of installment contract was not subject to penalties of Act pertaining to retail installment contracts although contract was executed in violation of the Act in that two documents rather than a single document evidenced the purchase, where assignee was innocent of any knowledge of such illegality at time it received assignment of the contract.

Judgment affirmed.

1. Sales ⚷464, 475

Contracts in violation of Act pertaining to retail installment contract are not wholly unenforceable, but such contracts are enforceable by an innocent assignee, and if not assigned, penalties for violation of the Act are limited and bar only recovery of any time price differential, service charge, or delinquency, collection, or refinance charges, but do not bar suit for principal of the debt. West's Ann.Civ.Code, §§ 4, 1803.2, 1804.2, 1812.7.

2. Statutes ⚷241(1)

Statutes which impose a penalty, or provide for a forfeiture, must not be extended by implication.

3. Sales ⚷475

Assignee of installment contract was not subject to penalties of Act pertaining to retail installment contracts although contract was executed in violation of the Act in that two documents rather than a single document evidenced the purchase, where assignee was innocent of any knowledge of such illegality at time it received assignment of the contract. West's Ann.Civ.Code, §§ 4, 1803.2, 1804.2, 1812.7.

Partlow & Thomas, Fresno (Alfred Thomas and Don E. Waddell, Fresno, of counsel), for appellants.

Jensen & Hahesy, Fresno (Jefferson E. Hahesy, Fresno, of counsel), for respondent.

GOLDSTEIN, Judge.* 900

This case, which so far as we have been able to ascertain is of first impression, arises under the Sections of the Civil Code, commonly known as the Unruh Act. (Sections

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* Throughout this opinion, the appellants are referred to as the defendants, and the respondent as the plaintiff.

1803–1812.95 C.C.) That act deals generally with the subject of retail installment contracts.

In May, 1960 the defendants purchased a water conditioner from the Lindsay Soft Water Company. The transaction was evidenced by a retail installment contract which was later assigned to the plaintiff.

The actual cash price of the water conditioner was $500.00; however, by the terms of the contract an additional time price service charge of $150.00 was added to its cost raising the total to $650.00. The contract provided for attorneys fees in the event of suit after default by the buyer. The trial court rendered judgment for the sum of $650.00 together with $100.00 ⌊901 attorneys fees. From the judgment, the defendants have appealed.

At the trial, the defendants claimed fraud and misrepresentation. However, they concede that the evidence was sufficient to support the trial court's finding that these charges were not sustained.

The defendants, however, point out that the trial court found that there were two documents executed by the buyers in connection with the sale. They point out that Section 1803.2 C.C. requires that every retail installment contract shall be contained in a *single* document. It is their claim that since the contract violated the Unruh Act, it is unenforceable by both the seller, as well as the assignee.

It is true that there were two documents found by the court evidencing the transaction. They were:

(1) A "purchase agreement" on the reverse side of which was a further agreement called "customer advertising agreement".

(2) The "retail installment contract" which was the subject of this action.

Although the court found that there were two agreements, and that the Unruh Act was violated thereby, it also found that the plaintiff assignee had no notice of the existence of the "purchase agreement" when the "retail installment contract" was assigned to Applying the provisions of Section 1812.7 C.C., the court held that the plaintiff assignee was thereby exonerated from any penalties by reason of the violation of law by its predecessor in interest.

Section 1812.7 C.C. provides that penalties for violation of the Unruh Act are imposed only against a "person who acquires a contract or installment account with knowledge of" noncompliance with its provisions. No penalty, whatsoever, is imposed upon the innocent assignee. The record amply supports the trial court's finding that the plaintiff had no notice of the existence of the two documents evidencing the sale at the time when the contract was assigned to the plaintiff. The evidence of Russell T. Fusselman, vice president of the plaintiff, was positive to this effect.

[1] The defendants, however, take the position that the court, in viewing the transaction, is not limited by the penalty provisions of the Unruh Act, but that the entire contract is unenforceable because the transaction is tainted with illegality. They point out that the Civil Code specifically provides that its provisions, even including those in derogation of the common ⌊902 law, must be liberally, not strictly, construed, "with a view to effect its objects and to promote justice". (Section 4 C.C.) They claim that a liberal construction of the Unruh Act requires that the court find that all contracts in violation thereof, are wholly unenforceable even by an innocent assignee. We find no merit in this contention.

It should be noted that the evidence shows that the plaintiff notified the defendants of the assignment of the contract within the fifteen day period required by Section 1804.2 C.C. The defendants, upon receipt of such notice, limited their protests to the alleged misrepresentation and failure on the part of the equipment to perform as warranted. At no time did they make the claim that the Unruh Act had been violated.

It should further be noted that the penalty provisions of the Unruh Act (which as we have pointed out, are not imposed upon the innocent assignee), are definitely limited and bar only the recovery of any time price differential, service charge, or delinquency, collection, extension, deferral, or refinance charges. (Section 1812.7 C.C.) Suit for the principal of the debt is not barred.

[2] Statutes which impose a penalty, or provide for a forfeiture, must not be extended by implication. In Oddo v. Hedde, 101 Cal.App.2d 375, 225 P.2d 929, the court states:

> "Penal statutes that encroach upon private rights of citizens must be strictly construed, and statutes which provide for a forfeiture must be strictly construed". (Citing cases.) Page 383, 225 P.2d page 394.

The penalties imposed by the Unruh Act are of statutory creation. They did not exist at common law. For this court to enlarge upon those penalties would be tantamount to a distortion of the legislative intent and to judicial legislation rather than interpretation.

In Genilla v. Hanley, 6 Cal.App. 614, 92 P. 752, the court states the rule as follows:

> "In the present case, the Legislature, having in the act itself not only fixed the penalty, but provided the manner for enforcing the same in case of a violation of the stipulation, must be presumed to have intended the act to apply to those cases only wherein the penalty could be enforced in the manner designated * * *." (Page 617, 92 P. page 753)

Here we must apply the rule of statutory construction, namely, "Expressio Unius Est Exclusio Alterius". In re Nowak, 184 Cal. 701, 195 P. 402; McNee v. Harold Hensgen & Associates, 178 Cal.App.2d 881, 3 Cal. Rptr. 377.

Defendants counsel cite General Motors Acceptance Corp. v. 903 Kyle, 54 Cal.2d 101, 4 Cal.Rptr. 496, 351 P.2d 768, in support of their claim. It is to be observed that that case, like the present one, arose under the Civil Code, although under a different section (Section 2982 C.C.). In the Kyle case, the question presented was whether a conditional sales contract for the sale of a motor vehicle was unenforceable. There is a marked distinction between the penalties imposed in connection with the sales of motor vehicles and those under the Unruh Act. In the case of motor vehicles, the contract is wholly unenforceable for deliberate violation of designated provisions of the Act. Such is not the case here. The Supreme Court, however, in the Kyle case, emphasized the strict limitation imposed on courts in construing the penalty provisions of the Civil Code, stating at page 111, 4 Cal.Rptr. at page 502, 351 P.2d at page 774:

> "The courts will not impose penalties for noncompliance with statutory provisions in addition to those that are provided expressly or by necessary implication".

[3] We, therefore, conclude that the illegality here shown does not render the contract unenforceable, but that the court is limited to the specific penalties imposed by the Unruh Act. We further conclude that the plaintiff was innocent of any knowledge of the original illegality and, therefore, cannot, under the Unruh Act, be penalized by reason of that illegality.

We affirm the judgment of the Court below in all respects with costs to the plaintiff.

KELLAS, P. J., and POPOVICH, J., concur.

208 Cal.App.2d 834

⊥834 ⊥**John F. CURTIS, Plaintiff and Appellant,**

v.

Marit B. MENDENHALL, as Administratrix, etc., Defendant and Respondent.

Civ. 26107.

District Court of Appeal, Second District, Division 2, California.

Oct. 24, 1962.

Action on an account stated arising out of a purchase of life insurance. The Superior Court, Los Angeles County, James M. McRoberts, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Fox, P. J., held that evidence sustained finding that plaintiff voluntarily advanced premiums on life of insured and that such advance was made neither at request of defendant's decedent nor pursuant to an agreement with such decedent whereby he would obligate himself to personally pay the premiums.

Judgment affirmed.

1. Appeal and Error ⚿989

If findings are attacked for insufficiency of the evidence, power of a reviewing court begins and ends with a determination as to whether there is any substantial evidence to support them.

2. Trial ⚿143

Substantial conflicts may arise even when all the evidence is produced by one party and it is then sole province of jury to determine questions in issue.

3. Appeal and Error ⚿994(3)

Although a court may not disregard uncontradicted credible evidence, an appellate court cannot control a finding or conclusion denying credence, unless it appears that there are no matters or circumstances which at all impair accuracy of the testimony.

4. Account Stated ⚿3

Generally, an account stated must be founded on previous transactions of a monetary nature and where there is no underlying primary indebtedness one is not created by mere fact that an invoice is sent, even in absence of a disclaimer.

5. Account Stated ⚿19(3)

Evidence, in action on account stated, sustained finding that plaintiff voluntarily advanced insurance premiums on insured's life, and that such advance was neither made at request of defendant's decedent nor pursuant to an agreement with defendant's decedent whereby decedent would obligate himself to personally pay the same.

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William C. Hiscock, Los Angeles, for appellant.

James A. Poore, Los Angeles, for respondent.

⊥FOX, Presiding Justice. ⊥836

This is an action by plaintiff on an account stated arising out of the purchase of life insurance. Plaintiff appeals from an adverse judgment.

The defendant, Marit B. Mendenhall, is the administratrix[1] of the estate of Dr. Arthur J. Mendenhall, deceased. Several persons, including the decedent, had invested in a gambling casino (the Boulder Club) in Las Vegas, Nevada. Only one of the group, Ernest Amante, had any experience in this field and the investors, consequently, were concerned as to what would happen to their funds in the event of Amante's death. Decedent, on behalf of the investors, contacted plaintiff, an insurance agent, concerning an insurance policy on the life of Amante for the benefit of all the investors in the sum of ⊥$250,000. Apparently to obviate certain problems in obtaining a Nevada license to operate the club, the license was issued solely in Amante's name.[2] ⊥837

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[1] Defendant is inadvertently referred to as "administrator" at several places throughout the Clerk's Transcript.

[2] It appears that the Boulder Club was technically a sole proprietorship in Amante's name and decedent didn't want

John Suckling, an attorney then representing plaintiff, testified that decedent came up with the suggestion that he (decedent) buy the insurance on the basis that decedent had made a loan to Amante, and after the insurance was issued, create a trust and assign the insurance policies to the trust with decedent as trustee. The policies were issued but never delivered to either decedent, the beneficiaries, or the insured. The trust, however, was subsequently executed and the assignment made.[3]

Plaintiff's secretary testified that the plaintiff paid the premium by having it charged to his (plaintiff's) account and that she prepared and mailed an original invoice for the sum of $3,106.79 and subsequently several duplicates to Dr. Mendenhall. She further stated that it is her duty to open all incoming mail in plaintiff's office and that she never saw any writing from decedent stating that he would not pay the amount of the invoice.[4] It is this invoice and the subsequent ⊥838 lack of disclaimer thereof that constitute the basis of plaintiff's claim for an account stated.[5]

The trial court found, *inter alia*, "it is not true that on December 3, 1957, the deceased ARTHUR J. MENDENHALL was indebted to the plaintiff in the sum of $3,106.79 or any other sum or at all, and such allegation is not supported by the evidence. In connection therewith, the Court finds that the billing of December 3, 1957, was not an account stated based upon a prior indebtedness or agreement of the parties, but was a billing to the deceased ARTHUR J. MENDENHALL for a premium payment voluntarily made in advance by plaintiff, and such advancement was not made at the request of the said named deceased or under an agreement with the deceased to pay the same."

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the fact that there were silent partners a matter of record. The difficulty in obtaining a policy on Amante's life was that it was not factually apparent that the investors had any insurable interest in the life of Amante and an insurance company will not issue a policy on the life of another without some kind of an insurable interest.

[3] Two policies were issued by the life insurance company—one for $225,000. and the other for $25,000. In both policies Amante was the named insured with his wife as beneficiary. It appears that only the $225,000. policy was assigned to the trust. It is interesting to note that the trust was drafted by plaintiff's attorney and the assignment was typed by his (plaintiff's) secretary.

[4] The factual picture can be better understood by referring to the following letter:

"December 26, 1957

"To Whom It May Concern:

"This statement will certify to the fact that I, and several of my associates, arranged for the purchase of $250,000 of life insurance on the life of Ernest Amante on March 21, 1956. This insurance was issued by the Massachusetts Mutual Life Insurance Company, Springfield, Massachusetts, in policies # 2436150 and # 2436151 with an annual premium of $9,692.50. Loans against the first year cash values were made in the amount of $3,585.71 leaving a balance due of $6,106.79. A partial payment of $3,000 was made on March 20, 1956, leaving a balance of $3,106.79.

"This life insurance on Ernest Amante was purchased to protect the investors in the Boulder Club, a gambling casino located at 118 Fremont Street, Las Vegas, Nevada. Mr. Amante sought financial backing from me and my associates, and we felt that since Mr. Amante, who had over 20 years experience in this type of venture was the key man, his life should be insured.

"The Boulder Club of Nevada failed in 1957 as the result of a disastrous fire in December 1956 and general business conditions which were poor throughout 1956 and 1957. Mr. John Curtis presented his statement for the balance of the premiums due but the Boulder Club was unable to make any payment. Since the closing of the Casino in 1957 there have been no funds available to pay this balance.

"Respectfully,
"Arthur J. Mendenhall, M.D.
for the Boulder Club,
Las Vegas, Nevada

"Mary Penfield
"Witness

[5] A creditor's claim was rejected by the administratrix.

Plaintiff argues on appeal that the above finding is not supported by the evidence since "no evidence was offered by respondent." He further contends that since "the evidence of appellant both oral and documentary was uncontradicted, clear and not inherently improbable", "such evidence must be accepted by the court and the judgment [therefore] was contrary to the evidence."

[1] In T.V. Wire Products v. Osipow Electric Supply Company, 204 A.C.A. 567, pp. 570–571, 22 Cal.Rptr. 384, p. 386 this court stated: "The general rule to be applied when reviewing the sufficiency of the evidence is set out in Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 210 P.2d 757. The court stated (p. 370, 210 P.2d p. 759): '[W]here the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; we have no power to judge of the effect or value of the evidence, to ⊥839 weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.' (Estate of Teel, 25 Cal.2d 520, 526–527, 154 P.2d 384; Estate of Bristol, 23 Cal.2d 221, 223–224, 143 P.2d 689; Standard Realty & Development Co. v. Ferrera, 151 Cal.App.2d 514, 516, 311 P.2d 855; 3 Witkin, Calif. Proc. sec. 84, pp. 2245–2246.) 'The critical word in the definition is "substantial"; * * *' (Estate of Teel, supra.) In Estate of Bristol, supra, the court stated (23 Cal.2d pp. 223–224, 143 P.2d p. 690): 'Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover whether such doubt or conflict exists, the court should be realistic and practical.'"

[2] While it is true that no witnesses were presented by the defendant, this is partially explained by the fact that Dr. Mendenhall (whose liability is sought to be established) was deceased at the time of the trial. Defendant, however, did cross-examine one of plaintiff's witnesses—his (plaintiff's) secretary, and defendant also introduced documentary evidence in the form of the two insurance policies. In Isham v. Trimble, 5 Cal.App.2d 648, p. 651, 43 P.2d 581, p. 582, the trial court pointed out: "At the trial no evidence whatever was presented by respondent and he was not called to the stand by appellants. But this did not require the trial court to accept appellant's theories; nor does it support their assertion that there was no conflict in the evidence. Substantial conflicts may, and often do, arise when all of the evidence is produced by one party and it is then the sole province of the jury to determine the questions in issue. [Citation.]"

[3] Although the court may not disregard uncontradicted, credible evidence, "[a]n appellate court cannot control a finding or conclusion denying credence, unless it appears that there are no matters or circumstances which at all impair the accuracy of the testimony, and a trial judge has an inherent right to disregard the testimony of any witness, or the effect of any prima facie showing based thereon, when he is satisfied that the witness is not telling the truth or his testimony is inherently improbable due to its inaccuracy, due to uncertainty, lapse of time, or *interest*[6] or bias of the witness. All of these things may be properly considered in determining the weight to be ⊥840 given the testimony of a witness *although there be no adverse testimony adduced.* The trial judge is the arbiter of the credibility of the witnesses. A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his

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[6] All of the plaintiff's witnesses (plaintiff, his secretary, and his attorney) had an interest in the outcome of the instant case. (Footnote ours.)

own conduct as to discredit his whole story. * * * [Citations.] Where conflicting inferences may be drawn from testimony, this court is bound by the findings of the trial court as conclusively as in other cases of conflict. [Citation.]" (Emphasis added.) (La Jolla Casa DeManana v. Hopkins, 98 Cal.App.2d 339, 345–346, 219 P.2d 871.)

[4] It is a general rule that an account stated must be founded on previous transactions of a monetary character and where there is no underlying primary indebtedness, one is not created by the mere fact that an invoice is sent—even in the absence of a disclaimer. (Stimson Mill Co. v. Hughes Mfg. Co., 8 Cal.App. 559, 97 P. 322.) The testimony of plaintiff's secretary that she had originally sent the invoice to Amante, supports an inference that sending the invoice to decedent was a mere afterthought and that there was no personal obligation on the part of the decedent to pay the insurance premiums. The trial court could have reasonably concluded that, considering all evidence in the case, plaintiff failed to satisfy his burden of establishing the existence of an agreement, express or implied, by which decedent would assume personal liability. The testimony that the trust instrument was drafted by plaintiff's attorney and the testimony that the assignment of the insurance policy to the trustee was typed by plaintiff's secretary, when considered in the light of the terms of the trust which expressly provide that the decedent as trustee would not be personally liable, reasonably support an inference by the trial court that plaintiff was fully aware of all the facts herein and was willing to advance the premium on that basis. The above evidence also supports an inference that there was an implied agreement between plaintiff and the deceased to the effect that plaintiff would satisfy all claims out of the trust estate and would not, in any way, hold the decedent personally liable. This latter inference is further supported by: (1) the fact that the decedent's name nowhere appears on the face of the policies; (2) the testimony of plaintiff's secretary that the letter (set out in footnote 4, supra) was used with plaintiff's income tax returns claiming the amount due as a deduction; and (3) the ⌊841 fact that the policies were never delivered to the decedent, the beneficiaries or the insured but remained in the possession of plaintiff.

[5] Thus it cannot be said that there is not sufficient evidence to support the trial court's finding that plaintiff voluntarily advanced the insurance premiums and that such advance was made neither at the request of the deceased nor pursuant to an agreement with the deceased whereby the deceased would obligate himself to personally pay the same. "'Unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support a finding of the trier of fact, it cannot be set aside on appeal.' (Murphy v. Ablow, 123 Cal.App.2d 853, 858, 268 P.2d 80, 83.)" (Estate of Reed, 132 Cal.App.2d 732, 735, 282 P.2d 935.)

Judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

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208 Cal.App.2d 852

⌊852 **George M. GREENE, Plaintiff and Appellant,**

v.

Doris WILSON, Defendant and Respondent.

Civ. 25880.

District Court of Appeal, Second District,
Division 3, California.

Oct. 24, 1962.

As Corrected Oct. 29, 1962.

Rehearing Denied Nov. 9, 1962.

Hearing Denied Dec. 19, 1962.

Action by judgment creditor of divorced husband to subject to the judgment community property awarded to wife in final judgment of divorce. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., rendered a judgment for the wife, and the creditor appealed. The District Court of Appeal, Ford, J., held that creditor was precluded, under doctrine of promissory estoppel, from subjecting to his judgment the community property, where creditor told wife that he would collect only from husband and never from her, and in reliance thereon she undertook to salvage business awarded to her under divorce decree and assumed substantial obligations.

Affirmed.

1. Husband and Wife ⚷272(1)

Evidence supported findings that divorced husband's judgment creditor, who sued to subject to his judgment community property awarded to wife in final divorce judgment, had represented to wife, her attorneys, and persons who lent her money, that he would collect only from husband, that loans were made to wife in reliance thereon, and that wife incurred obligations in reliance thereon.

2. Husband and Wife ⚷272(1)

Generally, upon division of community property under divorce decree, former husband and wife take the part awarded subject to prior liens and community debts not reduced to liens.

3. Husband and Wife ⚷272(1)

Divorced husband's judgment creditor was entitled to subject community property awarded to wife in divorce suit to satisfaction of his judgment, unless he was guilty of such conduct as to prevent his successful recourse to that remedy.

4. Estoppel ⚷85

Doctrine of promissory estoppel is recognized in California.

5. Estoppel ⚷119

Whether promissory estoppel exists is fact question, unless but one inference can be drawn from the evidence.

6. Estoppel ⚷85

Divorced husband's judgment creditor was precluded, under doctrine of promissory estoppel, from subjecting to his judgment community property awarded to wife in final judgment of divorce, where creditor told wife that he would collect only from husband, not her, and in reliance thereon she undertook to salvage business awarded to her under divorce decree and assumed substantial obligations.

7. Appeal and Error ⚷1010(1)

Appellate court could not interfere with challenged findings of fact which were supported by substantial evidence.

8. Appeal and Error ⚷1043(7)

Even if denial of motion for continuance to permit plaintiff's attorney to produce a witness was abuse of discretion, there was no miscarriage of justice where it did not appear reasonably probable that result more favorable to plaintiff would have been reached had the witness testified in accordance with statement made by plaintiff's attorney.

9. Trial ⚷105(2)

Material evidence which is subject to objection that it is hearsay but which is admitted without such objection may be considered by trier of fact.

10. Appeal and Error ⚷1051(1)

Refusal to strike certain affidavits, which were in file of superior court in previous trial, as hearsay on motion of plaintiff's attorney was not prejudicial where the complete file, which included the affidavits, had been previously received without objection by plaintiff's attorney.

11. Appeal and Error ⚷1047(3)

Even if granting of plaintiff's motion to strike from evidence all portions of complete file of superior court in previous case, except part relating directly to judgment itself, would have been more consonant with fairness, failure to do so did not give rise to miscarriage of justice where affidavits sought to be stricken provided evidence purely cumulative in nature.

12. Continuance ⚷26(2)

Denial of continuance to permit plaintiff to procure attendance of affiants was not abuse of discretion where plaintiff was charged with knowledge that affidavit was part of file, which was in evidence, and four days after refusal to limit extent of contents of file, plaintiff had not arranged for presence of affiants.

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Spiegel, Lincoff & Wolfson and Gerald G. Wolfson, Santa Monica, for appellant.

Beardsley, Hufstedler & Kemble, Los Angeles, for respondent.

854 FORD, Justice.

On June 19, 1959, the plaintiff, George M. Greene, obtained a judgment in the amount of $16,635.65 against Gordon Wilson in an action on a promissory note dated February 14, 1947. Mr. Wilson and Doris Wilson were husband and wife from December 31, 1933, until the entry of a final judgment of divorce on December 11, 1956. Mr. Greene was not able to satisfy his judgment by recourse to assets of Gordon Wilson, there having been a return *nulla bona* with respect to the writ of execution. He brought the present action against Doris Wilson for the purpose of subjecting to his judgment real property and business assets received by Mrs. Wilson by virtue of the final judgment of divorce.[1] This appeal is from a judgment in favor of Mrs. Wilson.

It was determined in the interlocutory judgment in the divorce action that the community property of the Wilsons consisted of a residence and the furnishings therein, their personal effects, insurance on the life of Mr. Wilson and on the life of Mrs. Wilson, and two businesses theretofore known respectively as Tri-Color Laboratories and Tri-Color Multiprint. Reference will hereinafter be made to the businesses under the designation of Tri-Color Laboratories. The matter of the disposition of the community property was deferred until the time of the final judgment. In the final judgment of divorce the community property, other than Mr. Wilson's personal effects and the insurance on Mrs. Wilson's life, was awarded to Mrs. Wilson, except that a Mercury automobile which was a business asset was awarded to Mr. Wilson and he was ordered to pay the unpaid portion of the purchase price thereof. However, Mr. Wilson was given a lien in the sum of $25,000 on the assets of the businesses which lien was to be discharged by Mrs. Wilson by means of monthly payments in specified amounts. It was further ordered that Mrs. Wilson assume and pay all community obligations owed to Ona Kimball and hold Mr. Wilson harmless therefrom. A similar burden was placed on Mr. Wilson with respect to community obligations owed to Anna E. Wilson and Doris Seligman. Each was ordered to assume and pay one-half of certain income tax obligations.

[1] In the present action the trial court 855 found in part as follows: 1. At the time of the rendition of the final judgment of divorce the equity in the residence was of a value of approximately $17,000, but the business known as Tri-Color Laboratories was insolvent, its condition being that "the debts exceeded the fair market value of the assets thereof, and said business was unable to meet its obligations as they became payable" and it "had no fair market value." 2. The lien in the amount of $25,000 in favor of Gordon Wilson has been satisfied and discharged, and the other obligations assumed and paid by Doris Wilson, pursuant to the final judgment of divorce and in satisfaction of certain tax liens on the business in excess of $21,500, exceeded the value of the assets awarded to her. 3. On numerous occasions during the pendency of the divorce action and during the pendency of the action against Mr. Wilson on the promissory note, the plaintiff Greene stated and represented to the defendant Doris Wilson and to her attorneys and to persons who later lent money to her that he intended to, and would, collect his claims only against Gordon Wilson, and that he would never assert any claim against Doris Wilson or any property she might acquire in the di-

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[1] Pursuant to stipulation, the sum of $17,935.36 is being held in trust by the attorneys for the plaintiff awaiting the final determination of this case. That sum represents part of the money payable to Doris Wilson because of her subsequent sale of the business hereinafter described as Tri-Color Laboratories.

vorce action. 4. The plaintiff Greene knew that Doris Wilson, her attorneys and the persons who later lent money to her would rely on those statements and representations. 5. In reliance thereon, she and her attorneys made no attempt to protect her from that liability in the final judgment of divorce, and persons to whom the statements and representations were made "advanced money to and guaranteed loans to Doris Wilson in excess of $60,000.00." 6. In reliance on such statements and representations of the plaintiff Greene, Doris Wilson "purchased thousands of dollars of new equipment for Tri-Color Laboratories and made representations of her own financial condition to equipment sellers and trade creditors," on which representations such creditors relied. 7. In reliance on the plaintiff's statements and representations, Doris Wilson represented to the subsequent purchasers of the business that Mr. Greene had no claims against the business and the purchasers relied on such representations.[2]

⌊856 ⌊One of the conclusions of law drawn by the trial court was that the plaintiff Greene was "barred and prevented by the doctrine of promissory estoppel from enforcing the claim sued upon" against the defendant Doris Wilson.

[2, 3] As stated in Mayberry v. Whittier, 144 Cal. 322, at page 325, 78 P. 16, at page 17: "It is clearly the general rule that, upon a division of community property under a divorce decree, the former husband and wife each take the part awarded subject to prior liens; and it has been held that the part awarded either wife or husband is subject to community debts not reduced to liens." (See also Vest v. Superior Court, 140 Cal.App.2d 91, 95, 294 P.2d 988.) Consequently, the plaintiff Greene was entitled to pursue the property awarded to Doris Wilson in the divorce suit for the purpose of subjecting it to the satisfaction of his judgment, unless there was conduct on his part of such a nature as to prevent his successful recourse to that remedy. (Bank of America etc. Ass'n v. Mantz, 4 Cal.2d 322, 326–327, 49 P.2d 279.)

[4, 5] The doctrine of promissory estoppel is recognized in this state. (Drennan v. Star Paving Company, 51 Cal.2d 409, 413, 333 P.2d 757.) In section 90 of the Restatement of Contracts the doctrine is expressed as follows: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." (See also Morrison v. Home Savings & Loan Ass'n, 175 Cal.App.2d 765, 768, 346 P.2d 917; Van Hook v. Southern California Waiters Alliance, 158 Cal.App.2d 556, 570, 323 P.2d 212; Henry v. Weinman, 157 Cal.App.2d 360, 366, 321 P.2d 117; Graddon v. Knight, 138 Cal.App.2d 577, 582–583, 292 P.2d 632; Wade v. Markwell & Co., 118 Cal.App.2d 410, 420, 258 P.2d 497, 37 A.L.R.2d 1363; Hunter v. Sparling, 87 Cal.App.2d 711, 725, 197 P.2d 807; 31 C.J.S. Estoppel § 80.)[3] In Drennan v. Star Paving Co., supra, ⌊857 ⌊51 Cal.2d 409, at page 414, 333 P.2d 757, at page 760, it is said: "The very purpose of section 90 is to make a promise binding even though there was no consideration 'in the sense of something that is bargained for and given in exchange.' (See 1 Corbin, Contracts 634 et seq.)" Whether, in a particular case, such an estoppel exists is a question of fact, unless but one inference can be drawn from the evidence. (Henry v. Weinman, supra, 157 Cal.App.2d 360, 366, 321 P.2d 117.)

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[2] While there were other findings of fact in favor of the defendant Doris Wilson with respect to other matters of defense raised by her, it is not necessary to set them forth herein in view of the determination hereinafter expressed that the recited findings find sufficient support in the evidence and, under the applicable law, sustain the judgment of the trial court.

[3] Apropos with respect to the defendant Doris Wilson's position in the present case is the following statement found in Fried v. Fisher, 328 Pa. 497, at 501, 196 A. 39, at 42, 115 A.L.R. 147, at 150: "Illustrative cases abound in the reports, especially since the more formal embodiment of the principle in section 90 of the Restatement. Its most frequent application has been to cases in which a person announces his intention of abandoning an existing right, and thereby leads another, relying thereon, to some action or forbearance. Such cases have sometimes been referred to as well-rec·

There is substantial evidence in the record in this case in support of the defense of promissory estoppel. Mrs. Wilson testified with respect to several conversations she had had with Mr. Greene. After she heard that he had sued Mr. Wilson, she made a trip to Scottsdale, Arizona, about Easter in 1956 and spent several days with Mr. Greene and his mother in their home. She had known Mr. Greene since he was eleven years old and at one time he had lived with Mr. and Mrs. Wilson. In Scottsdale she told Mr. Greene the circumstances of her divorce litigation and that she was seeking all of the community property. She further testified as follows: "I told him * * * that I wanted to know from him what he was suing on, if he was suing me, if he was including Tri-Color in his suit, and he said, 'No,' he was just suing Gordon Wilson and that he was not going to sue me, he had turned the notes over to some attorneys * * * on a contingency basis. * * *" She also testified that Mr. Greene "repeated that he was not going to ever sue me for this money or include me in the suit or ever ask me for the money, or Tri-Color." The reason he gave was that "he felt Gordon Wilson owed it to him"; he mentioned that Mr. Wilson had induced him and his mother to loan him money and then had found various ways of avoiding repayment.

Prior to December 10, 1956, when Mr. Greene was in Los Angeles for the trial of his action against Mr. Wilson, Mrs. Wilson saw Mr. Greene on several occasions. She testified to a discussion which occurred at the home of an attorney, Mr. Henzie, who was representing her in the divorce suit. In Mr. Henzie's presence, Mr. Greene said that he was looking to Gordon Wilson alone for the money. Mr. Henzie said that he was asking him directly about the matter because it was a subject he would want to consider in the divorce proceedings if Doris Wilson was involved in the matter of the payment of the debt. At a later time, Mr. Greene telephoned her and said that he and his wife would not come to her home because they were returning to Scottsdale since his lawsuit with Mr. Wilson had been settled by an agreement for the payment of a sum of money in monthly instalments.

Pursuant to the final judgment of divorce Mrs. Wilson took over the operation of the business of Tri-Color Laboratories on December 11, 1956. In her opinion, at that time the assets had a value of approximately $54,000, but the business appeared to have "no value, because of the net deficit, the net worth deficit of $27,000," exclusive of income tax liabilities of about $22,000. Approximately $38,000 was owed to one supplier of printing material for color prints. Large sums of additional capital were needed if the operation of the business was to continue. She borrowed $50,000 from a bank, the loan being guaranteed by three attorneys, two of whom later lent her the additional sum of $16,000. While the loan of $50,000 was repaid from moneys received in the subsequent sale of the business, she had not

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ognized exceptions to the general proposition that, in order to give rise to an estoppel, a representation must relate to an existing fact and not be merely an expression of opinion or a promise of future performance. 'There is no rule more necessary to enforce good faith than that which compels a person to abstain from enforcing claims which he has induced others to suppose he would not rely on. The rule does not rest upon the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.' Faxton v. Faxon, 28 Mich. 159, 161."

been able to repay the sum of $16,000 which she had borrowed. Over the period of her operation of the business she paid about $75,000 on account of conditional sales contracts for new equipment, the contracts being in the total amount of approximately $115,000. In addition, she satisfied income tax liens in the amount of approximately $21,000 which related to the years 1952–1955, inclusive. Mrs. Wilson testified that in making the loans, purchasing equipment, and paying accounts, she relied on Mr. Greene's prior statements that he was not making any claim against her or the assets she would acquire under the judgment of divorce. She did not know that Mr. Greene was making a claim against her or the assets of the business until the first part of February, 1959, when she saw a letter from his attorney "in the escrow" arising out of the transaction in which she was selling the business.

Mr. Blankenbaker, a certified public accountant, testified that the books of the business showed that, as of December 31, 1956, the excess of liabilities over assets was in the amount of $26,976. No obligation to Mr. Greene was recorded on the books as a liability of the business.

Mr. Gilbert, an attorney, testified that he met Mr. and Mrs. ⊥859 Greene at the home of Doris Wilson in November or early in December, 1956, and saw them on several occasions within a week or ten days thereafter. On one occasion Mr. Greene said that he was in court on a lawsuit with Gordon Wilson. He further said that Mrs. Wilson had not been served in that action because he had told his attorneys to take no steps or proceedings against her in any way. Mrs. Wilson said that she appreciated this very much; that she thought that she might get the business as a result of the final hearing in her divorce action. Mr. Greene said to her, "You needn't have any worry about that at all. I will never take any steps to try and collect any of this money from you or any property you might get." Either in the same or another conversation, Mr. Greene said that he hoped that she would get the business from Gordon Wilson; as far as he was concerned he could not think of anybody he knew to whom he would rather see something like that happen. Mrs. Wilson stated that she had been somewhat concerned about the matter because in the operation of the business she would have to borrow money and her ability to do so would be dependent upon the financial condition of the business. Mr. Greene said, "Don't worry about that at all, and I hope you get the business, that I will never under any circumstances take any steps to collect this money from you or anything that you might get." Mr. Greene also said in one conversation that he would be very happy if Gordon Wilson had to pay some small amount monthly so that every month he would be reminded that he "hadn't gotten away with it." In conversation Mr. Greene also made comments as to his resentment with respect to the way in which Gordon Wilson had treated him and his mother in their earlier financial dealings. Mr. Gilbert further testified that in one of the conversations Mrs. Wilson said that if any claim was going to be asserted against her, she wanted to get in touch with her attorneys regarding it because they were having their final hearing on the matter in court, and that if this would affect her or any property she might get, she would want to see her lawyers concerning the matter of raising this subject so that it might be considered in the determination of the Wilsons' respective rights in the divorce action. Mr. Gilbert participated in the matter of the loans to Mrs. Wilson and, in doing so, relied on Mr. Greene's statements; he would not have so participated if those statements had not been made.

Mr. Henzie, one of Mrs. Wilson's attorneys in the divorce action, testified that in the hearing with respect to the divi⊥860sion of property in October, 1956, he and his associate, Mr. Belcher, took no steps to protect Mrs. Wilson with respect to any claims of Mr. Greene. At his home on one occasion, which he believed to have been on Sunday, December 9, 1956, he participated in a conversation. He testified as follows: "The substance of that conversation was that Mr. Greene stated that Gordon Wilson had misled him and had imposed upon him and that he, therefore, considered that Gordon Wilson owed him the money that he had advanced, that Mrs. Wilson had not taken part in any of the negotiations or the loans that had been involved so far as his claim against Mr. Wilson was concerned; and, therefore, that he did not consider that she owed him any money or that she should have to pay any of the amounts involved. He said, in substance, that he didn't care how long it took him to collect from Mr. Wilson or what amount, how big or small the payments were, that the only thing he was interested in was seeing that Gordon Wilson alone paid the amounts that he had advanced. He said that—he told me that—he stated in the presence of the people who were then there that he had assured Mrs. Wilson that under no circumstances would he ever attempt to collect any of that money either from her or from any property that she might be awarded in the divorce case. And about this time in the conversation we discussed the possibility of Mrs. Wilson getting the businesses and the home and so on. And Mr. Greene stated that he certainly did hope that she was successful in that regard. And at that time I told Mr. Greene that it was very important to us and to Mrs. Wilson for us to know exactly what his position was in that regard because if he was ever going to attempt to collect from her and to recover out of a property that was awarded to her in the divorce case that she should know that in order that we could take steps to have that properly considered in the divorce hearing that we were going to have in the next few days. And he told—he again said that under no circumstances was he going to attempt to collect from her or from any property that was awarded to her in the divorce court. That was the substance of the conversation." In that conversation it was mentioned that in the divorce proceeding counsel were going back into court on the following Tuesday, December 11, 1956.

With respect to his reliance upon Mr. Greene's statements, Mr. Henzie testified as follows: "Well, in reliance upon Mr. Greene's assurance that he would not make any effort to collect any of the monies that would ultimately—recover against Gordon ⌊861 Wilson, we made no effort in the final hearing before Judge Herndon to get a specific order that Gordon Wilson assume and pay that obligation, and we made no provision for it in the final judgment that was prepared in my office." He further testified that the obligations to Mr. Greene had never been set up on the books and records of Tri-Color Laboratories. Mr. Henzie participated in the guarantee of the $50,000 loan; in so doing he relied upon Mr. Greene's statements and would not have so participated if Mr. Greene had not given such assurances that he would not look to Mrs. Wilson or the business for the payment of the debt.

Mr. Henzie testified that on Tuesday, December 11, 1956, Mrs. Wilson and her attorneys went into the superior court and there was a conference in which the judge and the attorneys for the Wilsons participated. The conference related to the division of the community property. The judge stated that he had determined that the house and the furnishings therein were worth $21,000, that there was an encumbrance against the real property of approximately $4,000, and that, accordingly, the net value was $17,000. He further stated that, based on the appraisal of the expert witness who had testified on behalf of Mr. Wilson, he would find that the value of the business was $35,000. The total value of such assets was $52,000. The judge then stated that he was going to award the business and the house and furnishings therein to Mrs. Wilson and that he would impress the business with a lien of $25,000 in favor of Mr. Wilson. Other matters were also discussed. Mrs. Wilson's attorneys prepared the form of the final judgment of divorce. The judgment was entered on that day, December 11, 1956.

The agreement between Mr. Greene and Gordon Wilson with respect to their litigation as to the money owed to Mr. Greene bore the date of December 10, 1956. Therein Mr. Wilson agreed to pay Mr. Greene the sum of $7,500 without interest, payable at the rate of $150 per month commencing on December 15, 1956, and continuing for a period of fifty months; it was agreed that, in the event of any default in payment, Mr. Greene could enter judgment against Mr. Wilson in the pending action for the total amount of $20,535.65, less any amounts theretofore paid. There was a provision for a period of grace with respect to the matter of remedying any default. It was further provided that after $7,500 had been paid, Mr. Wilson's promissory note for $3,500, payable without interest in installments of $150 per month, would be accepted in full ⊥862 release and satisfaction of all claims of Mr. Greene in connection with the pending litigation or otherwise. Pursuant to that agreement Mr. Wilson made payments in the total amount of $3,900 but failed to make the payment due on February 15, 1959. On June 19, 1959, judgment was rendered against Mr. Wilson for $16,635.65.

[6, 7] It is true that Mrs. Wilson's position was that Mr. Wilson's lien for $25,000 against the assets of the business had been satisfied because of Mr. Wilson's use of funds of the business in violation of certain provisions of the interlocutory and final judgments of divorce. Consequently, the imposition of the lien in the final judgment may have been of little practical importance. But it was a reasonable inference that if Mr. Greene's statements that he would not look to Doris Wilson or any property which she might receive in the divorce action for the satisfaction of any obligation owed to him had not been made and reliance had not been placed thereon by Mrs. Wilson and her attorneys, some protection for her with respect to the claims of Mr. Greene would have been asked of the trial court in the divorce proceedings and that such relief would probably have been granted. There could reasonably have been included in the final judgment of divorce a provision to the effect that Mr. Wilson was required to pay all obligations owing to Mr. Greene and to hold Mrs. Wilson harmless from claims based thereon. (See Carew v. Carew, 175 Cal.App.2d 706, 346 P.2d 845.) Furthermore, had Mr. Greene's statements not been made and relied upon, the agreement between Mr. Greene and Mr. Wilson, made on the day before the conference of the court and counsel with respect to the division of community property in the divorce action, could have been brought to the attention of the court with a request that Mr. Wilson be ordered to comply with that agreement and, upon his failure to make a payment when due, to give prompt notice of that fact to Mrs. Wilson so that she might protect her interests by curing any default within the grace period and thereupon acquire a right to have reimbursement from Mr. Wilson. Such an order would have enabled Mrs. Wilson to avoid a claim of the nature asserted in the present litigation. Moreover, the evidence clearly supported the inference that Mrs. Wilson undertook to salvage the business of Tri-Color Laboratories and, in so doing, assumed substantial obligations in reliance upon the statements and representations of Mr. Greene. Such statements and representations were sufficient to constitute promises within the doctrine of promissory estoppel. ⊥863 (See Drennan v. Star Paving Co., supra, 51 Cal.2d 409, 413, 333 P.2d 757.) Since the evidence presented a question of fact for the trial court as to the existence of an estoppel of the nature asserted by Mrs. Wilson, and since there was substantial evidence in support of the findings of fact of the trial court with respect to that matter, an appellate court cannot interfere with the challenged findings. (Henry v. Weinman, supra, 157 Cal.App.2d 360, 366, 321 P.2d 117.)

[8] Several other matters remain for consideration. At the conclusion of his testimony on Thursday, February 9, 1961, Mr. Wilson, who then lived in San Francisco,

was excused from further attendance at the trial upon the request of his attorney, Mr. Hildreth. Mr. Hildreth was also excused from thereafter being present at the trial; he indicated, however, that he might want to participate in the arguments at the conclusion of the case. On the last day of the trial, Wednesday, February 15, 1961, counsel for Mr. Greene stated that he had intended to call Mr. Hildreth as a witness and that Mr. Hildreth had said in his presence and that of Mrs. Wilson's attorney that he would return upon being requested to do so and that the use of a subpoena would not be necessary. But when Mr. Greene's attorney called Mr. Hildreth's office, he was informed that Mr. Hildreth would be away until Thursday night. A motion for a continuance so that Mr. Hildreth's testimony might be obtained was denied. A statement with respect thereto was made which was in substance as follows: Mr. Hildreth would testify that he was present at the conference in chambers of counsel and the judge in the divorce proceedings on December 11, 1956, pursuant to a telephonic notification that the judge wanted to state orally his proposed determination with respect to the final judgment; that he informed the court that on the previous day a settlement had been made of the litigation between Mr. Greene and Gordon Wilson; that nothing was said by Mrs. Wilson's attorneys to the effect that they or their client considered that she had a release with respect to the Greene claims; that Mr. Hildreth had no knowledge of any such claim of a release, but if such matter had been brought before the court, Mr. Hildreth "would have taken steps for further relief"; and that the agreement between Mr. Greene and Mr. Wilson was executed in his office on December 10. If it be assumed that the showing made by Mr. Greene's attorney with respect to his diligence in attempting to produce Mr. Hildreth as a witness was such that it was an abuse of discretion to deny the motion ⊥864 for a continuance, still no miscarriage of justice is evident because it does not appear reasonably probable that a result more favorable to the plaintiff Greene would have been reached had Mr. Hildreth testified in accordance with the statement made by the plaintiff's attorney. (See Crosby v. Martinez, 159 Cal.App.2d 534, 542, 324 P.2d 26.)

During the course of the trial and before he was excused from further attendance, the attorney for Gordon Wilson offered in evidence (by reference) the file of the superior court in the action brought by Mr. Greene against Mr. Wilson. An objection was made on behalf of the defendant Doris Wilson. It was then stated by counsel for Gordon Wilson that the purpose of the offer was to furnish proof as to the judgment in that action. The plaintiff's counsel also desired to have the judgment in evidence. Mrs. Wilson's attorney thereafter stated in part: "The reason we don't want this in is because after the judgment * * * there are voluminous affidavits, * * * these can have no benefit to the Court in proving existing judgment. * * *" After further discussion the trial judge asked, "How about the whole file?" Counsel for the plaintiff started to answer the enquiry, whereupon the attorney for Mrs. Wilson stated, "I will withdraw my objection, let it go in evidence." The file was received as an exhibit. On the following day, the plaintiff's attorney stated, with respect to the exhibit, "Of course, we are not putting in pages and pages having to do with affidavits." Counsel for Mrs. Wilson replied that all of the file went into evidence and that it was "very important" inasmuch as there was "something" he wanted to use. The court ruled that all of the contents of the file had been received in evidence and refused to strike from evidence any portion of the file in the absence of Mr. Hildreth, counsel for Gordon Wilson, who had offered the file in evidence.

In the presentation of Mrs. Wilson's case, her attorney read to the court certain affidavits contained in the court file to which reference has just been made. The plaintiff Greene's objections that they constituted inadmissible hearsay were overruled. One affidavit was that of Mr. Greene's mother and the other was the affidavit of David and Patricia Van Every. Such affidavits related to admissions made by the plaintiff Greene that he intended to proceed against Mr. Wilson only and did not intend to proceed against Mrs. Wilson or her property. In each instance, Mr. Greene was asked if he made the statements on the subject contained in the affidavits and he stated that he did not recall making those set forth in his ⊥865 mother's affidavit and that he had not made those embodied in the other affidavit. Mrs. Greene, the plaintiff's mother, was called as a witness on behalf of her son and testified as to the circumstances under which her affidavit was obtained. In substance, she denied that the affidavit correctly related statements of her son.

[9–11] Material evidence which is subject to the objection that it is hearsay but which is admitted without such an objection may be considered by the trier of fact. (Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156; Crocker-Anglo National Bank v. American Trust Co., 170 Cal.App.2d 289, 299, 338 P.2d 617.) As has been noted, after Mrs. Wilson's attorney had withdrawn his objection, the complete file of the superior court in Mr. Greene's action against Gordon Wilson, which included the affidavits, was received in evidence. But even if it would have been more consonant with fairness to have granted the plaintiff's motion to strike from evidence all portions of the file except that part relating directly to the judgment itself, no error giving rise to a miscarriage of justice is evident. The evidence produced through use of the affidavits was purely cumulative in nature inasmuch as the defendant Doris Wilson, Mr. Gilbert and Mr. Henzie had testified at length as to the statements of Mr. Greene and it does not appear reasonably probable that a disposition of the case more favorable to the plaintiff would have resulted if such affidavits had been excluded. (See Nesbitt Fruit Products, Inc. v. Del Monte Beverage Co., 177 Cal.App.2d 353, 364, 2 Cal.Rptr. 333; Milton v. Hudson Sales Corp., 152 Cal.App.2d 418, 439, 313 P.2d 936.)

[12] In view of what has been said, it is unnecessary to discuss at length the plaintiff's assertion that the admission of the Van Every affidavit "was particularly damaging since the Van Everys were not available for cross-examination and the court refused to grant a continuance in order that * * * they * * * could testify." However, insofar as the matter of the denial of a continuance is concerned, it is to be noted that the trial court's refusal to limit the extent to which the contents of the file were to be considered as being in evidence occurred in the morning session of Friday, February 10, 1961. On Tuesday, February 14, 1961, the plaintiff Greene testified in rebuttal. He said that until that day he had been staying with his friends, the Van Everys, and that when he came to Los Angeles for the trial he had looked at a copy of their affidavit and had discussed with Mr. Van Every "last night ⊥866 and the night before" the circumstances under which he had signed the affidavit. He was not permitted to relate the conversation and his counsel requested a continuance, stating, "We telephoned the Van Everys at the 3:00 o'clock recess, and they have been [sic] gone out of town for several days and will not be back until Saturday. * * *" Since the plaintiff's counsel was charged with knowledge that the affidavit was part of the file which was in evidence, the denial of a continuance cannot be said to have been an abuse of discretion in the light of the lack of diligence on the plaintiff's part in arranging for the presence of Mr. and Mrs. Van Every. (See Espinola v. Provenzano, 156 Cal.App.2d 760, 762, 320 P.2d 149.) But, in any event, because the evidence obtained by use of the Van Every affidavit was of a cumulative nature, no prejudicial error occurred. (See Nesbitt Fruit Products, Inc. v. Del Monte Beverage Co., supra, 177 Cal.App.2d 353, 364, 2 Cal.Rptr. 333.)

Since the findings of fact of the trial court relating to the matter of promissory estoppel have substantial support in the evidence and sustain the judgment, it is not necessary to discuss the plaintiff's attack on findings relating to other matters upon which the defendant Doris Wilson also based her defense. (See Bolen v. Parks, 149 Cal.App.2d 460, 468–469, 308 P.2d 521.) Other claims of error asserted to have occurred during the course of the trial need not be considered since their nature is such that they do not affect the determination herein set forth.

The judgment is affirmed.

SHINN, P. J., and FILES, J., concur.

209 Cal.App.2d 33

⊥33 ⊥**The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Joseph Gilbert HERNANDEZ, Defendant and Appellant.

Cr. 8048.

District Court of Appeal, Second District, Division 2, California.

Oct. 25, 1962.

Hearing Denied Dec. 19, 1962.

Defendant was convicted of second degree burglary and from a judgment of the Superior Court of Los Angeles County, Maurice C. Sparling, J., the defendant appealed. The District Court of Appeal, Ashburn, J., held that alleged misconduct of prosecutor was not prejudicial, that failure to appoint private counsel at public expense for the defendant was not error, and that evidence of a 1956 crime was not prejudicial.

Judgment affirmed.

1. Criminal Law 🔑1171(5)

Comments of prosecutor with reference to defendant's failure to take the witness stand so that the prosecutor could question him about other offenses though improper was not prejudicial in view of evidence of the defendant's guilt. West's Ann. Pen.Code, § 459.

2. Criminal Law 🔑726

Prosecutor's remark that defendant was trying to make a mockery of the court and was trying to draw upon the jury's sympathy made in reply to argument by the defendant in which he sought the jury's sympathy because without counsel notwithstanding he had discharged the public defender were not improper.

3. Criminal Law 🔑730(10)

Prosecutor's misstatements with reference to the law did not require reversal where the trial court correctly instructed the jury with reference to the inferences that might be drawn from defendant's failure to explain or deny the evidence against him.

4. Criminal Law 🔑1166½(1)

Failure of the trial court to appoint private counsel for defendant at public expense after defendant had discharged the public defender was not reversible error, where court discussed the question with defendant at length repeatedly and defendant made it clear that he had no intention of conducting his defense though he participated in the conduct of the trial with reasonable effectiveness. West's Ann.Pen.Code, § 987.

5. Criminal Law 🔑667(1)

Where record established that defendant appearing without counsel had no intention of calling any witnesses, failure of the trial court to ask defendant whether he had any witnesses he wished to call did not deny defendant a fair trial.

6. Criminal Law 🔑372(1)

Evidence of prior crimes may be admitted if tending to show a similar pattern, scheme or modus operandi to that employed in the case being tried.

7. Criminal Law 🔑673(5)

In burglary prosecution, admitting evidence of a similar crime committed in 1956 was not prejudicial where jury was told that it was permitted to use such evidence only for limited purposes set forth in the instruction. West's Ann.Pen.Code, § 459.

Robert Barnett, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Gilbert F. Nelson, Los Angeles, for respondent.

⊥35 ⊥ASHBURN, Justice.

Defendant was charged by information with burglary from an automobile in violation of § 459 of the Penal Code. He was arraigned on April 7, 1961, and at that time the public defender was appointed to represent him as his attorney. He entered a plea of not guilty. Trial was set for May 19, 1961, and on that date defendant moved to have the public defender relieved as counsel. The motion was granted after explanation of what the effect would be and recommendation that defendant not insist on his motion; but he did insist and he was substituted in propria persona, and the trial was continued until May 24th. The trial took place on May 24th and May 25th and the jury found defendant guilty of second degree burglary. A motion to dismiss and a motion for new trial were both denied and defendant was sentenced to the state penitentiary. Defendant appeals, being now represented by private counsel.

Mrs. Costello, a witness, testified that on March 17, 1961, at approximately 5:00 in the afternoon, she parked her car in a vacant lot. She left her purse on the seat of the car having covered it with a baby's blanket. She closed all the windows and locked all the car doors. She returned 10 or 15 minutes later to find that the wind wing of her car was open, the latch having been broken off; it was lying in the grass in front of the car. Her wallet which contained $10 was missing from her purse. A few days later it was found along the highway near Marineland but the money had been taken from it.

Another witness, Mr. Comstock, testified that he had parked his Camper (a truck with living quarters mounted on the rear) on the same lot during the same period of time. On the same afternoon he went to the back of the Camper to get a jacket. Through the front window of the Camper he saw a hand reaching in a window; he looked out a little further and saw defendant walking away from the Camper. He then observed defendant walking down a line of automobiles looking into cars and trying door handles on four or five automobiles until he came to Mrs. Costello's automobile. Defendant then returned to his own car which was parked next to ⊥the ⊥36
Camper. He got something from under the seat of his car, concealed it under his coat and walked back to the front seat of Mrs. Costello's car on the passenger's side. He placed something against the window and gave the impression that he was prying down. Mr. Comstock then observed a metallic object fly out into the field and saw the defendant bend down over Mrs. Costello's automobile and it appeared that he opened the car door. He then observed appellant return to his own automobile. The witness wrote down defendant's license number and walked over to Mrs. Costello's car. At that time Mrs. Costello was returning to her car. The police came and Mr. Comstock told them the story. Two days later he was called down to the Palos Verdes Police Station where he identified defendant in a lineup.

Defendant claims three instances of misconduct on the part of the prosecuting attorney. Defendant did not take the stand in his own behalf. In the People's closing argument the prosecuting attorney referred to defendant's argument to the jury as follows: "He says that there is no evidence in this case, that he has not been convicted of other crimes. It's true, there is no evidence here that he has been convicted of other crimes. However, if he took the stand, I would have liked to ask him a few questions about other things that I could properly have asked him about, but he knows that I would have asked him about it and didn't want to take the stand * * *."

[1] In People v. Sanchez, 35 Cal.2d 522, 219 P.2d 9, references in argument to prior convictions where the defendant was neither charged with them nor did he take the stand were deemed improper and in that case prejudicial under the facts. The comments of counsel in the instant case, although not express with respect to prior convictions, were subject to criticism. This argument is not adequately met by the People. However, in view of the rather overwhelming evidence the misconduct was not prejudicial.

[2] The second item of alleged misconduct is the contention that the prosecutor appealed to the jury's passion and prejudice. At one point counsel stated to the jury that defendant was trying to make a mockery of the court and the judicial system and that he was trying to draw upon the jury's sympathy so that they would feel sorry for him and feel that the prosecutor and the judge had picked on him. The prosecutor was merely replying to argument made by the defendant in which he obviously sought the jury's sympathy because he was without counsel—this in spite ⊥37 of the fact that he dis⊥charged the public defender. He argued that he did not have an opportunity to prepare his case and repeated references were made as to what a lawyer would have done had one represented defendant. The comments of the prosecutor were not excessive and were appropriate to combat those of defendant.

[3] The third alleged item of misconduct is that the prosecutor told the jury that the court would instruct them that because defendant did not testify in his own behalf they "must" accept inferences adverse to defendant and reject inferences pointing to his innocence. This is clearly a misstatement of the law. However, the trial court correctly instructed the jury with respect to the inferences that may be drawn from defendant's failure to explain or deny evidence against him.[1] In addition, the court further instructed the jury: "In determining the guilt or innocence of the defendant you are to be governed solely by the evidence introduced in this trial and the law as stated to you by the Court." Any effect which the prosecutor's comments may have had was remedied by the instructions.

[4] Defendant's next argument is that in spite of the fact that he discharged the public defender the court should have appointed private counsel for him at public expense. Counsel for defendant now concedes "that the cases in California all seem to hold that where a Defendant knowingly discharges the public defender he does not have the right to have the trial judge appoint him private counsel." (People v. Simeone, 132 Cal.App.2d 593, 597, 282 P.2d 971; People v. Douglas, 187 Cal.App.2d 802, 806, 10 Cal.Rptr. 188; People v. Williams, 174 Cal.App.2d 364, 378, 345 P.2d 47; People v. Hood, 141 Cal.App.2d 585, 589, 297 P.2d 52.) It is argued that the court did not inquire into defendant's history, educational level, family background, legal background or any of the⊥ factors ⊥38 "which have been stated to comprise the intellectual makeup of a defendant in determining whether he can effectually dismiss his court appointed counsel." It is

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[1] "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. The failure of a defendant to deny or explain evidence against him does not, however, create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt."

further argued that the court did not determine whether defendant understood the issues and available defenses and had capacity to effectively waive counsel. The record, however, reveals that the court discussed the question with defendant at length repeatedly, advising defendant that the law did not entitle him to have private counsel appointed even though he discharged the public defender and defendant made repeated references to § 987 of the Penal Code, arguing that it authorizes the judge to appoint private counsel. Defendant throughout the exchange appeared to be remarkably articulate and at least as qualified as the average layman to conduct his defense. However, defendant made it clear that he had no intention of conducting his defense but was going to stand on his "rights" under § 987 and remain mute throughout the trial,—this in spite of the fact that the court stated that it appeared that defendant was acting upon the poor advice of "jailhouse lawyers." Despite the defendant's expressed intention he in many instances did participate in the conduct of the trial with reasonable effectiveness. The cases cited with respect to this point by defendant are Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; In re James, 38 Cal.2d 302, 240 P.2d 596, and People v. Chesser, 29 Cal.2d 815, 178 P.2d 761 These cases merely hold that where no effort is made on the part of the trial court to determine that there is a clearly understood intent to waive counsel and an appreciation of its effect, the waiver is not effective. These cases do not apply to the case at bar.

After the People had rested the following colloquy took place: "Now you may inform the jury of what your defense will be, assuming that you are going to take the stand, or if you have any other witnesses you may tell the jury what you anticipate those witnesses will testify to. MR. HERNANDEZ: Is it on the record that I am not acting as my attorney? THE COURT: You have stated that a number of times. That is a matter of law, whether you are acting as your own attorney or not. If you represent yourself, why, you are appearing in what is known as proper person, you are appearing in your own right. You have that right. MR. HERNANDEZ: Then I remain mute, your Honor. I cannot. THE COURT: Very well. Do you wish to take the stand? Do you wish to testify? MR. ⊥39 HERNANDEZ: I cannot participate in this because I have no counsel. THE COURT: By that, I judge that you do not wish to take the stand. MR. HERNANDEZ: The Court may judge as it sees fit. I merely state— THE COURT: Let's put it this way: If you do wish to take the stand, if you do wish to testify, do so now. MR. HERNANDEZ: I am not competent to judge whether I should or not. THE COURT: Well, the Court told you this morning that if you do not, the fact that you do not may be considered by the jury. MR. HERNANDEZ: I have nothing more to say, your Honor."

[5] Defendant argues that the court should have asked defendant "do you have any witnesses that you wish to call?"; and it is asserted that by not doing this the court foreclosed defendant's right to call witnesses, thereby denying him a fair trial. There is no merit in this; the record discloses that the court was exceedingly solicitous of defendant's rights and demonstrated great patience under the circumstances.

It is clear from the above colloquy and from the entire record that defendant had no intention of calling any witnesses. It is also quite apparent that if defendant did have witnesses to call he would not have been too timid to so inform the court even after the court remarked that the evidence was closed. There was no error here.

Appellant's last argument is that evidence of a prior crime was improperly admitted. Numerous witnesses testified that defendant was seen on May 13, 1956, walking along beside parked cars looking in the windows of cars and trying door handles and shaking the car as though he were attempting to open the door and get in. He was arrested and a search of his person produced a small crowbar. A search of his car revealed a camera, binoculars and $389 cash. The owner of the camera testified that he had left it in his locked car with his wallet and when he returned to the car he found that the wind wing had been broken open and the camera and the billfold taken. Appellant admitted the crime and entered a plea of guilty to a charge of petty theft. The record does not disclose a conviction. It is defendant's contention that the acts testified to are so remote as to time as to be inadmissible as evidence of "common design or plan" and therefore should not have been admitted under the general rule with respect to prior crimes. It is contended that the prejudicial effect of the testimony far outweighed any evidentiary value.

⊥40 ⊥[6] In People v. Shapiro, 180 Cal.App.2d 714, 4 Cal.Rptr. 788, the defendant was convicted of burglary. Evidence of a crime committed by him six years previously was admitted where the same technique for gaining entrance was employed in both instances. The opinion states: "It is well settled in California that evidence of a prior crime or crimes may be admitted if it tends to show 'a similar pattern, scheme or *modus operandi* to that employed in' the case being tried. People v. Kearns, 149 Cal.App.2d 113, 121, 307 P.2d 1015, 1021; People v. Peete, 28 Cal.2d 306, 314–315, 169 P.2d 924. 'Remoteness of five or six years in point of time does not affect the admissibility of the evidence, but at most affects only its weight.' People v. Kearns, supra, 149 Cal.App.2d 113, 121, 307 P.2d 1015, 1021.

"'Usually, it is a primary question for the court to determine whether facts pertaining to offenses other than that charged show a general pattern, scheme or plan and are sufficiently similar and possess a sufficiently high degree of common features with the act charged to warrant an inference that if defendant committed the others he committed the one charged, and the question of remoteness usually goes to the weight and not to the admissibility of the evidence.' People v. Brown, 170 Cal.App.2d 80, 83, 338 P.2d 504, 506.

"The similarity of the *modus operandi* of the two crimes justified the admission of the evidence." (Pp. 718–719, 4 Cal.Rptr. pages 790–791.)

[7] No doubt the evidence of the 1956 crime was such that it might have influenced the jury, regardless of its evidentiary content. However, its prejudicial effect was minimized by an instruction of the trial court. The Jury was told that it was permitted to use such evidence for only limited purposes and those purposes were set forth in the instruction.

The judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.

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208 Cal.App.2d 745

⊥**The PEOPLE, Plaintiff and Appellant,** ⊥745

v.

SOUTHERN PACIFIC COMPANY,
Defendant and Respondent.

Cr. 44.

District Court of Appeal, Fifth District,
California.

Oct. 22, 1962.

Hearing Denied Dec. 19, 1962.

Prosecution of railroad for failing to provide shipment of cattle with proper food and drink. From a judgment of the Justice Court, Madera County, Alec W. Brown, J., dismissing the complaint, the state appealed. The District Court of Appeal, Brown, J., held that cattle, which were still confined in the car in which they had been transported into the state and which were undelivered to the consignee and still in care and custody of railroad were still in interstate commerce, and federal Cruelty to Animals Act precluded application of state statute concerning care and feeding of livestock.

Judgment affirmed.

1. Commerce 🔑12

Subject to certain exceptions, when property is separated from stream of interstate commerce and has been intermingled with the mass of property within the state, it is subject to and protected by state laws. Cruelty to Animals Act, §§ 1–4, 45 U.S.C.A. §§ 71–74; West's Ann.Pen.Code, § 597.

2. Stipulations 🔑3

A court is not bound by an erroneous stipulation as to a conclusion of law.

3. Stipulations 🔑17(3)

Where counsel agree to a given set of facts, their stipulation cannot prevent court from declaring a particular legal conclusion which follows from those facts.

4. Commerce 🔑33(1)

An interstate shipment is not completed until there has been a delivery to the consignee and a complete surrender of dominion and control over the car by the carrier.

5. Commerce 🔑33(2)

Cattle, which were still confined in car in which they had been transported into state and which were undelivered to consignee and still in care and custody of railroad, were still in interstate commerce, and federal Cruelty to Animals Act precluded application of state penal statute concerning care and feeding of livestock. Cruelty to Animals Act, §§ 1–4, 45 U.S.C.A. §§ 71–74; West's Ann.Pen.Code, § 597.

6. Commerce 🔑12

Power of Congress to regulate interstate commerce does not completely preclude states from exercising their inherent police powers in matters of local concern, where Congress has not blanketed the field, even though such state enactments may indirectly affect interstate commerce. U.S.C.A.Const. art. 1, § 8, cl. 3.

7. Commerce 🔑12

Where congressional enactment fails to expressly state whether its provisions occupy a field in which states are otherwise free to legislate, exclusion of state action may be implied from nature of legislation and subject matter although express declaration of such result is wanting.

8. Commerce 🔑12

Congress, by enacting federal Cruelty to Animals Act, has occupied entire field of regulating treatment of livestock carried in stream of national commerce, and no room is left for states to implement the Act. Cruelty to Animals Act, §§ 1–4, 45 U.S.C.A. §§ 71–74; West's Ann.Pen.Code, § 597.

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Stanley Mosk, Atty. Gen., Doris H. Maier, Asst. Atty. Gen., Nat A. Agliano, Deputy Atty. Gen., Sacramento, for appellant.

David P. Barcroft, Madera, Lawrence L. Howe, San Francisco, for respondent.

⊥BROWN, Justice. ⊥746

A criminal complaint, valid on its face, was filed in the Justice Court, Madera, charging defendant-respondent with violation of section 597 of the California Penal Code, a misdemeanor, in that defendant did wilfully and unlawfully fail to provide 41 head of cattle with proper food and drink at Madera, California. Defendant interposed a demurrer.

A stipulation of facts was entered into and filed with the court. Briefly stated, it recites that the defendant transported 41 head of cattle from Ogden, Utah, to Madera, California, over its line of railroads as a revenue freight shipment. At Madera the cattle car was uncoupled and placed on one of⊥defendant's tracks. The cattle were ⊥747
left therein without proper food and water. The consignee had not accepted delivery and defendant still had charge and custody of the animals.

Defendant's demurrer was sustained without leave to amend and the complaint was dismissed on the grounds that Congress had preempted the field by enactment of the Cruelty to Animals Act (Title 45 U.S.C. §§ 71–74), and hence section 597 of the Penal Code as applied to the regulating of the care and feeding of livestock in interstate shipment was invalid.

On appeal, the Judge of the Superior Court issued his opinion affirming the action of the Justice Court.

The case was certified, upon application of the plaintiff, to this court and we ordered the case transferred for a hearing and decision.

Our task is to answer the following question:

> "Do the provisions of Title 45, U.S.C., §§ 71–75 preclude the application of the provisions of section 597 of the Penal Code of the State of California to a common carrier where the cattle are at their destination?"

[1] Examining the question on appeal, it will be noted that it is composed of two parts. The first part deals with the problem of whether the federal act supersedes and supplants the state law. The second part presupposes that the cattle had reached their destination and were therefore separated from interstate commerce. If the second part is found to be true, the first part need not be further considered. It is not debatable that, with exceptions not relevant here, when property is separated from the stream of interstate commerce and has become intermingled with the mass of property within the state, it is subject to and protected by state law. (Ex parte Maier, 103 Cal. 476, 37 P.2d 402; Motor Trading Co. v. Ingels, 43 Cal.App.2d 20, 110 P.2d 132.)

Were the cattle still in interstate commerce at the time of the alleged offense? The answer must be in the affirmative.

[2, 3] Plaintiff's argument that we are not bound by the stipulation of facts entered into by counsel cannot be sustained. The established rule is that a court is not "bound by an erroneous stipulation as to a conclusion of law which is not a stipulation of a fact" (People v. Singh, 121 Cal.App. 107, 111, 8 P.2d 898), and where counsel agree, as they may, to a given set of facts, their stipulation cannot prevent the court from declaring a particular legal conclusion which follows from those facts (People v. Jones, 6 Cal.2d 554, 59 P.2d 89; San Francisco Lumber Co. v. Bibb, 139 Cal. 325, 73 P. 864; ⌊748 Lieb v. Superior Court, 199 A.C.A. 394, 397, 18 Cal.Rptr. 705; Duncan v. Garrett, 176 Cal.App.2d 291, 294, 1 Cal.Rptr. 459). The stipulation before us was voluntarily entered into and recites a given state of facts relied upon by both plaintiff and defendant as well as two courts below. Justice and fairness dictate that it may not now be disregarded by this court and, since it contains all facts available to us, it must operate as the gateway to the path of decisional law we must follow.

Plaintiff urges that transportation may be complete upon the expiration of a reasonable time therefor even though there has been no physical transfer of the commodity to the consignee, and cites the cases of Kirmeyer v. Kansas, 236 U.S. 568, 35 S.Ct. 419, 59 L.Ed. 721, and Charleston & W. C. Ry. Co. v. Gosnell, 106 S.C. 84, 90 S.E. 264, L.R.A.1917B, 215. Both cases deal with intoxicating liquors transported across state lines. In each the rule that transportation is not complete until delivery to the consignee *or the expiration of a reasonable time therefor* is mentioned, but in the Charleston case the court explained the rule thusly: In early cases the federal Supreme Court held that liquors transported from one state into another did not lose their interstate commerce character until arrival at destination and delivery to the consignee. Dealers took advantage of the rulings to leave shipments in the custody of the carrier so long as they saw fit, whether reasonable or unreasonable, for the purpose of evading state prohibition laws. The federal Supreme Court then interpreted the word "delivery" to include not only an actual transfer of the liquors to the consignee but likewise a constructive delivery from the fact that they had remained in the carrier's custody an unreasonably long time after arrival at their destination. These two cases fail to aid plaintiff. No case has been cited and none has been found which applies the "constructive delivery by lapse of an unreasonable time" rule to a commodity other than liquor. Nor is there a late decision applying the rule to the transportation of liquor, probably for the reason that the Webb-Kenyon Act (27 U.S.C. § 122) and the Twenty-first Amendment to the federal Constitution now authorize states to prohibit or regulate the importation of liquor. (See Milam v. Commonwealth, 200 Va. 68, 104 S.E.2d 60.)

Case authority to which defendant has referred us supports the conclusion that the cattle, even if it be assumed they had reached the destination city, were not separated from inter⊥749 state commerce by delivery to the consignee and surrender of control and dominion by defendant. In Erie Railroad Co. v. Shuart et al., 250 U.S. 465, 39 S.Ct. 519, 63 L.Ed. 1088, a car containing horses was held to be still in the course of transportation even though it had arrived at the destination city, was uncoupled and turned over to consignee Shuart, who was bound by the bill of lading to unload the horses, and the railroad employees had withdrawn. The federal Supreme Court, in defining the word "transportation" as it applies to interstate carriers followed the language contained in the Hepburn Act (49 U.S.C. § 1(3) (a)) to the effect that transportation included "cars and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Rhodes v. Iowa, 170 U.S. 412, 18 S.Ct. 664, 42 L.Ed. 1088, dealt with the criminal liability under an Iowa penal law of the carrier's station agent for moving a package containing intoxicating liquor from the station platform to a freight warehouse. It was held that the movement was part of the interstate commerce transportation and was done before the law of Iowa prohibiting the transportation of such goods within the state could constitutionally attach.

In McNeill v. Southern Pacific Co., 202 U.S. 543, 26 S.Ct. 722, 50 L.Ed. 1142, railroad cars containing coal arrived at the destination city and were placed on the railway company's team track. The consignee declined delivery at that place and the railroad then moved the cars to a distant siding where they remained for at least several days. Despite arrival at the destination city, notification to the consignee, and the lapse of several days, the United States Supreme Court held that the cars were still in the course of interstate commerce, not having been delivered to the consignee but remaining on the tracks of the railroad company in the condition in which they had been brought into the state.

[4] Other cases which support the proposition that interstate shipment is not completed until there has been a delivery to the consignee and a complete surrender of dominion and control over the car by the carrier are Danciger v. Cooley, 248 U.S. 319, 39 S.Ct. 119, 63 L.Ed. 266; Chapman v. United States, 8 Cir., 151 F.2d 740; Murphy v. United States, 6 Cir., 133 F.2d 622; and O'Kelley v. United States, 8 Cir., 116 F.2d 966.

⊥750 [5] It must be admitted, as plaintiff contends, that the factual situations in these cases differ each from the other and each from the case here under consideration. Yet the tests therein set out for determining when interstate transportation ends are equally applicable to this case. Measuring our facts by those tests, we must conclude that the cattle, still confined in the car in which they had been transported into this state, undelivered to the consignee, and still in the care and custody of the railroad were, at the time of the offense charged, in the course of transportation in interstate commerce.

Thus we reach the first part of plaintiff's question: Do the provisions of the federal Cruelty to Animals Act preclude the application of the provisions of section 597 of the California Penal Code to a common carrier engaged in interstate commerce? Again, our answer must be in the affirmative.

At the outset it should be noted that the right of the state to enforce section 597 of the Penal Code in areas where the field has not been occupied by federal law is not here questioned. We do not decide that the section is unconstitutional *per se;* we decide only that it is unconstitutional in its application to the facts of this case. We are not unmindful of the interest of the state in protecting animals within its borders from inhuman treatment by man by imposing and enforcing criminal sanctions. But if this state statute may not be constitutionally applied to a carrier's conduct toward animals in interstate commerce, no great industry of the state will be threatened, no economic loss will follow, and neither the lives, property nor welfare of state citizens will be affected. When weighed in the balance, the interest of the state must yield to the national interest.

[6] The Congress derives power to regulate interstate commerce from Article I, section 8, clause 3 of the Constitution of the United States, but it is established that that grant of power does not completely preclude the several states from exercising their inherent police powers in matters of local concern, where Congress has not blanketed the field, even though such state enactments may indirectly affect interstate commerce. (Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852; Simpson v. Shepard, 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151.)

[7] State action affecting interstate commerce has been held to be precluded where Congress has evidenced its intention to completely preempt the field sought to be regulated, ⌊751 even though the state action is merely complementary to the federal law (Campbell v. Hussey, 368 U.S. 297, 82 S.Ct. 327, 7 L.Ed.2d 299). Where, as here, the Congressional enactment fails to expressly state whether its provisions occupy a field in which states are otherwise free to legislate, the settled rule "* * * that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting" (Bethlehem Steel Co. v. State Board, 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234) is applicable. We are convinced the federal act here involved meets the test set out in Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, and adopted by Mr. Chief Justice Warren in the case of Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640, as follows:

> "First, '[the] scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' "

Section 597 of the Penal Code prohibits cruelty to animals generally, in various enumerated forms, and makes violation a crime. It is not directed at interstate commerce but lays its hand upon "Every person." This broad language embraces the carrier, its officials, agents and employees. The statute does not spell out what constitutes cruelty by withholding from animals food, water, shelter or protection from the weather. No particular standard of conduct is set up; this is a matter left to the trier of fact. The act charged must be accompanied by malice. Jurisdiction is in the State courts.

The federal Cruelty to Animals Act (Title 45 U.S.C. §§ 71–74) commonly known as the "Twenty-eight Hour Law," imposes liability on the railroad alone and does not touch employees or officers. Animals in interstate commerce may not be confined for more than 28 hours, or for more than 36 hours upon written request of the owner, and must then be unloaded, placed in properly equipped pens, fed, watered and rested for at least 5 hours (§ 71) at the expense of the owner, and the carrier is granted a lien upon the animals for food, care, and custody furnished (§ 72). A penalty of $100 to $500 for "knowingly and wilfully" violating sections 71 and 72 (§ 73) may be recovered from the carrier in a civil action brought in the name of the United States.

Federal courts are vested with exclusive jurisdiction (§ 74).

[8] The detailed care with which the federal act was framed, spelling out the ⊥752 maximum number of hours for confinement during which food and water may be withheld by the carrier, a minimum number of hours for the animals to rest in properly equipped pens, providing for the amount and method of imposing a civil penalty and conferring exclusive judicial jurisdiction upon the federal courts, leads to the ineluctable conclusion that the Congress has intended to occupy the entire field of regulating the treatment of livestock carried in the stream of national commerce.

We are persuaded that the California Legislature is in accord with this view for, in 1933, it enacted section 422 of the Agricultural Code. That section deals with the same subject matter and its language closely follows the federal act, but whereas the federal law addresses itself to the carrier alone, the Agricultural Code section is addressed to "any officer, agent or conductor of any railroad in this State" who carries and transports specified animals in carloads. It is significant that the Legislature saw fit to exclude from the operation of this section the carrier as a separate entity. It is a logical assumption that the carrier was intentionally omitted for the reason that the Legislature believed the federal act governing the treatment of animals in interstate commerce overrides state action directed toward the same objective.

The aim of the federal enactment is to secure humane treatment of all livestock carried through and into the states by carriers engaged in national commerce (United States v. Delaware L. & W. R. Co., D.C., 206 F. 513; United States v. Atchison T. & S. F. Ry. Co., 10 Cir., 185 F. 105; United States v. Atlantic Coast Line R. Co., 4 Cir., 173 F. 764) and to fix the point of time at which the common law duty of a carrier to feed and water animals must be exercised (Kent v. Chicago Etc. Ry. Co., 189 Mo.App. 424, 176 S.W. 1105). The federal act constitutes a single, comprehensive scheme which, by its natural operation, amply assures uniform humane treatment of animals transported interstate and imposes uniform liability upon all common carriers. So pervasive are its terms that reason compels the inference Congress left no room for the states to supplement it.

The judgment is affirmed.

CONLEY, P. J., and STONE, J., concur.

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208 Cal.App.2d 841

⊥841 **The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Arthur Duane THOMPSON, Defendant and Appellant.

Cr. 7557.

District Court of Appeal, Second District, Division 2, California.

Oct. 24, 1962.

Hearing Denied Dec. 19, 1962.

Defendant was convicted of assaults against different victims with intent to commit rape, robbery of one of the victims, and an attempt to violate section 288a, and from judgments of the Superior Court of Los Angeles, Maurice C. Sparling, J., the defendant appeals. The District Court of Appeal, Herndon, J., held that defendant's waiver of trial by jury of 12 was not invalid as not expressed in "open court", that evidence of other crimes was admissible, and that cross-examination was not improper as relating to an irrelevant matter.

Affirmed.

1. Rape 🔑53(1)
Robbery 🔑24(1)
Sodomy 🔑6

Evidence sustained conviction of attempt to commit rape, robbery of one of the victims, and attempt to violate section 288a. West's Ann.Pen.Code, § 288a; West's Ann. Welfare & Inst.Code, § 5500 et seq.

2. Jury 🔑29(5)

Where the judge called defendant and counsel for the defendant and state into his chambers out of the presence of the jury and reported information from bailiff that one juror had recognized defendant as committing a discreditable act in her presence and the juror was excused pursuant to stipulation of counsel who agreed to proceed with the remaining 11 jurors, waiver was not invalid as not expressed in "open court". West's Ann.Const. art. 1, § 7.

3. Stipulations 🔑14(11)

Where the judge called defendant and counsel for the defendant and state into his chambers out of the presence of the jury and reported information from bailiff that one juror had recognized defendant as committing a discreditable act in her presence and the juror was excused pursuant to stipulation of counsel, who agreed to proceed with the remaining 11 jurors, and court expressly asked counsel whether they felt it necessary to select alternate jurors and they replied in the negative, the trial could properly proceed before 11 jurors pursuant to stipulation of counsel. West's Ann.Const. art. 1, § 7.

4. Criminal Law 🔑1035(5)

Where the judge called defendant and counsel for the defendant and state into his chambers out of the presence of the jury and reported information from bailiff that one juror had recognized defendant as committing a discreditable act in her presence and the juror was excused pursuant to stipulation of counsel, who agreed to proceed with the remaining 11 jurors, defendant was not prejudiced on the ground that the juror excused might have related her experience to other jurors where defendant did not object to the proceedings in the trial court on such ground nor make any requests that the juror be examined in such regard and hence he was not entitled to raise the contention on appeal. West's Ann. Const. art. 1, § 7.

5. Criminal Law 🔑1030(1)

A defendant may not silently proceed in the hope of an acquittal and then, failing to achieve such a result, demand a second chance.

6. Criminal Law 🔑1144(15)

It will be presumed that jurors were true to their oaths and followed the various admonitions and instructions of the court.

7. Criminal Law 🔑371(9)

Admission of testimony relating to other assaults by defendant upon other victims, other rapes, and other attempts to force violations of section 288a involving other victims, was not error. West's Ann.Pen. Code, § 288a.

8. Witnesses 🔑330(3)

Where defendant on direct examination denied commission of a similar offense in Beverly Hills on or about August 30, 1960, cross-examination as to whether or not he had been in that city on that date and on his denial introducing a parking ticket issued to his car in Beverly Hills returnable on August 30, 1962 was not improper as concerning an irrelevant matter.

9. Criminal Law 🔑824(1)

In prosecution for intent to commit rape and to violate section 288a, failure of the trial court on its own motion to give a cautionary instruction was not error where the prosecuting witnesses were adults, and there was an abundance of corroboration and no danger of blackmail, neurotic fabrication or fanciful imagination being present in all the seven victims. West's Ann.Pen.Code, § 288a; West's Ann.Const. art. 6, § 4½.

◆

Paul Augustine, Jr., Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Jack K. Weber, Deputy Atty. Gen., for respondent.

⊥HERNDON, Justice.

This appeal is taken from judgments ⊥843 entered after a jury trial and upon a verdict which convicted defendant and appellant of: (1) assaults against two different victims with intent to commit rape; (2) robbery of one of said victims, and (3) an attempt to violate section 288a of the Penal Code committed against the other. Following his conviction, defendant was adjudged to be a sexual psychopath under the provisions of chapter 4 of part 1 of division VI of the Welfare and Institutions Code and was committed to the state hospital for the required ninety-day period of observation and diagnosis.

After completion of the observation period the superintendent of the state hospital made a return to the court wherein it was declared that defendant was a sexual psychopath and a menace to the health and safety of others, but that he would not benefit from treatment in a state hospital. The trial court so found and denied defendant's motions for a new trial, made both before and after his commitment to the hospital. He was thereafter sentenced to state prison. In his opening brief, filed *in propria persona,* appellant has listed a number of clearly untenable assignments of error. Counsel appointed by this court very properly has abandoned a number of them.[1]

[1] We have concluded that the evidence supporting the verdict and the judgment is abundantly sufficient to establish every element of the crimes charged, and that it is not "inherently improbable" in any particular. We regard it as unnecessary to spread upon these pages any lengthy recital of the testimony which relates an unusually sordid and repulsive story of sexual perversion and brutality.

Appellant contends that "there was no adequate waiver of trial by jury as required by law." We shall relate briefly the proceedings which constitute the basis for this contention. Upon the reconvening of the court on the second day of trial, the judge called appellant and his counsel and counsel for the People into his chambers out of the presence |844 of the jury. The bailiff, the reporter and the clerk of the court also were present. The following exchange then occurred:

"*The Court:* * * * The bailiff last night gave some information to the Court which I would now like to have you repeat for the benefit of those present. *The Bailiff:* Juror No. 6, Donna Prior, said that she recognized the defendant from the time she was out at the college and said she was in the restroom and this gentleman looked underneath the partition. *The Court:* By 'this gentleman,' you mean the defendant? *The Bailiff:* The defendant, and she said it was the defendant and she told him to get out and that's all that occurred, but she said it was this gentleman. *The Court:* She further stated, did she not, that she didn't place the defendant during the voir dire examination and, in fact, only after the testimony of the witnesses yesterday were the facts that she related called to her attention? *The Bailiff:* That is correct. *The Court:* She felt very badly about the matter as she stated that to you, did she not? *The Bailiff:* Yes, sir.

"*Mr. Kirschke:* She is to be commended for her candor, I think, in bringing it up. *The Bailiff:* She was very upset. *The Court:* Yes, indeed. I called you in so you might have that information and to ascertain what your desire is. *Mr. Ellertson:* Well, of course, I think she should be excused. The question would then arise, would you want to go ahead with 11 jurors? *Mr. Kirschke:* Well, this is an unusual situation. It's like a challenge for cause, in effect. *The Court:* Yes. Under the circumstances, I do feel that— *Mr. Kirschke:* Well, the intelligent thing to me, it would seem, would be to stipulate that she might be excused and proceed with 11 jurors because obviously she would have some bias or prejudice against Mr. Thompson. *Mr. Ellertson:* That is agreeable with me and that would be my recommendation to you. *Mr. Thompson:* Whatever Mr. Ellertson says.

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1. We have reviewed all of appellant's contentions and, as aptly stated in Taliaferro v. Taliaferro, 203 A.C.A. 723, 729, 21 Cal.Rptr. 864, 868: "We find no merit in any of them, and decline to impose further upon the captive audience which must purchase these reports by either listing or discussing those captious contentions."

Mr. Ellertson: You want to go ahead with 11 jurors? *Mr. Kirschke:* Does that make sense to you, to stipulate she may be excused and then proceed with 11 jurors instead of 12? *Mr. Thompson:* Yes. I don't see any difference. *Mr. Kirschke:* Obviously she would be prejudiced against you. *Mr. Thompson:* Yes. *The Court:* I'm perfectly willing, under the circumstances, to excuse her for cause with the stipulation and with you, particularly, Mr. Thompson, so stipulating, that she may be excused for cause and to proceed with the trial with the 11 remaining jurors. That is your wish? *Mr. Thompson:* Yes. * * * *The* ⊥845 *Court:* Will it be stipulated that out of the presence of the other jurors I may excuse her in here so she will not need to take the box and then be excused? *Mr. Kirschke:* So stipulated. *Mr. Ellertson:* So stipulated. *The Court:* That is agreeable to you, Mr. Thompson? *Mr. Thompson:* Yes, sir."

Thereafter, the following proceedings were had in the presence of the jury: "*The Court:* Good morning, ladies and gentlemen. It's now almost 11:00 o'clock. The Court is extremely sorry for the delay in calling you in this morning. The Court had 23 matters on the 9:00 o'clock calendar and the Court has been continuously involved in those matters. Incidentally, one of your number, Mrs. Donna L. Prior, has been excused by the Court from further attendance in this trial. It's largely a personal matter. It certainly is no fault or criticism of her in any way, shape or form. The Court will explain to you later in more detail the reason for her being excused, but the Court assures you that the Court has nothing but praise for Mrs. Prior. It has been stipulated by counsel that she might be excused." No further comment was made on the matter during the course of the trial.

[2] Article I, section 7, of the California Constitution provides in part: "* * * A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, * * *." Manifestly, the proceedings had herein were appropriate under the circumstances. (People v. Rodriguez, 175 Cal.App.2d 56, 60, 345 P.2d 330.) We find no merit in appellant's contention that his waiver was not expressed in "open court" merely because the jury was not present. Even if it were plausible to argue that generally a jury may be waived only in the presence of the jury, both appellant and his counsel here expressly agreed that the juror should be excused in chambers so that she would "not need to take the box and then be excused." Obviously no possible prejudice could have resulted from this procedure; indeed, it clearly was the most suitable method by which to minimize the effect of the incident.

[3] It should be noted also that prior to the commencement of the trial, the court expressly asked counsel whether or not they felt it necessary to select alternate jurors. Both counsel indicated that they did not believe it necessary. Where there are no alternate jurors a trial may be had before a lesser number than twelve upon stipulation of the parties. (Cf. People v. Ragsdale, 177 Cal.App.2d 676, 678, 2 Cal.Rptr. 640; People ⊥846 v. Patterson, 169 Cal.App.2d 179, 186, 187, 337 P.2d 163; People v. Clark, 24 Cal.App.2d 302, 304–306, 74 P.2d 1070.)

[4, 5] Appellant further argues that he was prejudiced because the juror might have related her experience to the other jurors prior to being excused. However, neither appellant nor his counsel objected to the proceedings in the trial court on this ground, nor did they make any request that the juror be examined in this regard. Clearly, appellant cannot raise for the first time on appeal an alleged error that he did not afford the trial court an opportunity to correct. He may not silently proceed in the hope of an acquittal and then, failing to achieve such a result, demand a second chance. (People v. Spinks, 190 Cal.App.2d 366, 368, 11 Cal.Rptr. 923.)

[6] The record does not contain so much as a hint of evidence to support appellant's speculations regarding any possible irregularity in the excused juror's conduct. It af-

firmatively reveals that when a recess was taken immediately after the jury was impaneled, the court stated to them: "You are admonished that you are not to discuss this case among yourselves, nor with any other person; nor are you to form or express an opinion thereon until the case is finally submitted to you for decision." A similar admonition was given the jury at every recess and adjournment during the trial. The juror involved in the instant case appears to have been most conscientious in her duties and there is nothing to dispel the general rule that "[i]t will be presumed that the jurors were true to their oaths and followed the various admonitions and instructions of the court." (People v. Isby, 30 Cal.2d 879, 896, 186 P.2d 405, 416.)

[7] Appellant assigns as error the admission of testimony relating to other crimes committed by him, i. e., instances of assaults by appellant upon other victims, other rapes and other attempts to force violations of section 288a involving other victims. Appellant's own arguments concerning the issues of intent and identity sufficiently answer his contentions made in this assignment. As the court stated in People v. Nye, 38 Cal.2d 34, 37, 237 P.2d 1, 3, "The evidence of the attempt to rape Miss W. was clearly admissible to show that defendant's acts against Mrs. P. were committed with the intent to commit rape." (See also People v. Combes, 56 Cal.2d 135, 146–148, 14 Cal.Rptr. 4, 363 P.2d 4; People v. Peete, 28 Cal.2d 306, 319, 169 P.2d 924, dealing with the issue of identity and People v. Sylvia, 54 Cal.2d 115, 119, 120, 4 Cal.Rptr. ⌊847 509, 351 P.2d 781, involving related sex offenses tending to show lewd disposition or intent.)

[8] Appellant asserts that prejudicial error was committed during the course of his cross-examination in that he was questioned concerning an irrelevant matter. The examination in question was with reference to a similar offense committed by appellant in Beverly Hills on or about August 30, 1960. On his direct examination, appellant denied any knowledge of the incident. On cross-examination, he was asked whether or not he had been in Beverly Hills on August 30, 1960. He replied that he had not. He was then asked whether he had been in Beverly Hills at any time during August of that year. Again he replied in the negative. By way of impeachment, he was shown a parking ticket issued to his car in Beverly Hills on August 16, 1960, and returnable on August 30, 1960. Appellant first denied that he had received the ticket. However, following the noon recess, he admitted that the ticket was his and said that he had been confused as to the dates. Clearly, the question whether or not he was in Beverly Hills on the date in issue was relevant, and, in view of his denial that he was there at any time during the month, the impeaching questions were proper. (People v. Pike, 58 A.C. 69, 88–91, 22 Cal.Rptr. 664, 372 P.2d 656.)

[9] Appellant's final assignment of error relates to the failure of the trial court upon its own motion to give a cautionary instruction. Instructions of this type are appropriate in all cases involving sexual crimes, but the circumstances of each case determine whether failure to give such instruction was prejudicial. (People v. Nye, supra, 38 Cal. 2d 34, 40, 237 P.2d 1.) In the instant case, the prosecuting witnesses were adults, there was an abundance of corroboration, and there was no danger of "spite, blackmail, vindictiveness, private vengeance, neurotic fabrication or fanciful imagination" being present in all seven victims. We find the following concluding language from People v. Nye, supra, equally appropriate here (38 Cal.2d page 41, 237 P.2d 1, 5):

"To acquit defendant, the jury would have had to reject the testimony of the women in its entirety, or reject their identifications of defendant * * *, or decide that defendant had not intended to have sexual intercourse with them by force. A careful examination of the entire record in accord with Article VI, Section 4½ of the California Constitution, leads us to the conclusion that it is improbable that the jury would have rejected the testimony of the prosecuting witnesses had a ⌊848 cautionary instruction been given and that there has therefore been no miscarriage of justice requiring reversal of the judgment." (See also People v. House, 157 Cal.App.2d 151, 157, 320 P.2d 542.)

Affirmed.

FOX, P. J., and ASHBURN, J., concur.

209 Cal.App.2d 21

⊥21 ⊥**Joan A. SIMON, Plaintiff and Appellant,**

v.

BANK OF AMERICA, Etc., Executor of the Estate of Jennie Monette Hicks, Deceased, Defendant and Respondent,

County of Kern and First Christian Church of Bakersfield, Intervenors and Respondents.

Civ. 136.

District Court of Appeal, Fifth District, California.

Oct. 24, 1962.

Proceeding wherein the Superior Court, Kern County, Gordon L. Howden, J., rejected a claim against an estate and the claimant appealed. The District Court of Appeal, Brown, J., held that contestant's taking deposition of claimant against estate on question of testatrix' mental condition, in will contest in which parties to instant proceeding were all co-respondents, where claimant was not cross-examined by executor and not about details of claim, did not result in waiver of dead man's statute with respect to her testimony on her claim, and that there was no satisfactory evidence of any agreement on part of testatrix to compensate claimant or of extent and nature of claimant's services to decedent as housekeeper, nurse, chauffeur and attendant.

Affirmed.

1. Witnesses 🔑178(4)

Contestant's taking deposition of claimant against estate on question of testatrix' mental condition, in will contest in which parties to proceeding on claim against estate were all co-respondents, where claimant was not cross-examined by executor and not about details of claim against estate, did not result in waiver of dead man's statute with respect to her testimony on her claim against estate. West's Ann.Code Civ.Proc. § 1880, subd. 3.

2. Witnesses 🔑181

Waiver of dead man's statute made in one trial continues to second trial and waiver of objection made at one stage of taking of testimony is waiver during the whole progress of that proceeding. West's Ann. Code Civ.Proc. § 1880, subd. 3.

3. Witnesses 🔑181

Dead man's statute may be waived by personal representative. West's Ann.Code Civ.Proc. § 1880, subd. 3.

4. Witnesses 🔑178(4)

Taking of deposition of survivor amounts to waiver of dead man's statute. West's Ann.Code Civ.Proc. § 1880, subd. 3.

5. Pleading 🔑313

A bill of particulars is not evidence but is a part of the pleading.

6. Witnesses 🔑181

Demand for bill of particulars is not waiver of dead man's statute. West's Ann. Code Civ.Proc. §§ 452, 1880, subd. 3.

7. Executors and Administrators 🔑221(5)

There was no satisfactory evidence of any agreement on part of testatrix to compensate claimant or of extent and nature or value of claimant's services to decedent as housekeeper, nurse, chauffeur and attendant.

◆

Conron, Heard, James & Hamilton, Calvin H. Conron, Jr., Bakersfield, for appellant.

Vizzard, Baker, Sullivan & McFarland, Lawrence N. Baker, Bakersfield, for respondent and defendant.

Roy Gargano, County Counsel, Rex R. Mull, Chief Deputy County Counsel, Bakersfield, for intervenor and respondent Kern County.

Donahue & Hastin, Kenneth N. Hastin, Bakersfield, for intervenor and respondent Christian Church of Bakersfield.

⊥22 ⊥BROWN, Justice.

This is an action by appellant on a rejected claim against the respondent Bank of America, executor of the estate of Jennie Monette Hicks, deceased, for services rendered to Mrs. Hicks as companion, housekeeper, nurse, chauffeur and attendant, and for the purchase of clothing and merchandise at the decedent's request, between September 1941 and August 30, 1959, and for advancements, in the sum of $8,000. The claim was rejected and suit was filed. A bill of particulars was demanded and was supplied in the amount of $4,696, showing items commencing October 3, 1946, and ending August 30, 1959.

In the estate proceedings an application was made to set aside the will by contest and appellant's deposition was taken. In this petition appellant was named as one of the respondents, as were also the County of Kern and the First Christian Church, as beneficiaries under the will. Appellant's bequest under the will was $500. Appellant's deposition was taken by the contestant, Alice Cochrum, on May 26, 1961, and she was examined by Mr. Mull, Chief Deputy Counsel for the County of Kern. Mr. Mull's questions concerned appellant's diary, how she made the notes therein, the source of the notes, when she became acquainted with the decedent, and how many times she visited her. Appellant answered that she helped the decedent by taking her to the bank to cash her welfare checks each month, to pay her taxes, and had bathed her. No questions were asked by the Bank of America as respondent herein.

On June 14 and 15, 1961, the court entered an order making ⊥23 the First Christian Church and the County of Kern intervenors.

This action was then tried without a jury and appellant presented as witnesses three of the social welfare workers who had worked on the case of Mrs. Hicks, the decedent, and who had visited the decedent from time to time with regard to the pension which she was receiving from the State. These witnesses, Katherine Sullivan, Angeline Napier and Winnie Bloxom, testified as to their personal observations and evidence was received as to the various reports which were made by them from visits with the decedent. The testimony of appellant's witnesses is summarized as follows: Mrs. Sullivan, one of the social workers who had been assigned to the case of the decedent from 1954 to 1957, testified that she observed the appellant assisting decedent in buying groceries and other supplies, doing some cooking and taking care of her personal needs, paying some bills for her and furnishing the transportation for decedent to pay her bills and do other errands; that she was told by the decedent that appellant bathed her and enumerated on many occasions the services appellant had performed for her and decedent told her "she [decedent] had every intention of seeing that Mrs. Simon was reimbursed for the actual expense to which she had been put, plus additional compensation for her many services," but she did not recall whether the decedent had mentioned that there was an agreement with appellant for such reimbursement and there were no specific amounts of loans or of reimbursements entered in the case record of decedent. The Welfare Department case file concerning the decedent was introduced in evidence and showed that Mrs. Sullivan had received a telephone call from appellant to the effect that the decedent wanted to borrow money from appellant to pay the city taxes but that the appellant was not willing to lend the amount without a signed note, which the decedent refused to give. Mrs. Napier, another social worker, testified that she took over the case of the decedent from Mrs. Sullivan in 1957 and continued with it until the decedent's death; that she had seen appellant assisting the decedent in buying groceries and in cashing her checks at the bank; that the decedent had told the witness that she didn't mind Mrs. Napier's calling appellant to assist her because "it was understood that she would reimburse her some day for all of this"; that decedent told the witness that appellant had paid the taxes, utilities, groceries and other items for her and that the decedent wouldn't take a bath 24 unless appellant was there to assist her; that decedent told her she intended to reimburse appellant but had not specified any amounts and had not mentioned leaving appellant property by a will; and that the decedent had never mentioned that there was a definite agreement as to such reimbursement. Mrs. Crandall testified that she had been a friend and neighbor of the decedent for many years and that during that time she had seen the appellant helping the decedent by cooking for her, buying groceries, bathing her, and that the decedent would call appellant any time she wanted to go downtown and asked her advice on matters; that decedent said she was going to give appellant some of her property but never mentioned a will. Mrs. Crandall stated that she, also, had assisted decedent a few times. Mrs. Carver testified that she, too, had assisted the decedent in buying groceries, cleaning her house, taking meals to her and transporting her or doing errands for her, and stated that appellant had told her the decedent gave appellant $5 every time she cashed her check, but did not mention receiving any other money from the decedent.

Appellant testified, but her testimony was objected to under the deadman's statute, section 1880 of the Code of Civil Procedure, by all respondents. At the conclusion of the trial, motions to strike the testimony of appellant were submitted. In the memorandum decision of the judge he directed judgment for the respondent Bank of America after concluding that there was no credible evidence that there was an agreement to compensate the appellant and such evidence as was presented was vague and indefinite, and he also struck out all of the testimony of appellant under the deadman's rule. Findings of fact and conclusions of law were filed, stating that the deceased was not indebted to the appellant and judgment was entered from which this appeal was timely taken.

Decedent was 96 years of age when she died on December 1, 1960. Her nephew was appointed her guardian on September 28, 1959. Decedent was deaf, had been in the hospital on many occasions, was very senile, had dizzy spells, and according to the records of the Welfare Department, was always falling down at home when she was alone. Her eyesight was impaired by cataracts and glaucoma; she broke her wrist in 1958. Her neighbors and everyone concerned about her felt that she should have been in a rest home. For a while her disabled veteran son lived with her, but predeceased her. Her will was dated February 21, 1955, and her estate was valued at $32,000.

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Did the Court Err in Striking Appellant's Testimony Under the Deadman's Statute?

Appellant states that this point is of minor importance because in her opinion there was substantial evidence to support a judgment for the appellant, notwithstanding the absence of her testimony.

[1] In the will contest the contestant caused the appellant's deposition to be taken concerning the mental condition of decedent, how often she saw decedent and over how long a period of time, and she was cross-examined not by the attorney for the executor but by the attorney for the County of Kern who later became one of the intervenors. In this cross-exami-

nation she was asked about how long she had known and been with the decedent and the matter, with reference to her bill of particulars, of Hattie Carlock's staying with decedent for a period of six weeks, which was within the direct examination. (Adams v. Herman, 106 Cal.App.2d 92, 234 P.2d 695.) She was not questioned about the details of her claim against the estate or certain debts which she had testified to on direct examination. This deposition was lodged with the court clerk in the probate proceeding, but there is no reference or indication that the deposition was ever introduced or used in any will contest proceeding or otherwise, nor was it introduced in the action before us. In the will contest the parties in the case now before us were all co-respondents and their interests were similar to the extent of upholding the will. The deposition of appellant was not taken or used by the adverse party (respondent in this case) and her testimony on cross-examination did not waive the statute, and in fact she was testifying for the estate. In Chase v. Evoy, 51 Cal. 618, 620, the court stated that Code of Civil Procedure section 1880 does not operate to prevent such a person from testifying *for* the estate. Even if appellant's testimony could be considered as adverse, it still could be competent against Kern County, a joint respondent in the will contest action. (Shain v. Forbes, 82 Cal. 577, 23 P. 198.)

[2] A waiver under Code of Civil Procedure section 1880, subdivision 3, made in one trial continues to the second trial. (Deacon v. Bryans, 212 Cal. 87, 93, 298 P. 30; Hill v. Estate of Westbrook, 39 Cal.2d 458, 247 P.2d 19.) A waiver of objection made at one stage of the taking of testimony is a waiver during the whole progress of that proceeding. (Ess v. Griffith, 139 Mo. 322, 40 S.W. 930, 931; Deacon v. Bryans, supra, 212 Cal. p. 91, 298 P. 30.)

⌊26 ⌊In Moul v. McVey, 49 Cal.App.2d 101, 121 P.2d 83, the court said that the use of the deposition taken in the previous guardianship proceeding by the executor constituted a waiver and that in other states the courts have uniformly held that the introduction of testimony previously given lifts the bar of the statute. (Cole v. Sweet, 187 N.Y. 488, 80 N.E. 355; Drvol v. Bant, 183 Cal.App.2d 351, 358–359, 7 Cal.Rptr. 1.)

[3, 4] It is true that the provisions of the statute may be waived by the personal representative, and the taking of a deposition of a survivor amounts to a waiver of the section, whether used or not, in that same action. (McClenahan v. Keyes, 188 Cal. 574, 576, 206 P. 454.) Here, the deposition was not used in the present action.

In Shain v. Forbes, supra, 82 Cal. 577, 23 P. 198, the court held that while the plaintiff was not a competent witness as against the representative of the estate, he would be competent as against other joint defendants whether the judgment could be joint or several. However, in our case the appellant is not asking for judgment against the intervenor Kern County, so it would be immaterial whether or not said stricken testimony had been left in as far as this respondent was concerned.

[5] Appellant contends that the statute was also waived by the demand for a bill of particulars, which was furnished. In Burgermeister v. Wells Fargo Bank, etc., Co., 191 Cal.App.2d 624, 13 Cal.Rptr. 123, a bill of particulars was demanded and furnished and no comment is made in that case as to the waiving of the statute. However, in Gough v. Security Trust & Savings Bank, 162 Cal.App.2d 90, 327 P.2d 555, a bill of particulars was demanded and filed and the court held that, "'A bill of particulars merely amplifies the allegations of the complaint, and it is deemed to constitute a part of that pleading. * * * It has the effect merely of limiting plaintiff's evidence to the specific items therein. It does not take the place of necessary evidence'" to prove the

claim. (Silva v. Linneman, 73 Cal.App.2d 971, 975, 167 P.2d 794.)

Therefore, a bill of particulars is not evidence, but only a part of the pleading.

In Millet v. Bradbury, 109 Cal. 170, 172, 41 P. 865, 866, the court said:

> "The bill of particulars which was furnished to the defendants is to be regarded as an amplification of the complaint, and for the purpose of determining the plaintiff's right of recovery, or the admissibility of evidence that may be offered in support of her claim, is to be regarded as if it had been incorporated into the complaint as originally filed."

⊥27 ⊥Volume 6 of Wigmore on Evidence, Third edition, 1940, section 1848, at pages 388–389, states:

> "To avoid unfair surprise, the claimant's *pleadings* may be required to state with greater particularity the facts upon which his claim is based. For example, in many jurisdictions, by statute, the plaintiff, in an action for a sum of money made up of several items incurred on *an account,* is required to deliver before trial to the defendant or to annex to the declaration an *itemized statement* of the particulars, on penalty of being forbidden to prove the account. But this is no more than a rule of Pleading; the distinction being that by a rule of Evidence he could have proved his case by other evidence if he failed to give the notice, while by this rule of pleading he is confined to the particulars stated, which thus become virtually allegations of his declaration."

[6] The procedure governing bills of particular is set forth in the Code of Civil Procedure under the general rules of pleading and not under evidence. We therefore find that while a bill of particulars is generally used in actions on contract, pleadings are to be liberally construed (Code Civ.Proc. § 452) and that the demand for a bill of particulars is not a waiver of the deadman's statute. In the bill of particulars furnished there was a $415 item for money borrowed in February 1959.

Appellant, at oral argument, cited and relied on Bernkrant v. Fowler, 55 Cal.2d 588, 12 Cal.Rptr. 266, 360 P.2d 906. That case is too remote in its facts to constitute persuasive authority for appellant's position in the case at bar. It was there concluded that where the plaintiffs' action against an executrix did not seek a money judgment, enforceable against the assets of the estate, but sought only a determination that their debt to the decedent had been discharged, they were not precluded by subdivision 3 of section 1880 of the Code of Civil Procedure from testifying to events occurring prior to the death of the decedent. The holding obviously rests on the fact that the type of action there involved and the nature of the relief sought brought that case outside the ambit of the privilege. It therefore does not operate as a liberalization of the statute.

Appellant also refers to volume 84 of American Law Reports, Second, page 1356, as indicating the liberalization of the deadman's statute in the United States. The California cases referred to, such as Bailey v. Moshier, 35 Cal.App. 345, 169 P. 913, hold that the mortgagor can testify as to pay⊥ments made by him before the decedent's ⊥28 death on the basis that such testimony relates to a question of fact and not to a claim or demand against the estate. Sedgwick v. Sedgwick, 52 Cal. 336, involved a demand brought in favor of the estate and claimant was allowed to testify to rebut the executor's claims for credits. In Beyl v. Robinson, 179 Cal.App.2d 444, 456, 4 Cal.Rptr. 18, the testimony was allowed where the party was not proceeding as a creditor but was seeking to defeat a money claim of the estate against him.

The present condition of the deadman's statute is discussed in the California Law Revision Report of February 1957, which does not indicate any liberalization as far as claimants against estates are concerned but possibly in other phases, and in general, favors more strict construction thereof. There is sympathy for a liberalization or a revision or repeal. In a dissenting opinion in Roy v. Salisbury, 21 Cal.2d 176, 130 P.2d 706, Mr. Justice Traynor states that revision or repeal of this section (Code Civ.Proc. § 1880) cannot be accomplished by the court, but only by the Legislature. Revision of this section was recommended by the California Commissioners on that subject in 1900.[1]

Substantial Evidence Supporting the Findings of Fact and Judgment

[7] The question before us is whether or not there is any satisfactory evidence of any agreement to compensate the appellant or evidence of the extent and nature of appellant's claimed services to the decedent or the value thereof. Though there was no testimony by any of the witnesses as to the value of the services rendered, the courts have generally held that the trier of the facts may fix the reasonable value of such services. (Burgermeister v. Wells Fargo Bank etc., Co., supra, 191 Cal.App.2d 624, 630, 13 Cal. Rptr. 123.)

As to the testimony received by the court as to the proof of the contract or agreement which consisted of a statement by Mrs. Sullivan that decedent told her that "she [decedent] had every intention of seeing that Mrs. Simon was reimbursed for the actual expense to which she had been put, plus additional compensation for her many services"; a statement by Mrs. Napier that "it was understood that she [decedent] would reimburse her [appellant] someday for all of this"; and a statement by Mrs. Crandall that decedent told 29 her she "didn't have any money now but then she was just going to reimburse her [appellant] and leave her some of her property," such is to be viewed with caution. This matter is discussed in Belletich v. Pollock, 75 Cal.App.2d 142, 147, 171 P.2d 57, where the court in reversing the verdict in favor of the claimant stated that these transactions must be viewed with "most scrutinizing jealousy," that such oral evidence, without satisfactory corroboration, is the weakest kind of evidence known to the law, and that such declarations or admissions are received with caution. (Smellie v. Southern Pac. Co., 212 Cal. 540, 299 P. 529.)

In Austin v. Wilcoxson, 149 Cal. 24, 29, 84 P. 417, 419, the court said:

> "* * * it is not stating it too strongly to say that evidence so given under such circumstances must appear to any court to be in its nature the weakest and most unsatisfactory."

Here, the appellant's witnesses, both on direct and cross-examination, failed to be specific as to times and places, or any information which has any relation whatsoever to the bill of particulars.

In the Burgermeister case, supra, 191 Cal.App.2d 624, 13 Cal.Rptr. 123, the claimant was a nurse and there was testimony that she was on call at any time of the day or night for a period of twenty years at the house of the decedent. In that case, the evidence supported her claim that she was to receive $10,000 by means of a will; the decedent failed to make such a testamentary provision, and the court allowed that sum. In our present case, unlike the Burgermeister case, the decedent did leave the appellant $500 in her will. We believe that there was not sufficient evidence to establish the position of the appellant that she was entitled to any greater sum.

In Payne v. Bank of America, 128 Cal. App.2d 295, at page 307, 275 P.2d 128, at page 135, the court said:

> "Where services are rendered in the mere expectation of a legacy whose

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[1] Senate Bill 1166 was introduced but not enacted in the California Senate April 1959 repealing subdivision 3, section 1880 of the Code of Civil Procedure and adding hearsay exceptions.

> amount is to be at the entire discretion of the testator, without any contract, express or implied, to pay for the services, there can be no recovery for the reasonable value thereof."

And continued at pages 307–308, 275 P.2d at page 136:

> "In the instant case, the court could legitimately conclude from the evidence and from the conversations as to his intentions attributed to Priester that plaintiff was relying solely upon the anticipated testamentary generosity of his friend Priester; that at the time of the proffered services he did not expect to be paid for them but to be remembered in the will. Under the holding of the |30 authorities herein cited, a person who expects to be benefited by a legacy cannot later resort to an action for the reasonable value of his services where a mere expectation is shown and neither an express nor an implied contract to pay for the services is established."

Appellant further claims that she advanced certain sums to and on behalf of the decedent, being the difference between the amount of the pension and the amount of the approved budget, but we can find no evidence of payments by appellant for the decedent, though there is listed in the bill of particulars an amount of $415 alleged to have been advanced for clothing and $40 cash. The welfare workers did indicate that decedent had received $900 from the sale of certain property in 1949 and that said amount was deposited in decedent's bank and the balances as given by decedent are listed in the various welfare reports, on February 9, 1959, showing a balance of $32.53.

We have concluded that the decision of the trial court was correct.

The judgment is affirmed.

CONLEY, P. J., and STONE, J., concur.

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209 Cal.App.2d 73

|73 **Guthrie McCLAIN, Mark Eudey and Belden S. Gardner, Jr., Plaintiffs and Appellants,**

v.

COUNTY OF ALAMEDA, a body corporate and politic, Board of Retirement of the Alameda County Employees' Retirement Association, et al., Defendants and Respondents.

Belden S. GARDNER, Jr., Guthrie McClain and Mark Eudey, Plaintiffs and Appellants,

v.

COUNTY OF ALAMEDA, a body corporate and politic, Board of Retirement of the Alameda County Employees' Retirement Association, et al., Defendants and Respondents.

Civ. 20089 and 20285.

District Court of Appeal, First District, Division 3, California.

Oct. 29, 1962.

Hearing Denied Dec. 26, 1962.

Actions by taxpayers to enjoin performance of contracts relating to construction of buildings by county employees' retirement association for county under lease-option contracts. From adverse judgments of the Superior Court, Alameda County, Lewis E. Lercara and Marvin Sherwin, JJ., the taxpayers appealed. The District Court of Appeal, Devine, J., held that long-term lease-option agreement under which county employees' retirement association was to build two buildings which county agreed to lease with an option to purchase did not violate the constitutional provision against the incurring of an indebtedness by a county.

Judgments affirmed and appeal from orders granting motion to strike dismissed.

1. Counties 🔑149

Long-term lease-option agreement under which county employees' retirement association was to build two buildings which county agreed to lease with an option to purchase did not violate constitutional provision against incurring of an indebtedness by a county. West's Ann.Const. art. 11, § 18.

2. Courts ⚷92

When two independent reasons are given for a decision, neither one is to be considered mere dictum.

3. Counties ⚷113(1)

Procedure established by Retirement Act for investment of retirement funds in public improvements does not create a conflict of interest on part of county board of supervisors which performs functions both for the county and for the county employees' retirement association nor does the fact one of the members of the board of supervisors is also a member of the retirement board itself create a conflict of interests. West's Ann.Gov.Code, §§ 31601–31607; West's Ann.Civ.Code, §§ 2230, 2232.

4. Counties ⚷122(1)

Fact that district attorney acted as counsel for both the county and for the county employees' retirement association in drawing up lease-option contracts and gave whatever legal advice they required did not have effect of invalidating the contracts. West's Ann.Gov.Code, § 31607.

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Cushing, Cullinan, Hancock & Rothert, Harlow P. Rothert, San Francisco, Nichols & Rogers, Harold E. Rogers, Jr., San Francisco, for appellants.

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Aiken, Kramer & Cummings, Oakland, for respondents Engstrum & Nourse & Stolte, Inc.

Henry A. Dietz, County Counsel of San Diego County, Joseph Kase, Jr., Deputy County Counsel, San Diego, amici curiae for County of San Diego and Bd. of Retirement of the San Diego County Employees' Retirement Ass'n.

Keil & Connolly, William L. Guilfoyle, San Francisco, Hagar, Crosby & Rosson, Oakland, amici curiae for Oakland-Alameda County Coliseum, Inc.

John A. Nejedly, Dist. Atty., of the County of Contra Costa, Prentice K. Bancroft, Deputy, Martinez, amici curiae for County of Contra Costa.

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George F. Holden, County Counsel, Adrian Kuyper, Asst. County Counsel, Santa Ana, amici curiae for County of Orange and Orange County Employees' Retirement Ass'n.

Harold W. Kennedy, County Counsel, George W. Wakefield, Chief Assistant, Joel R. Bennett, Deputy, Los Angeles, amici curiae for County of Los Angeles.

⌊DEVINE, Justice. ⌊75

[1] In 1961, the County of Alameda entered into two contracts with the Board of Retirement of Alameda County Employees' Retirement Association by which the retirement association agreed to construct a building for the welfare department of the county and an administration building, the county to lease the buildings with an option to purchase. Plaintiff McClain, a taxpayer, seeks to enjoin the contract relating to the welfare building, and plaintiff Gardner seeks to enjoin the administration building contract. Engstrum & Nourse and Stolte, Inc., contracting corporations which are building the welfare building, are joined as defendants. Motion to strike parts of the complaint was granted and demurrer was sustained without leave to amend.

Plaintiffs contend that the two long-term leases are actually contracts of purchase, and that they violate section 18 of Article XI of the Constitution of California, which provides: "No county * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose * * *." It is the position of plaintiffs that the lease-option agreements are really contracts of sale and that the lease-option plan is a subterfuge. It is further contended by plaintiffs that the agreements are void because the board of supervisors performs functions for both parties, namely, the county and the retirement board, and because a member of the board of supervisors was at the same time a member of the retirement board and participated in the making of the contracts.

Respondents reply that the first issue has been determined by the Supreme Court in the case of County of Los Angeles v. Byram, 36 Cal.2d 694, 227 P.2d 4, and that if the board of supervisors performs functions for both parties and a member thereof has dual positions, there is nothing illegal about the matter, and, in fact, it is compelled by statute.

In the Byram case, a contract for the construction of a court building in the County of Los Angeles was challenged upon the same constitutional ground as is stated here by appellants. In the Byram case, the validity of a contract, upon which the agreements in the present case obviously were patterned, was sustained by the Court upon two grounds: (1) that the county was obliged by law to provide adequate quarters for courts, and that an obligation imposed by law upon a county is not an indebtedness or liability within the ⌊76 meaning⌊of the debt limitation provision; and (2) that the lease-option agreement was not by its terms violative of the debt limitation. Respondents claim that the same two reasons which were effective in sustaining the contract in the Byram case are equally effective to sustain the contracts under our consideration.

We need not decide whether the first of the two reasons is valid, because we sustain the judgment upon the second. As the Court pointed out in Byram (36 Cal.2d at p. 699, 227 P.2d at p. 7), "There is no doubt that the duty of providing adequate quarters for courts is mandatory, explicit and imposed by law on the county. It has no choice in the matter." Section 68073 of the Government Code provides that: "In each county the board of supervisors shall provide suitable rooms for holding the superior, municipal and justice courts, for the chambers of judges of said courts * * *." (At the time of the Byram case the statutes were 2 Deering's Gen.Laws, Act 5238, § 22, Stats. 1947, ch. 1101, § 1; Code Civ.Proc., § 144, Govt.Code, § 25351.)

In the Byram case (36 Cal.2d id. at pp. 699, 700, 227 P.2d 4), the Court discussed the subject of general as distinct from explicit duties, and then held that it was the undoubted law that the housing of the courts is a duty specifically imposed upon the board of supervisors. We do not ignore the argument of respondents that a county cannot carry on the functions imposed on it by law without buildings to house the administrators of the law, but because following this argument would require us to declare a new limitation on the application of the section of the Constitution, we abstain from deciding whether the county is exempt from the provisions of section 18 of Article XI of the Constitution because of the governmental functions which are to be performed within the buildings.

[2] We find, however, that respondents are sustained by the second reason given by the Court in the Byram case, namely, that the contracts in their own terms do not violate the constitutional provision. We note, preliminarily, that the second ground of decision in the Byram case is not dictum, as suggested in appellants' closing brief. Where two independent reasons are given for a decision, as in the Byram case, neither one is to be considered mere dictum since there is no more reason for calling one ground the real basis of the decision than the other. (Bank of Italy etc. Assn. v. Bentley, 217 Cal. 644, 650, 20 P.2d 940; Gilgert v. Stockton Port District, 7 Cal.2d 384, 389, 60 P.2d 847.)

Many of the arguments advanced by respondents are those which were presented to the Supreme Court not only in the ⊥77 Byram case, but also in the earlier cases of Dean v. Kuchel, 35 Cal.2d 444, 218 P.2d 521, and City of Los Angeles v. Offner, 19 Cal.2d 483, 122 P.2d 14, 145 A.L.R. 1358, but it would be unprofitable for us to state them, because if the Byram case contract is substantially the same as those before us, the matter has been determined by the highest court of the state. We have compared the contracts and we find them to be substantially the same. We have set down the main provisions of these contracts, in columnar form, in an appendix to this opinion, so that the similar provisions may be seen side by side.

Appellants, indeed, make note of the fact that, in general, the Alameda contracts manifestly were drawn to fit the design of the Byram contract. They offer the following distinctions, each of which we find to be unavailing for the reasons given following each statement of appellants' contention: (1) That in the Byram case the taxpayers were not represented, the action having been by an architect for writ of mandate to compel the county treasurer to issue a warrant to pay his fee. Of course, we could not diminish the effect of the decision of the Supreme Court by any such consideration and, anyway, the observation of appellants is inaccurate because a taxpayer did intervene in the Byram case and filed a 36-page brief. (2) That the decisions in the Byram case, and in the case of Dean v. Kuchel, supra, which Byram followed, were influenced by emergency conditions and shortage of available finances. The Supreme Court did not state that these matters had anything to do with its decisions upon a constitutional limitation, and we can give no weight to this contention. (3) That a bond issue for a courthouse had twice been defeated by the voters of Los Angeles County, but the voters of Alameda County were not given an opportunity to vote on bonds for the two buildings. This argument is rather two-edged, but, in any event, this was not given as a reason by the Court in the Byram case. (4) That in the Byram case the Court may have determined that both the payments of rent and option prices, which declined over a 50-year period instead of a 28-year period, "were closely enough related to true values to avoid the label of subterfuge." In each case, appellants argue, there is a question of fact to be determined anew, preliminarily by the trial court, and therefore demurrer should not have been sustained without leave to amend.

In this case, say appellants, the option price for purchase in 1981 will be equivalent to 16 months' rent, although the remaining life expectancy will be 30 to 50 years; wherefore, ⊥78 unless the option price is absurdly low, the yearly payments, denominated rentals, must actually have created a credit upon the purchase price. Thus, they argue, there is an increasing compulsion upon the county every year to exercise the option when it becomes available, and, therefore, a liability is in fact being created. They argue that they are entitled to present these and other facts to the trial court and have its determination as to the true character of the contracts. We do not so read the Byram case. In the brief discussion upon the nature of the agreement in that case (36 Cal.2d id. at p. 700, 227 P.2d 4), the Court did not make a determination upon any balancing of rentals with option prices, but relied upon the Offner and Dean cases, and it is to be noted that although in the Offner case the option price was to be the then appraised value of the property, subject to a certain minimum price, in Dean v. Kuchel there was no option price at all, except if the state were to make use of an acceleration clause, and it was agreed that the property would belong to the state, the lessee, at the expiration of the 25-year lease. In Dean v. Kuchel, the Court declared that it was the essence of the Offner rule that payments are for a month to month use of the building (35 Cal.2d at p. 448, 218 P.2d 521). In the Dean case, as in the cases before us, the amount which the public body was required to pay, if it chose to pay under the acceleration clause, was almost exactly the total of the remaining rental, as pointed out in the dissenting opinion of Mr. Justice Edmonds (id. at p. 450, 218 P.2d 521). In the Dean case, there was an element pointing toward ownership by the lessee, which is not present in these cases, namely, that in event of destruction of the improvements, the state was obliged to pay for the cost of repairs or reconstruction in excess of proceeds of insurance (id. at p. 450, 218 P.2d 521).

As the Supreme Court in the Byram case found no substantial distinction between that case and the Dean and Offner cases, read together, so we find no substantial distinction between the cases before us and all three of the cases decided by the Supreme Court, read together.

[3] The motion to strike was directed to a paragraph of the complaint which alleges, in substance, that the contracts are wasteful of the taxpayers' money because financing of the buildings by general obligation bonds would be less costly to the county. Appellants concede, in their briefs, that the determination of such a matter, assuming the legality of both procedures, would be within the discretion of the board of supervisors, and not subject to review by the courts. ⌊79 ⌊They argue, however, that the matter is relevant to their final point, namely, that in the whole procedure established by the Retirement Act for the investment of retirement funds in public improvements (Govt. Code, §§ 31601–31607), a conflict of interest on the part of the board of supervisors as a whole, and of one member in particular, is created. The claimed conflict of interest is this: Section 31601 of the Government Code provides that a lease-purchase contract entered into by the board of retirement shall be approved by unanimous vote of the board of retirement and by a four-fifths vote of the members of the board of supervisors, acting for the protection of the retirement fund. On the other hand, the board of supervisors acts in its capacity as officers of the county as such. Thus, say appellants, the board of supervisors is charged with the duty of obtaining the best possible investment for the retirement board, and at the same time getting the best possible contract for the county. In particular, one of the members of the board of supervisors is, as permitted by statute (Govt. Code, § 31520), a member of the retirement board itself.

Appellants cite many cases which express the general rule which is based upon the common law (42 Am.Jur., § 59, p. 926) against the exercising of functions of incompatible offices or trusts. There is nothing to prevent the Legislature, however, from allowing, and even demanding, that an officer act in a dual capacity. Section 2230 of the Civil Code allows a trustee even to act adversely to his beneficiary when the latter, having capacity to contract, with full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so; and section 2232 of the Civil Code allows a trustee to undertake another trust adverse in its nature to his beneficiary, if he has the latter's consent. Since these acts of the Legislature allow a trustee, under certain circumstances, even to have an interest personally adverse to that of the beneficiary, certainly the Legislature may, as it has done, establish a carefully planned system whereby counties may have the advantage of financing public improvements by contracts which provide for the use of retirement funds; the retirement funds, on the other hand, having the advantage of prime investments, even though there is imposed upon public officers the duty of creating a contract that is fair to both parties.

[4] The fact that the district attorney acted as counsel for both parties in drawing the contracts, and gave them wha⌊tever legal ⌊80 advice they required, likewise does not have the effect of invalidating them, although private counsel might have been employed. (Govt.Code, § 31607.)

Appeal from orders granting motion to strike dismissed. Judgments affirmed.

DRAPER, P. J., and SALSMAN, J., concur.

APPENDIX

Byram Contract	*Alameda County Contracts*
1. County owns the land.	1. Retirement board owns the land for the administration building; county owns the land for the welfare building.
2. Retirement board has offered to erect a building and to rent it to the county, construction cost to be $6,000,000.	2. Retirement board will provide administration building at a maximum construction cost of $4,568,026, and welfare building at $2,400,000.
3. Retirement board to pay architect's and engineer's fees.	3. Retirement board to pay architect's and engineer's fees.
4. Retirement board to lease to county for 50-year term.	4. Retirement board to lease administration building to county for 30-year term, welfare building for 35-year term.
5. County to pay $25,000 monthly rent.	5. County to pay $35,000 monthly rent for administration building, $12,500 for welfare building.
6. County to pay ad valorem taxes, special assessments and insurance.	6. County to pay ad valorem taxes, special assessments and insurance.
7. Retirement board shall keep the building and equipment insured.	7. Retirement board shall keep the buildings and equipment insured.
8. Either party may terminate lease after return of the retirement board's investment, plus interest (estimated at 40 years).	8. Either party may terminate lease as provided in section 31603 of the Government Code, which requires return of investment, together with specified rate of interest (estimated at 18 years for administration building, 23 years for welfare building).
⌊81 ⌊9. County retains title to land unless retirement board exercises its option to purchase. Title to building remains in retirement board unless county exercises its option to purchase.	9. Administration building: title to land and building remains in retirement board unless county exercises its option to purchase. Welfare building: title to building remains in retirement board unless county exercises option to purchase, but title to land remains in county unless retirement board exercises its option to purchase.

(Cont'd)

	Byram Contract		*Alameda County Contracts*
10.	County shall maintain the land and building.	10.	County shall maintain the land and buildings.
11.	Each month's rental to become due only in consideration of right to possess, occupy and use the building during the preceding month, and in event of destruction or damage to building by casualty so that it becomes untenantable, rentals shall cease and shall not accrue again until the building is ready for occupancy.	11.	Each month's rental only in consideration of right to possess, occupy and use the buildings in the preceding month, and in event of destruction or damage to buildings by casualty so that they become untenantable, rentals shall cease and shall not accrue again until the buildings are ready for occupancy.
12.	County has option to purchase the building during the term of lease for the amount of investment by retirement board less 2% per year; if county's option is not exercised, retirement board has option to buy or lease the land at fair market value.	12.	Welfare building: county has option to purchase building and equipment on a declining scale of option prices, commencing with the fifth year at $2,200,000, and ending with the 28th or any subsequent year for $232,000, provided the option must produce an amount not less than retirement board's investment plus interest at rate prescribed in section 31703 of Government Code; if county does not exercise option to purchase, retirement board may purchase building at then fair market value. Administration building: Same terms as apply to welfare building, except amount at end of fifth year is $4,650,000, and at end of 20th year $542,000; county's option is to purchase not only building and equipment, but also the land, which has been owned by retirement board from the beginning.

209 Cal.App.2d 125

⊥125 ⊥**The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Roy GRIFFIN, Defendant and Appellant.

District Court of Appeal, Fifth District, California.

Oct. 29, 1962.

The defendant was convicted in the Superior Court, Tulare County, Leonard Ginsburg, J., of second-degree burglary and unlawful possession of narcotics, and the defendant appealed. The District Court of Appeal, Stone, J., affirmed second-degree burglary conviction and reversed conviction for possession of narcotics, where conviction for both offenses violated double punishment statute, punishment for second-degree burglary was 1–15 years, and punishment for possession of narcotics was maximum of 10 years.

Affirmed as to second degree burglary count; reversed as to count charging possession of narcotics.

1. Criminal Law ⚷27

County jail sentence which was a term of probation did not reduce crime from felony to misdemeanor, but final, straight, one-year jail sentence after revocation of probation did reduce the original conviction to a misdemeanor conviction. West's Ann.Pen.Code, § 17.

2. Criminal Law ⚷27

County jail sentence which is not term or condition of probation constitutes conviction of misdemeanor.

3. Criminal Law ⚷1170½(1)
Witnesses ⚷350

Prosecuting attorney's attempt to impeach defendant by asking questions concerning prior convictions which turned out to be for misdemeanors was error but did not warrant reversal in view of defendant's admission of two prior felony convictions and parole from a third and of overwhelming evidence of guilt of crime charged. West's Ann.Code Civ.Proc. § 2051; West's Ann.Const. art. 6, § 4½.

4. Criminal Law ⚷1209

Conviction of defendant for burglary and possession of narcotics constituted "double punishment for single act" in violation of Penal Code, where act of stealing the narcotics was fulfillment of object of burglarious intent. West's Ann.Pen.Code, §§ 461, 654; West's Ann.Health & Safety Code, § 11500.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⚷1182, 1186(1)

Second-degree burglary conviction would be affirmed and conviction for possession of narcotics reversed, where conviction for both offenses violated double punishment statute, punishment for second-degree burglary was 1–15 years, and punishment for possession of narcotics was maximum of 10 years. West's Ann.Pen. Code, § 461; West's Ann.Health & Safety Code, § 11500.

Sherman Rogers, Tulare, for appellant.

Stanley Mosk, Atty. Gen., Raymond M. Momboisse, Edsel W. Haws, Deputies Atty. Gen., Sacramento, for respondent.

⊥STONE, Justice. ⊥126

Appellant was charged by an information with Count I, burglary, second degree, and Count II, possession of narcotics. He pleaded not guilty and not guilty by reason of insanity, as to each count. A jury found him guilty on each count, whereupon appellant waived a jury trial on his plea of not guilty by reason of insanity, and the court found him sane at the time the offenses were committed.

Some time after midnight February 16, 1962, appellant entered the South Court Pharmacy in the City of Visalia by prying the rear door open with a screw driver. An informer had "tipped off" a State narcotics agent that appellant was going to commit the burglary. Two State narcotics agents and two Visalia policemen who were staked out in the area observed appellant enter the building. When he emerged from the store, they placed him under arrest. He had in his possession a number of items taken from the drug store, including opiates and barbiturates.

127 At the trial appellant, relying upon the defense of entrapment, admitted the burglary. He argues that prejudicial misconduct on the part of the district attorney requires a reversal of the judgment as to each count. He also submits that he was sentenced twice for the same criminal act, in violation of Penal Code section 654, since the two counts with which he was charged, burglary and possession of narcotics, stem from the same criminal act.

Appellant was called to the stand by his attorney, and on direct examination testified as follows:

> "Q And Mr. Griffin, are you presently on parole from State Prison?
>
> "A Yes, sir, I am.
>
> "Q And why were you in State Prison?
>
> "A For 2nd degree burglary.
>
> "Q And do you have any other felony convictions?
>
> "A Yes, I do.
>
> "Q And what are those?
>
> "A One was NSF checks, and the other one was petty theft with a prior conviction.
>
> "Q I see. And when were you released from prison?
>
> "A November—December 16, 1950—'62—1—
>
> "Q (Interrupting) December 16, 1961?
>
> "A Yes.
>
> "Q And you were released on parole?
>
> "A Yes, I was.
>
> "Q What were the provisions of your parole?
>
> "A Stipulations of my parole was that I was under no circumstances that I was to come to Tulare County, under no circumstances was I to leave my mother and father which was my home. And that was it, they just didn't want me in this county."

Appellant also testified that he met the informer in Tehachapi, California, "which is a State Prison."

[1] The alleged misconduct of the district attorney consisted of questions concerning other prior convictions, directed to appellant on cross-examination. The prosecuting attorney asked if, in addition to the prior convictions about which he had testified, appellant had not, on December 24, 1951, also been convicted of the crime of forgery, a felony. Although it is not clear from the record, apparently appellant was placed on probation for the 1951 offense, and served six months in jail. Since the county jail sentence was a term of probation, it did not reduce the crime from a felony to a misdemeanor. (People v. James, 40 Cal.App.2d 740, 746, 105 P.2d 947; People v. O'Brand, 92 Cal.App.2d 752, 756, 207 P.2d 1083.) Appellant testified, however, that his probation was subsequently revoked and that he was then sentenced to a year in jail. The final straight jail sentence served to reduce the 128 original conviction of a felony to a conviction of a misdemeanor. (Penal Code § 17.)

[2] The prosecuting attorney also asked appellant if he had not been convicted of two counts of forgery in 1953. To this question appellant replied: "I think, eight months county time, which is automatically a misdemeanor." Appellant was correct in that a sentence to the county jail, which is not a term or condition of probation, constitutes a conviction of a misdemeanor. (MacFarlane v. Dept. Alcoholic Bev. Control, 51 Cal.2d 84, 89, 330 P.2d 769.)

We have nothing in the record other than the prosecuting attorney's questions and appellant's answers, to indicate the nature of the crimes for which appellant was convicted in 1951 and 1953. We must assume that the district attorney was in error as he apologized and proceeded to take up another line of questioning after a discussion between court and counsel. It should be noted, however, that defense counsel made no motion for a mistrial at this point. It would appear from the record that no such motion was made because counsel for appellant was convinced that the error resulted from a misconception of the law rather than intentional misconduct.

[3] Yet, regardless of good faith, there can be no question that it was error for the prosecuting attorney to attempt to impeach appellant by questions concerning his prior conviction of a misdemeanor. (Code Civ. Proc. § 2051; People v. Hamilton, 33 Cal.2d 45, 50, 198 P.2d 873; People v. Alfonso, 77 Cal.App. 377, 380, 246 P. 818; Witkin, California Evidence, p. 696.) On the other hand, it was not necessarily reversible error, as Article 6, section 4½ of the California Constitution admonishes that no judgment shall be set aside unless the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. (People v. Kelso, 25 Cal.2d 848, 852, 155 P.2d 819; People v. Phillips, 197 Cal.App.2d 159, 164, 17 Cal.Rptr. 301.)

A discussion of the manner in which Article 6, section 4½ should be applied in criminal cases is summarized in People v. Watson, 46 Cal.2d 818, at page 836, 299 P.2d 243, at page 254, as follows:

> "Giving due consideration to the varying language heretofore employed in relating the constitutional amendment to the particular situations involved, it appears that the test generally applicable may be stated as follows: That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result ⊥129 more favorable to the appealing party would have been reached in the absence of the error."

An examination of the record in the light of Watson and of Article 6, section 4½ of the Constitution, convinces us that the error in this case does not justify a reversal. Appellant, testifying on his own behalf, related that he had been convicted of two prior felonies and that he was on parole from a third felony-conviction sentence at the time the crime was committed. The evidence of guilt, not the least of which is appellant's admissions, is overwhelming. We do not believe the erroneous questions asked by the district attorney affected the outcome of the jury's deliberations. To state the proposition in another way, it does not appear from the record that a more favorable result to appellant would have been reached had the district attorney not committed the error. (People v. Jones, 204 A.C.A. 788, 793, 22 Cal.Rptr. 499.)

[4] There is merit in appellant's contention that his sentences for burglary and for possession of narcotics constitute double punishment for a single act, in violation of Penal Code section 654. Perhaps the leading case construing Penal Code section 654 is Neal v. State of California, 55 Cal.2d 11, 9 Cal.Rptr. 607, 357 P.2d 839, wherein the court had this to say at page 19, 9 Cal.Rptr. at page 611, 357 P.2d at page 843:

> "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."

The rule laid down in Neal is thoroughly discussed in Seiterle v. Superior Court, 57 A.C. 456, at page 439, 20 Cal.Rptr. 1, 369 P.2d 697, and viewing the facts before us in the light of the Neal and Seiterle cases, we are impelled to the conclusion that at the time of appellant's arrest the narcotics were in his possession incident to the burglary. The act of stealing the narcotics was a fulfillment of the object of appellant's burglarious intent. (In re Dowding, 188 Cal.App.2d 418, 10 Cal.Rptr. 392; Downs v. State of California, 202

A.C.A. 666, 20 Cal.Rptr. 922; People v. McFarland, 201 A.C.A. 9, 19 Cal.Rptr. 920; People v. Dykes, 198 Cal.App.2d 75, 17 Cal.Rptr. 564.)

⌊130 ⌊[5] Having determined that appellant can be punished for only one of the two offenses for which he was convicted, we must determine which of the two shall stand. The Supreme Court has indicated that in such circumstances the conviction for the more serious of two offenses must be affirmed and the conviction of the lesser offense reversed. (People v. Brown, 49 Cal. 2d 577, 593, 320 P.2d 5; People v. Kehoe, 33 Cal.2d 711, 716, 204 P.2d 321.) It has been held that the more serious of two offenses is the one for which the Legislature has prescribed the greater punishment. (People v. Hawkins, 196 Cal.App.2d 832, 840, 17 Cal.Rptr. 66; People v. Knowles, 35 Cal.2d 175, 217 P.2d 1.)

Penal Code section 461 provides that burglary, second degree, is punishable by imprisonment in the state prison for not less than one year or more than fifteen years. Health and Safety Code section 11500 provides that ten years in the state prison is the maximum sentence for a conviction of possession of narcotics. A more severe penalty is provided in those cases where a defendant has been previously convicted of a narcotics offense, but since no prior narcotics offense was charged or proved, ten years is the maximum sentence to which appellant is subject under section 11500. Therefore the judgment pursuant to Count I, burglary, second degree, carrying the more severe sentence, must be affirmed; and the judgment of conviction of violation of Health and Safety Code section 11500, Count II, must be reversed.

The judgment is affirmed as to Count I, burglary, second degree. The judgment is reversed as to Count II, violation of Health and Safety Code section 11500, possession of narcotics.

CONLEY, P. J., and BROWN, J., concur.

209 Cal.App.2d 143

⌊**Arnold CONRAD, Petitioner,** ⌊143

v.

SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF TEHAMA, Respondent.

Civ. 10538.

District Court of Appeal, Third District, California.

Oct. 30, 1962.

Hearing Denied Dec. 26, 1962.

Petition for writ of prohibition to restrain the Superior Court from further proceeding based on information charging violation of Blue Sky Law. The District Court of Appeal, Pierce, J., held that evidence at preliminary hearing that promoter of speculative venture solicited and obtained money from individuals on representation that they were to receive his personal shares in corporation, represented to be then issued and in escrow, with further agreement that money obtained would be used for benefit of corporation, when in fact corporate shares had not been issued and application before corporation commissioner for their issuance had been removed from pending file and later abandoned, was sufficient to support charge against promoter for criminal violation of Blue Sky Law.

Order to show cause discharged and writ denied.

1. Criminal Law 🔑238

Evidence at preliminary hearing that promoter of speculative venture solicited and obtained money from individuals on representation that they were to receive his personal shares in corporation, represented to be then issued and in escrow, with further agreement that money obtained would be used for benefit of corporation, when in fact corporate shares had not been issued and application before corporation commissioner for their issuance had been removed from pending file and later abandoned, was sufficient to support charge against promoter for criminal violation of Blue Sky Law.

West's Ann.Corp.Code, §§ 25000 et seq., 25152, 26104(a).

2. Criminal Law 🔑13
Statutes 🔑228

Although exceptions and exemptions in statutes imposing burdens are generally to be construed liberally in favor of public and narrowly against claimant, statutes which impose penalties and particularly those defining crimes must do so with reasonable degree of certainty.

3. Statutes 🔑47, 223.2(18)

Statute providing that prohibition against sale of corporate shares without a permit does not apply to sale of securities by or on behalf of vendor who is not issuer or underwriter thereof and who, being bona fide owner of securities, disposes of own property for his own account must be read in conjunction with statute making it a public offense for any person to knowingly aid in issue or sale of securities in nonconformity with permit of commissioner, and considered in this context there is nothing vague in statute prohibiting person from selling his own securities without permit unless he sells them for his own account and not for benefit of corporation. West's Ann. Corp.Code, §§ 25152, 26104(a).

4. Criminal Law 🔑1166(1)

Admission in preliminary hearing of written agreements of defendant, accused of violating Blue Sky Law, without proof that signature was that of defendant was not prejudicial where proof that he verbally made representations stated therein was ample to support charge without written documents which were admitted without any objection to foundation laid. West's Ann.Corp.Code, §§ 25000 et seq., 25003(a, c), 25152, 25500, 26104(a).

5. Licenses 🔑40

Where defendant represented that money solicited for purchase of securities purportedly sold in violation of Blue Sky Law was for benefit of corporation defendant, he was not relieved from charge of violation if he had actually diverted money for some other use. West's Ann.Corp.Code, § 26104(a).

6. Criminal Law 🔑507(1)

Persons from whom defendant, accused of violation of Blue Sky Law, solicited funds for sale of stock were victims, not accomplices whose testimony requires corroboration at preliminary hearing. West's Ann. Corp.Code, §§ 25000 et seq., 25003(a, c), 25152, 25500, 26104(a).

7. Criminal Law 🔑238

Uncorroborated testimony of accomplice is sufficient to hold defendant to answer to charge.

8. Licenses 🔑42(4)

Defendant's knowledge that his solicitation for sale of corporate stock without necessary permit violated law was clearly inferable not only from testimony of complaining witnesses but from file of corporation commissioner which was introduced in preliminary hearing by defendant. West's Ann.Corp.Code, § 25000 et seq.

McPherson & Mulkey, Chico, for petitioner.

Stanley Mosk, Atty. Gen., by Doris H. Maier, Asst. Atty. Gen., and R. M. Momboisse, Deputy Atty. Gen., Sacramento, for respondent.

⊥PIERCE, Justice. ⊥145

Petitioner seeks a writ of prohibition restraining the superior court from further proceedings based upon an information in four counts charging petitioner with violations of California's Corporate Securities Law, familiarly known as the "Blue Sky Law" (Corp.Code, sec. 25000 et seq.) After demurrer to an original information had been sustained, an amended information was filed, demurrer thereto was overruled and a motion to dismiss was denied. Thereafter a not guilty plea was entered. The specific sections stated in the amended information are sections 26104, subdivision (a), 25500 and 25152. And section 25003 is incidentally relevant.

Section 25500 prohibits any company from selling or offering or negotiating for the sale of any security of its own issue (with exceptions not here pertinent) "until it has first applied for and secured from the commissioner a permit authorizing it so to do."

Section 25003 defines "Company" as including "(a) All domestic and foreign private corporations * * *"; also "(c) Individuals selling, offering for sale, negotiating for the sale ⊥146 of, or taking subscriptions for, any security of their own issue."

Section 26104, subdivision (a), makes it a public offense of felony proportion for any person knowingly to authorize, direct, aid in the issue or sale of any security "in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this division, or of the Constitution of this State."

Section 25152 provides that the law "does not apply to the sale of securities when (a) made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of the securities, disposes of his own property *for his own account, and (b) the sale is not made, directly or indirectly, for the benefit of the issuer* or an underwriter of the security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of the Corporate Securities Law." (Emphasis supplied.)

The contention of petitioner is that the evidence at the preliminary hearing was insufficient to justify petitioner's being held to answer for the crimes charged. Specifically, his principal contention is that neither the foregoing sections, nor any other provisions of the Corporate Securities Law, make it a crime for an individual to sell or offer for sale corporate securities which he owns for the benefit of the corporation which issued such shares; and that if section 25152 were to be so construed it would be unconstitutional as a denial of due process. His secondary contention is that even if such act of selling for the corporate benefit *is* a crime, the evidence at the preliminary hearing was insufficient to establish reasonable and probable cause that petitioner committed such an act.

Our review of the regulation involved and the cases construing it establishes that acts charged against petitioner are criminal, and that the statutes are constitutional; and our review of the evidence before the committing magistrate convinces us that reasonable and probable cause was established.

The evidence was this: Petitioner, on July 21, 1959, met at the Elks Club in Red Bluff with four individuals, the alleged victims. At this meeting the agreements which are the basis of four counts of the information were initiated. The four individuals had previously been solicited by petitioner to subscribe, and had actually subscribed, substantial sums of money for the purposes of a corporation to be organized under the laws of Nevada to carry on placer gold-dredging exploration and operation near Ely, Nevada. In the prospectus presented ⊥147 by petitioner he had described himself as the "principal underwriter" of the shares to be issued. The corporation, the White Pine Mining Company, thereafter had actually been organized and an application (containing the prospectus mentioned above) signed by "Arnold Conrad" had been filed with the California Commissioner of Corporations. This was in March, 1959. On this application no permit had been issued. In fact, said application had, on July 8, 1959, been removed from the "pending calendar" of the corporation commissioner (and was later declared "abandoned"). The corporation commissioner's file (introduced into evidence by petitioner at the preliminary hearing) discloses that petitioner was then fully aware that no permit *would* issue on the application without radical amendment. At the outset rather extensive demands for more complete data had been made by the commissioner; a memo in the file by Deputy Commissioner J. T. McMenamin states: "Mr. Conrad is rather disturbed over the request by our engineer for a more complete engineers report * * * Mr. Conrad stated that he might withdraw the application and sell all of the stock of the company in New York. He will notify us in due course whether he desires to submit another engineers report or abandon the application." No compliance with the demands of the commissioner was ever made, and there is nothing to indicate that compliance was ever contemplated.

At the meeting held July 21, 1959, petitioner and the four individuals mentioned in the information, Handley, Tandy, Reddy and Pettinger were present. Petitioner represented that he controlled the corporation. He informed those at the meeting "he was the president and the general manager of it and he had the say of what there would be done, if and when." The secretary of the corporation was Al Burnham, his son-in-law. (Later when Conrad was requested to give the name of a dredging company with whom he was dealing and to give an accounting for funds expended he informed Tandy, so the latter testified: "It was none of my business, that when he got ready he would present the essence [sic] of the money that he had or the accounting of the money when he felt he was ready and that he would not give any name of the company whom he felt was better than Yuba.")

At the meeting in July 1959 petitioner informed those present that more money was needed for exploratory drilling. He represented that these tests were a condition precedent demanded by Yuba Consolidated
148 before it would agree to work the property. Petitioner informed them that if they would advance additional sums ($300 apiece) to the corporation, petitioner would give them his personal shares which were then in escrow (although as shown above none, in fact, were authorized to be issued). He presented four separate agreements to each of the "investors" present containing provisions to this effect, each of which agreements also states that "the party of the second part [Conrad] will be transferring and assigning his personal stock to the party of the first part [the investor] and all monies will be used for the benefit of the White Pine Mining Co."

Based upon these representations, checks were issued by each of the four, which were later mailed to the corporation at its Nevada office, after counterparts of the aforesaid agreements, each purporting to bear the signature of "Arnold Conrad" had been received by the several investors. These checks were cashed and honored.

[1] This evidence creates a clear picture of a promoter of a speculative mining venture soliciting and obtaining money from four individuals upon representations and, in fact, an agreement, that they were to receive his personal shares in the corporation, represented to be then issued and in escrow, with a further agreement that the money thus obtained would be used for the benefit of the corporation; all of this done when, in fact, the corporate shares had not been issued and when the application before the California Corporation Commissioner for their issuance had been removed from the pending file and was later abandoned.

That such acts constitute a criminal violation of the California Securities Law has been the settled law of this state since 1931. In that year it was so held in People v. Smith, 111 Cal.App. 177, 295 P. 105, under provisions of said law much less explicit in defining such acts as criminal than the present code sections. The facts in the Smith case are strikingly similar to the facts here. The code section then in effect permitted a bona fide sale of a security by the owner " 'who sells the same for his own account; and not for the purpose of evading the provisions of this act.' Stats.1929, p. 1254." The theory of the prosecution was that it was proper to put the question to the jury "whether the defendant was in fact the owner of the stock sold and was selling it in a bona fide way, whether he was selling the same for his own account and not for the benefit of the corporation * * *." (p. 179.) 295 P. on p. 106. The court sustained this contention and also states (on pp. 186, 187, 295 P. on p. 109):

> ⊥149 ⊥ "* * * The evidence is sufficient to show that the sales of stock described in the information were not sales of securities by an owner who was not the issuer thereof; that such sales were not made in a bona fide manner by an owner for his own account alone * * *but in part for the account of the corporation,* and made with the purpose of securing funds to sufficiently develop the property * * *. We think the evidence is sufficient to show that the entire proceeding was carried out by the appellant for the purpose of evading the provisions of the Corporate Securities Act." (Emphasis supplied.)

In People v. Mason, 86 Cal.App.2d 445, 195 P.2d 60, decided in June 1948, when the section (then section 2, subd. (c) 3; 2 Deering's Gen.Laws, Act 3814; now Corp.Code, section 25152) read substantially as it does now, and where again the facts were similar to the facts of the instant case the court says, after quoting the section, on page 454, 195 P.2d at page 65:

> "* * * This language is tantamount to declaring it to be a felony if by the sale of a security prior to the issuance of a permit to the issuer by the corporation commissioner the vendor *causes the issuer thereof to profit or to be advanced by such sale.*" (Emphasis supplied.)

This language is quoted in People v. Mills, 148 Cal.App.2d 392, 406, 306 P.2d 1005, 1015, where under the facts there present, it was held "That Mills was selling for the benefit of the corporation is fairly inferable." (See also People v. Sears, 124 Cal.App.2d 839, 847, 269 P.2d 683.)

Petitioner argues that the statement quoted above from People v. Mason, supra, and repeated in People v. Mills was but dicta and that the holding of the two cases was that the defendants there involved were, as in People v. Smith, supra, 111 Cal.App. 177, 295 P. 105, actually the corporation's "alter ego" and therefore in legal contemplation the issuers of the securities. We do not think these cases are susceptible to that narrow interpretation. There is, in Mills, reference to the "alter ego" doctrine (148 Cal.App.2d on p. 406, 306 P.2d 1005 of the opinion), but, as noted above, it was also stated that a sale was being made of corporate shares *owned by the defendant and for the benefit of the corporation.*

Assuming, however, but not deciding, that the prosecution *here* is compelled to rely upon the "alter ego" theory, we find in the transcript of the preliminary hearing representations by Conrad which seem to add up to a statement that he WAS the corporation, and effectually both the issuer and (as shown by his prospectus) the "principal underwriter" of ⊥ the shares, in which event the ⊥150 sales made here equally violate the Corporate Securities Law. (Secs. 25500 and 25003.)

Petitioner's next contention is that since the only statutory proscription against the selling without a permit of privately-owned shares not on the seller's own account but for the benefit of the corporation is contained in a code section (sec. 26104, subd. (a)), which was written into the law as a protection to the seller in that it expressly excepts sales of such privately-owned shares already issued and states the exception does not apply to sales for the benefit of the corporation, the latter limitation is effectually an exception to the exception. Therefore, petitioner argues the statute lacks that certainty which due process demands for laws creating crimes. (Citing Peterson v. Safeway Stores, 185 Cal.App.2d 24, 27, 7 Cal.Rptr. 924; MacLeod v. City of Los Altos, 182 Cal.App.2d 364, 369, 6 Cal.Rptr. 326.) This contention was not raised in the Smith, Mason, Sears or Mills cases cited above.

[2] Although, generally speaking, exceptions and exemptions in statutes imposing burdens are to be construed liberally in favor of the public; narrowly against the claimant (Marin Municipal Water Dist. v. Chenu, 188 Cal. 734, 207 P. 251), legislation which imposes a penalty, and particularly those defining crimes must do so with "a

reasonable degree of certainty." (In re Newbern, 53 Cal.2d 786, 792, 3 Cal.Rptr. 364, 350 P.2d 116.)

Our Supreme Court, quite recently, has expressed the rule thus, per Justice Traynor, in People v. McCaughan, 49 Cal.2d 409, at page 414, 317 P.2d 974, at page 977:

> " '[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322; [citing other cases]. A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed * * *."

[3] Guided by this test we find it impossible to accept petitioner's argument that the statutes challenged lack clarity. We use "statutes" in the plural advisedly because Corporations Code section 25152 must be read in conjunction with Corporations Code section 26104, subdivision (a), which sets forth the violations creating the public offense, reaching any person who "[k]nowingly authorizes * * * or sells * * * any security, in nonconformity with a permit ⊥151 of the commissioner then in effect authorizing such issue, or contrary to the provisions of this division * * *." Considered in this context there is nothing vague or uncertain in the provision of section 25152 which prohibits a seller from selling his own securities without a permit unless he sells them for his own account and not for the benefit of the corporation. Indeed, it could reasonably be said that since a sale of securities without any permit is actually a sale "in nonconformity with a permit of the commissioner then in effect authorizing such issue" the acts here constituted a public offense under the first clause in said section 26104, subdivision (a), and without necessity to refer to section 25152.

[4–8] The other contentions may be briefly disposed of. First it is urged that in the written agreements in evidence the signature reading "Arnold Conrad" was not proved to be petitioner's signature. Proof, however, that he presented the agreements and made the representations stated therein verbally to the parties assembled at the meeting, together with the proof of successive events is ample to support the charge even without the written document. Moreover, the agreements were also admitted in evidence without objection to the foundation laid. Secondly, it is contended that there is no proof that the money solicited and paid was actually used for the benefit of the corporation. That, however, was the represented purpose for which it was supposed to be used, it was the purpose stated for its use in the application filed. And if it was actually diverted by petitioner for some other use he is not relieved from the offense charged, but merely compounds his offense by adding grand theft as ground for another count to the accusation. Thirdly, it is urged that the preliminary hearing must fall because the evidence thereat rests entirely upon the uncorroborated testimony of accomplices. But these complaining witnesses were not accomplices; they were, if their testimony is to be credited, as it must be here, victims. (See Willens v. Hagge, 154 Cal.App.2d 242, 243, 316 P.2d 29.) Even if an elastic imagination would permit their classification as accomplices, uncorroborated testimony is sufficient to hold a defendant to answer. (People v. McRae, 31 Cal.2d 184, 187 P.2d 741.) Lastly, it is contended that there is no proof that petitioner had knowledge that the things which he did violated the law. But such knowledge is clearly inferable not only from the testimony of the complaining witnesses, but is brought into full light and focus by the file of the Corpo- ⊥152 rations Commissioner which petitioner himself introduced at the hearing.

The order to show cause is discharged and the writ is denied.

PEEK, P. J., and SCHOTTKY, J., concur.

209 Cal.App.2d 173

⊥173 ⊥**PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Lynn Walter NORTON, Defendant and Appellant.

Cr. 4126.

District Court of Appeal, First District, Division 1, California.

Oct. 31, 1962.

Hearing Denied Dec. 26, 1962.

Defendant was convicted in the Superior Court, San Francisco County, Charles S. Peery, J., of violation of Section 288a of the Penal Code, and he appealed. The District Court of Appeal, Sullivan, J., held that evidence consisting of eyewitness testimony of an officer who secreted himself in the men's restroom of a theater and observed the proscribed act was not obtained by an illegal search in violation of constitutional guarantees of privacy where act occurred in a doorless toilet stall which opened onto public part of the public restroom, and was observable by any member of the public who might have used the restroom, and under such circumstances, if defendant had any right of privacy, he waived it, and fact act was observed from a hidden position was immaterial.

Judgment affirmed.

1. Searches and Seizures 🔑1

The term "search," imports concept of exploratory investigation or an invasion and quest, a looking for or seeking out, a prying into hidden places for what is concealed, and merely to observe what is perfectly apparent to any member of the general public who might happen on the premises is not a search. West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amends. 4, 14.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law 🔑394.4(2)

Evidence consisting of eyewitness testimony of an officer who secreted himself in men's restroom of a theater and observed the proscribed act was not obtained by an illegal search, where act occurred in a doorless toilet stall which opened onto public part of the restroom and was observable by any member of the public who might have used the restroom. West's Ann.Pen. Code, § 288a; West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amends. 4, 14.

◆

Michael Lewton, Noel D. Martin, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., John S. McInerny and John F. Foran, Deputy Attys. Gen., San Francisco, for respondent.

⊥SULLIVAN, Justice. ⊥174

Lynn Walter Norton and Franklin Delano Strong were convicted, after a nonjury trial, of violating section 288a of the Penal Code. The trial court sentenced both defendants to imprisonment, suspended the execution of such sentence, thereupon placed both defendants on probation and ordered them to pay a fine. Norton alone appeals from the judgment of conviction.

Appellant's sole contention here is that the evidence upon which he was convicted was obtained by an illegal search and in violation of the constitutional guarantees of his privacy. (U.S.Const. 4th and 14th Amends.; Const. art. I, § 19.) He relies entirely on Bielicki v. Superior Court (1962) 57 A.C. 647, 21 Cal.Rptr. 552, 371 P.2d 288, urging that Bielicki is practically identical with the case before us and requires a reversal of the judgment herein. We have concluded, however, that the instant case is distinguishable from Bielicki on its facts, that the evidence complained of was admissible and that the judgment should be affirmed.

The only witness at the trial was Officer Yasinitsky of the San Francisco Police Department's so-called sex detail. He was produced by the prosecution. Neither of the defendants testified or called witnesses in defense. Officer Yasinitsky testified that on the day of the arrest he was assigned to duty at the Paris Theatre. He was stationed in the men's restroom of the theatre and while within the men's room proper, had secreted himself behind a marble partition separating part of the room from the other. This marble partition was the back wall of two toilet stalls, themselves separated by a marble partition. On the opposite side of the men's room and directly in front of the toilet stalls were urinals. From his position behind the partition, the officer was able to keep the general area under surveillance by the use of several "observation holes" which had been cut through the marble.

The toilet stall in which the offense was committed was enclosed on three sides only—by a partition on the right, by a wall of the theatre on the left, and in the rear by the wall or marble partition through which Officer Yasinitsky was making his observations. On the fourth side or front of the stall facing the urinals, the toilet door had been removed so that the stall was completely exposed and a person in the men's room proper could see into it.

While stationed behind the above marble partition, Officer Yasinitsky saw the defendant Strong enter and occupy the above toilet stall which was almost directly in front of the ⊥officer's observation post. The appellant who had just entered the men's room, at first used one of the urinals and then entered the toilet stall occupied by Strong where the act proscribed by section 288a then took place.[1] The officer then came out from his hiding place and arrested both defendants. ⊥175

Appellant's objection to the above testimony "on the grounds that it is an invasion of the right of privacy and therefore a violation of due process" was overruled. His motion to strike the testimony on the same grounds was denied.

Contrary to appellant's claim, the instant case is not factually identical with Bielicki v. Superior Court and is not controlled by the holding of the Supreme Court in the latter case. In Bielicki, the police had been authorized by the owner of an amusement park to go on the roof of a building housing pay toilets in order to keep the toilet area under surveillance for possible homosexual activity. A pipe had been installed in the roof through which an observer could see the toilet stalls below and some of the activities of their occupants. Through this pipe, a police officer observed the petitioners, each in one of the stalls, committing a violation of section 286 of the Penal Code through a hole in the partition between the stalls. Prior to making such observation, the officer had never seen or known of the petitioners and "had no grounds for believing or even suspecting that they had committed or were then committing any crime, or that they were occupying the booths for anything other than a lawful purpose." (57 A.C. at p. 651, 21 Cal.Rptr. at p. 554, 371 P.2d at p. 290.) The Supreme Court granted a peremptory writ of prohibition holding that the above evidence was inadmissible because obtained as a result of "a general exploratory search conducted solely to find evidence of guilt, a practice condemned both by federal law [citations] and by the law of this state [citations]." (57 A.C. at p. 651, 21 Cal.Rptr. at p. 554, 371 P.2d at p. 290.)

Thus, in our view, the factual essence in Bielicki was the clandestine observation by the police of a place which by its very physical appointments provided privacy to its occupant. Bielicki condemned such conduct by the police because they "observed activities of petitioners *which no member of the public could have seen*, as they were carried on within the confines of toilet booths each enclosed by three walls and a door. * * *

⊥"* * * On the facts before us it is undisputed that the activities of petitioners witnessed by Officer Hetzel were not 'in plain sight' or 'readily visible and accessible' (People v. Roberts (1956), supra, 47 Cal. ⊥17

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[1] It is not necessary for our decision that we consider previous occurrences observed by the officer, including an uneventful visit to the men's room by the appellant a short time before the offense here involved.

2d 374, 379 [8], 303 P.2d 721), but rather were hidden from all but the type of exploratory search here conducted." (Emphasis added.) (Bielicki v. Superior Court, supra, 57 A.C. 647, 652, 21 Cal.Rptr. 552, 555, 371 P.2d 288, 291.) Such surveillance therefore, because of the character of the place to which it was directed, of necessity invaded the occupants' constitutionally guaranteed right of privacy. The activities observed by the police in Bielicki were such that no other member of the public could have seen them, since they were carried on in toilet booths fully enclosed by three walls and a door. Distinguishable therefore, as the Supreme Court concluded, were (a) those cases holding that a consent to search is implied or even unnecessary where illegal acts, observable in or from an area open to the general public, are in plain view to the police as to any member of the public (e. g. People v. Rayson (1961), 197 Cal.App.2d 33, 17 Cal.Rptr. 243); and (b) those cases holding that looking through a window does not constitute an unreasonable search (e. g. People v. Martin (1955), 45 Cal.2d 755, 290 P.2d 855).

The above critical circumstance of "privacy of place" is not present in the case before us. Appellant and his codefendant did not carry on their criminal activities in a private place, but in a doorless toilet stall which opened onto the public part of a public restroom. Their activities were not, as in Bielicki, such that no other member of the public could have seen them. They were conducted in the plain view of any member of the public who might happen to use the restroom. Had the police entered the public part of the restroom they could have observed such activities in the same way as any member of the public. If appellant had any right of privacy, he certainly waived it.

[1, 2] As the court pointed out in Bielicki, the term "search" as used in the pertinent provisions of the United States and California Constitutions imports a definite concept. "'[T]he term implies some exploratory investigation or an invasion and quest, a looking for or seeking out. * * * A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way.' (People v. West (1956), 144 Cal.App.2d 214, 219 [5], 300 P.2d 729.)" (Bielicki v. Superior Court, supra, 57 A.C. at p. 650, 21 Cal.Rptr. at p. 553, 371 P.2d, at p. 289.) Merely to observe what 177 is perfectly apparent to any member of the general public who might happen to be on the premises is not a search. (People v. Roberts (1960), 182 Cal.App.2d 431, 437–438, 6 Cal.Rptr. 161; People v. Rayson, supra, 197 Cal.App. 2d 33, 38–39, 17 Cal.Rptr. 243; Thorp v. Dept. of Alcoholic Bev. Control (1959), 175 Cal.App.2d 489, 492, 346 P.2d 433.) Since appellant's offense was therefore committed out in the open, it made no difference that it was observed by the arresting officer from a hidden position from which he could conduct a more effective vigil.

The judgment is affirmed.

BRAY, P. J., and MOLINARI, J., concur.

Hearing denied; PETERS, J., dissenting.

208 Cal.App.2d 793

793 **The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

John Jay POLLART, Defendant and Appellant.

Cr. 1741.

District Court of Appeal, Fourth District, California.

Oct. 23, 1962.

Prosecution for escape from a state prison. The Superior Court of San Bernardino County, A. D. Mitchell, J., entered a judgment of conviction, and the defendant appealed. The District Court of Appeal, Griffin, P. J., held that the defendant's incarceration in an out-of-state prison following his escape tolled the three-year statute of limitations.

Affirmed.

1. Escape ⚷10

Evidence sustained conviction for escape from state prison. West's Ann.Pen. Code, § 4530.

2. Criminal Law ⚷1115(1)

Where record on appeal contained no facts concerning dates of defendant's arrest or his arraignment, District Court of Appeal could not consider his contention that he was illegally committed because he was not brought before magistrate until a week after his arrest.

3. Criminal Law ⚷228

Alleged delay between defendant's arrest and commitment did not result in unfair trial where no admissions or confessions were obtained during asserted delay.

4. Criminal Law ⚷1144(1)

Where transcript of preliminary hearing was not made part of record on appeal, it must be presumed that there were no irregularities in preliminary hearing.

5. Criminal Law ⚷1035(1)

The defendant could not urge for first time on appeal that he had not been afforded a speedy trial. West's Ann.Pen. Code, § 1382.

6. Criminal Law ⚷430

Copies of federal prison records were certified by their legal custodian and hence were admissible to prove that defendant's absence from state had tolled limitation of time for commencing criminal action, where records were certified by prison warden and his signature was sworn to and subscribed before prison record clerk, who was a person authorized to administer oaths. 18 U.S.C.A. § 4004; West's Ann.Pen.Code, §§ 800, 802; West's Ann.Code Civ.Proc. §§ 1905, 1918, subds. 7, 9.

7. Criminal Law ⚷1169(1)

Where prosecution showed that limitation of time for commencing criminal action had been tolled by defendant's incarceration in out-of-state prison, defendant did not suffer added prejudice because records proving his incarceration contained his photograph. 18 U.S.C.A. § 4004; West's Ann.Pen.Code, §§ 800, 802, 4530; West's Ann.Code Civ.Proc. §§ 1905, 1918, subd. 9.

8. Criminal Law ⚷637

Court is entitled to impose reasonable restraints on defendant.

9. Criminal Law ⚷637

The handcuffing of defendant while taking him to and from court to answer charge of escape from state prison was not unreasonable restraint. West's Ann.Pen. Code, § 4530.

10. Criminal Law ⚷761(2)

Instruction on tolling of statute of limitations during defendant's absence from state did not inform jury that defendant was out of state or indicate to it the court's opinion as to whether defendant had in fact been out of state. West's Ann.Pen.Code, §§ 800, 802.

John Jay Pollart, in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Jack K. Weber, Deputy Atty. Gen., for respondent.

⌊GRIFFIN, Presiding Justice. ⌊795

Defendant was convicted after a jury trial of the crime of escape from a state prison, in violation of Penal Code, section 4530. He has appealed from the judgment of conviction.

The evidence indicates that on June 27, 1958, defendant was serving terms in the Chino State Prison for armed robbery and assault with a deadly weapon. On that day he was sent to work in a hayfield with a crew of prisoners under the charge of Correctional Officer Carpenter. About 10:30 in the morning it was discovered that defendant was missing. No one had given him authority to leave. Officer Carpenter testified that he remembered the escape because defendant was the first man who had escaped from his custody and this made an impression on his mind. He identified defendant as the escapee. On cross-examination, the officer admitted that he had had some difficulty remembering defendant's name at the preliminary hearing, but indicated that his memory had been refreshed when he was shown a piece of paper with defendant's name on it.

Certain records of the United States Penitentiary at Atlanta, Georgia were received in evidence. They indicated that defendant was incarcerated at that institution between December 12, 1959 and October 5, 1961, pursuant to a sentence of the United States District Court of the Middle District of North Carolina. This conviction was for interstate transportation of a stolen automobile. A fingerprint expert testified that defendant's fingerprints were identical with those contained in both the federal and state commitment papers.

[1–3] Defendant contends that there is no evidence that he escaped from the state prison at Chino, California. This contention is without merit. It is also contended that defendant was illegally committed because he was not brought before a magistrate until a week after his arrest. To substantiate this point, defendant refers to the preliminary hearing transcript. This document is not a part of the record on appeal. Since the record contains no facts concerning the dates of appellant's arrest or his arraignment, we cannot consider this contention.⊥796 (People v. Finley, 174 Cal.App.2d 206, 211–212, 344 P.2d 614.) Moreover, since no admissions or confessions appear to have been obtained during the asserted delay, it cannot be said to have resulted in an unfair trial. (People v. Van Eyk, 56 Cal.2d 471, 480, 15 Cal.Rptr. 150, 364 P.2d 326.)

[4] Defendant's next contention is that the evidence at the preliminary hearing was not sufficient to show that he was the person who escaped. Since the transcript of the preliminary hearing has not been made a part of the record on appeal, it must be presumed that there were no irregularities in the preliminary hearing. (People v. Walker, 170 Cal.App.2d 159, 163, 338 P.2d 536.)

[5] Defendant also urges that he was not afforded the speedy trial required by Penal Code, section 1382. The information was filed on January 5, 1962. On January 12, defendant requested a two-week continuance. The matter was set for January 26, 1962, but the next hearing shown by the record occurred on February 16, 1962. At that time, the court denied a motion under Penal Code, section 995, and defendant entered a plea of not guilty. The case was set for trial on March 19, 1962, but the trial did not begin until April 23, 1962, which date is more than 45 days beyond the 60-day statutory limit. The record before us does not reflect the reasons for this delay. Defendant raised no objection on account of the delay at the time of his trial. By failing to object at that time, he has waived his right to raise this point on appeal. (People v. Vigil, 189 Cal.App.2d 478, 480, 11 Cal.Rptr. 319; People v. Encinas, 186 Cal.App.2d 12, 16, 8 Cal.Rptr. 624; People v. Bruce, 141 Cal.App.2d 854, 856, 297 P.2d 437.)

[6] The information charged, and the evidence showed, that the offense took place on June 27, 1958. The information was filed on January 5, 1962, which was more than three years after the occurrence of the offense charged. The general rule is that an indictment or information must be brought within three years after the commission of a felony. (Pen.Code, sec. 800.) However, the statute is tolled during periods of time when the defendant is not within the State of California. (Pen.Code, sec. 802.) Here, the information alleged that defendant was without the state between the date of the escape and December 8, 1961, a period of approximately two and one-half years. Evidence was presented showing that between December 12, 1959 and October 5, 1961, defendant was incarcerated in a federal prison at Atlanta, Georgia.⊥797 Defendant urges that the copies of the records of the federal prison which

were offered by the prosecution to prove defendant's absence from this state were not properly authenticated and should not have been received in evidence. An examination of the documents received in evidence to prove defendant's absence shows that they were certified by the warden of the United States Penitentiary at Atlanta, Georgia, and that the warden's signature and certificate were sworn to and subscribed before the record clerk of the prison, a person authorized to administer oaths under 18 U.S.Code, § 4004. In support of his contention, defendant cites People v. Foster, 3 Cal.App.2d 35, 40, 39 P.2d 271, where the court held that records of a Louisiana state prison were improperly received in evidence where they were duly certified by the warden of the penitentiary but his certification was not supported by an authentication showing that he was actually the warden of the state prison involved. Defendant's argument overlooks the distinction between subsections 7 and 9 of Code of Civil Procedure, section 1918. Subsection 7 of this statute requires that documents of a sister state be proven by a copy certified by the legal custodian thereof together with a certificate of the secretary of state or other official authenticating that the certifying officer has legal custody of the original document. Subsection 9 of that statute applies to documents in the departments of the United States Government and specifies that they can be proved by certificated copies of the legal custodian of the document. Code of Civil Procedure, section 1905, makes a similar distinction between the requirements for proving a copy of a judicial record of this state or of the United States on the one hand and the judicial records of a sister state on the other. In the first instance, a certificate of the clerk or other person having legal custody of the original record is sufficient to prove a copy thereof, whereas copies of judicial records of a sister state can be proved only by the certificate of the clerk, together with a certificate of the chief judge or presiding magistrate that the clerk's attestation is in due form. Since the records here involved were certified by their legal custodian, the statutory requirements were fulfilled and the court properly received in evidence copies of the documents on file in the United States Penitentiary at Atlanta, Georgia.

[7] Defendant makes several contentions to the general effect that he was deprived of a fair trial by reason of mis⊥conduct. ⊥798 First, he argues that he was prejudiced because two of the exhibits received in evidence contained his photograph. Since it was necessary for the prosecution to prove that defendant had been in prison out of the state, it is difficult to understand how he could suffer added prejudice because the records proving his incarceration contained his photograph.

[8, 9] Defendant also complains because five jurors saw him handcuffed in the hallway during the luncheon recess. There is nothing in the record to substantiate this contention. Even if it is true, there is nothing unreasonable or prejudicial about this event. A court is entitled to impose reasonable restraints on a defendant. (People v. Merkouris, 46 Cal.2d 540, 555–556, 297 P.2d 999.) It would not be unreasonable to handcuff a prisoner being tried on a felony charge who has previously escaped from a state prison while taking him to and from the court.

[10] The defendant's final contention is that the court erred while instructing the jury as to the law regarding the Statute of Limitations. The court said:

> "* * * you shall not consider any time during that period when the defendant was out of this state as the law holds that such time does not run unless the defendant is in the State of California."

The instruction also included the words:

> "Unless you find that the defendant was out of State for a period of 7 months or longer during this time you must find him not guilty."

It is clear that the trial court did not inform the jury that defendant was out of the state or indicate to it the court's opinion as to whether defendant had in fact been out of the state. The question was left entirely to the jury and there was no error.

An examination of the record convinces us that defendant received a fair trial and was properly convicted. Defendant did not take the stand at the trial and refute any of this evidence.

Judgment affirmed.

SHEPARD and COUGHLIN, JJ., concur.

208 Cal.App.2d 740

⊥740⊥ **MORRISON DRILLING CO., Inc., Petitioner,**

v.

SUPERIOR COURT OF ORANGE COUNTY, Respondent.

Civ. 7103.

District Court of Appeal, Fourth District, California.

Oct. 22, 1962.

Rehearing Denied Nov. 8, 1962.

Hearing Denied Dec. 19, 1962.

Proceeding for writ of certiorari to review order of Superior Court of Orange County staying all proceedings in trial of action against members of alleged joint venture for value of services allegedly rendered on behalf of the venture. The District Court of Appeal, Griffin, P. J., held that where plaintiff unsuccessfully sought to serve alleged member of joint venture within California and was not permitted to serve it as foreign corporation, plaintiff was entitled to proceed with suit against other members, for value of services rendered, without bringing in unserved member.

Writ of mandate issued.

1. Joint Adventures 🔑8

Joint obligors are indispensible parties to action brought to enforce joint liability.

2. Joint Adventures 🔑8

Plaintiff who has joined all joint obligors may proceed against less than all of them where service cannot be obtained on all of them. West's Ann.Code Civ.Proc. § 414.

3. Joint Adventures 🔑8

Where plaintiff unsuccessfully sought to serve alleged member of joint venture within California and was not permitted to serve it as foreign corporation, plaintiff was entitled to proceed with suit against other members, for value of services rendered, without bringing in unserved member. West's Ann.Code Civ.Proc. § 414; West's Ann.Corp.Code, § 15015.

4. Certiorari 🔑4
Mandamus 🔑3(12)

Writ of mandamus is more appropriate than writ of certiorari where a court erroneously refuses to assume jurisdiction.

Hancock & Garland, Newport Beach, for petitioner.

Kindel & Anderson, Los Angeles, for respondent.

⊥GRIFFIN, Presiding Justice. ⊥741

This is a petition for a writ of certiorari to review an order of the respondent superior court staying all proceedings in the trial of an action until plaintiff therein (petitioner here) has brought into the action a party alleged to be indispensible.

Petitioner brought the action in the superior court against certain members of a joint venture to recover for the value of services alleged to have been rendered on behalf of the joint venture. The defendants who had been served in the action demurred on the ground that petitioner had failed to join Batzer Oil Corporation, a Wyoming corporation, as a defendant and that Batzer Oil Corporation was one of the members of the joint venture, a joint obligor, and an indispensible party. By leave of court, petitioner filed an amended complaint naming Batzer Oil Corporation as a party defendant. However, petitioner was unsuccessful in his attempts to serve Batzer Oil Corporation within the State of California and petitioner's motion to serve Batzer Oil Corporation as a foreign corporation doing business in the state, by service on the secretary of state, was denied because no showing was made that Batzer Oil Corporation had conducted any business 742 within the State of California. Thereafter, the petitioner brought this petition for a writ of certiorari.

The complaint alleges that petitioner is a Wyoming corporation and that about August 17, 1959 the respondents here and Batzer Oil Corporation entered into a written joint venture agreement whereby they agreed to drill an oil and gas well in Converse County, Wyoming. It is alleged that Batzer Oil Corporation, acting as the agent of the respondents, entered into an oral contract with petitioner in Wyoming whereby petitioner was to supply and did supply services and materials in connection with the drilling of an oil and gas well in Converse County, Wyoming. Petitioner alleges that the reasonable value of the services and materials supplied by it is $11,351.64 and that it has been paid no part of this amount. It is alleged that the respondents and each of them are indebted to petitioner in the amount of $11,351.64.

Appended to the original complaint is a contract between respondents and Batzer Oil Corporation. In this contract, it is agreed that Batzer Oil Corporation owns certain interests in oil leases in Converse County, Wyoming, that the parties agree to drill a test well on the leased land and that Batzer Oil Corporation shall be the agent of the parties in charge of the actual drilling of the well. It is provided that each of the parties, including Batzer Oil Corporation, shall have either a one-eighth or a one-fourth interest in the proceeds of the joint venture and in its obligations. It does not clearly appear whether this contract was entered into within the State of California. At the head of the contract, or letter purporting to be the contract, is noted "4252 Beverly Boulevard, Los Angeles 4, California, August 17, 1959." It is directed to William L. Rush at 3950 Beverly Boulevard, Los Angeles, California and is purportedly signed by all parties on August 18, 1959, including Batzer Oil Corporation by F. G. Batzer, vice president. The complaint does not allege the place where the agreement was executed.

Both petitioner and respondents agree that the statutory and case authority in this state provides that the parties to a joint venture are jointly liable in an action brought by a third person to enforce an obligation of the joint venture. (Corp. Code, sec. 15015.) In Harrison v. McCormick, 69 Cal. 616, 620, 11 P. 456, 458, it was said:

> "The rule is well settled that several persons, contracting together with the same party, for one and the same act, shall 743 be regarded as jointly and not individually or separately liable, in the absence of any words to show that a distinct as well as entire liability was intended to fasten upon the promisors."

This rule is reiterated in Iwanaga v. Hagopian, 39 Cal.App. 584, 179 P. 523; Mirabile v. Smith, 119 Cal.App.2d 685, 688–689, 260 P.2d 179; and Hobgood v. Glass, 161 Cal.App.2d 208, 326 P.2d 546.

[1, 2] It is also clear that joint obligors are indispensable parties to an action brought to enforce a joint liability. (Williams v. Reed, 48 Cal.2d 57, 307 P.2d 353.) In 1 Cal.Pleading, at page 517, it is said:

> "* * * joint obligors or obligees on a contract must be joined as plaintiffs or defendants."

See also 2 Witkin, California Procedure, at page 1054, where it is said:

> "* * * *joint obligors* or debtors jointly liable under a contract must be joined as defendants. [Citation.]
>
> "*Partners and joint venturers* are likewise united in interest so as to require joinder in actions, whether on contract or tort."

Code of Civil Procedure, section 414, provides:

> "When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants."

See also Tally v. Ganahl, 151 Cal. 418, 424, 90 P. 1049, where the plaintiff was allowed to proceed against one joint obligor alone where the other was absent from the state and not within the jurisdiction of the court. In Rawitzer v. Wyatt, 9 Cir., 40 F. 609, the court held that Code of Civil Procedure, section 414, permits a plaintiff who has joined all joint obligors to proceed against less than all of them where service of process cannot be obtained on all of the joint obligors.

[3] This view of the effect of Code of Civil Procedure, section 414, was reiterated in Iwanaga v. Hagopian, supra, 39 Cal.App. 584, 179 P. 523, and Hobgood v. Glass, supra, 161 Cal.App.2d 208, 326 P.2d 546. In the latter case, the court said:

> "In Iwanaga v. Hagopian, 39 Cal. App. 584, 585, 179 P. 523, the court refers to the common law rule that a partnership obligation is joint, and not joint and several, and to the corollary rule that a judgment against less than all the partners upon such a liability extinguishes the original claim against all for the reason that the joint obligation is deemed ⊥744 merged in the judgment. The decision then proceeds to point out that in California the common law rules have been abrogated by statute:
>
> "'In some states the rigor of this common-law rule has been relaxed by statutes, which declare the obligations of copartners to be several as well as joint. But in this state the common-law rule has been expressly enacted by section 2442 of the Civil Code, which declares the liability of copartners to be joint, and we have no provision permitting several judgments to be recovered in several actions upon a joint obligation. The extent to which the common-law rule on this subject has been changed by the provisions of section 414 and section 989 of the Code of Civil Procedure is by permitting (section 414) an action brought against the joint debtors, but in which the summons has not been served on all, to proceed to judgment against those served, and (section 989) after judgment so obtained, to bring in any of the defendants not served by an order to show cause why they should not be bound by the judgment.'"

See also Wharton v. Harlan, 68 Cal. 422, 427, 9 P. 727.

The order of the lower court was therefore erroneous. It should not be inferred from this holding that the petitioner should have judgment on the issues framed by the pleadings. We have only discussed the issues presented by this petition. Our description of the liability of the defendants as "joint" is not intended to foreclose the trial court from deciding that this obligation is other than joint. Nor should our use of the term "joint venture" preclude the trial court from deciding the exact nature of the parties' relationship after the issues are framed by the pleadings and the evidence is presented. (See Corporations Code, section 25100, subsection (m).)

[4] The petition here seeks a writ of certiorari. A writ of mandamus is more appropriate where a court erroneously refuses to assume jurisdiction. (3 Witkin, California Procedure, sec. 50, p. 2531.) Although the petition seeks the wrong relief, there is no reason why this court should not grant the appropriate writ where the complete record is before us. (Board of Trustees of Leland Stanford Junior University v. State Board of Equalization, 1 Cal.2d 784, 37 P.2d 84, 96 A.L.R. 775; 3 Witkin, California Procedure, pp. 2567–2569.)

Let a writ of mandate issue directing respondent court to vacate all orders abating

⊥745 or staying proceedings in action⊥#97691 in said court, and directing it to assume jurisdiction, and to proceed to trial of the action.

SHEPARD and COUGHLIN, JJ., concur.

209 Cal.App.2d 1

⊥1 ⊥ **H. J. HEINZ COMPANY, a Corporation, Plaintiff and Appellant,**

v.

STATE BOARD OF EQUALIZATION of the State of California et al., Defendants and Respondents.

Civ. 10386.

District Court of Appeal, Third District, California.

Oct. 24, 1962.

Hearing Denied Dec. 19, 1962.

Suit for refund of use tax assessed under West's Ann.Rev. & Tax.Code, § 6201, and paid under protest. From an adverse judgment of the Superior Court, Sacramento County, James H. Oakley, J., the taxpayer appealed. The District Court of Appeal, Schottky, J., held that cans and cartons in which tomato paste was packed by food processor in California and kept in the State for several months before being shipped to out-of-State plants, where such containers were discarded and the contents thereof were reprocessed for sale, were put to consumptive use in California and were not exempt from the use tax under West's Ann.Rev. & Tax.Code, § 6009.1.

Judgment affirmed.

1. Taxation 🔑204(2)

Exemptions from taxation are strictly construed against taxpayer.

2. Taxation 🔑251

Party claiming tax exemption has burden of showing that it comes clearly within terms authorizing exemption.

3. Licenses 🔑19(3)

Section of Sales and Use Tax Law, defining storage and use as not including keeping or exercising right or power over tangible personalty for specified purposes, is construed as tax exemption statute. West's Ann.Rev. & Tax.Code, §§ 6008–6009.1, 6201.

4. Licenses 🔑19(3)

Cans and cartons, in which tomato paste was packed by processor in California and kept in State for several months before being shipped to out-of-State plants, where such containers were discarded and their contents reprocessed for sale, were put to consumptive use in California and were not exempt from use tax under section of Sales and Use Tax Law defining storage and use as not including keeping, retaining or exercising right or power over tangible personalty to be subsequently transported out of State and thereafter used solely outside State. West's Ann.Rev. & Tax.Code, §§ 6009.1, 6201.

5. Licenses 🔑19(3)

Section of Sales and Use Tax Law defining storage and use as not including keeping, retaining or exercising right or power over tangible personalty to be subsequently transported out of State for use thereafter solely outside State excludes from tax only property which is purchased and as so purchased is transported out of State for use outside State. West's Ann. Rev. & Tax.Code, §§ 6009.1, 6201.

6. Licenses 🔑19(3)

Cans and cartons in which tomato paste was packed by processor in California and kept in State for several months before being shipped to out-of-State plants, where such containers were discarded and their contents reprocessed for sale, were put to consumptive use in California and were not exempt from use tax under section of Sales and Use Tax Law defining storage and use as not including keeping, retaining or exercising power over tangible personalty to be processed, fabricated or manufactured into, or attached to or incorporated into, other tangible personalty to be transported out of State and thereafter used solely outside State. West's Ann.Rev. & Tax.Code, §§ 6009.1, 6201.

◆

Downey, Brand, Seymour & Rohwer, Robert R. Harlan, Associate, Sacramento, for appellant.

Stanley Mosk, Atty. Gen., by Ernest P. Goodman, Deputy Atty. Gen., San Francisco, for respondent.

⊥2 ⊥SCHOTTKY, Justice.

The appellant, H. J. Heinz Company, a Pennsylvania corporation, is a processor and manufacturer of food products. For its operations it purchases tin cans from the American Can Company and cardboard cases from the F. J. Kress Box Company. Appellant has filed with the aforementioned sellers resale certificates as authorized by the Sales and Use Tax Law and therefore no tax was paid at the time of purchase. One of the processing and manufacturing plants of the appellant is located at Tracy, California. At this facility various fresh food products, including tomato paste, are processed and then canned. The canned tomato paste is packed and shipped to plants outside of this state where the paste is reprocessed. The cans and cardboard⊥cases handled at the Tracy plant were purchased under resale certificates. ⊥3

The cans in question were filled with tomato paste and then were packed in cardboard cases. The tomato paste was kept in these containers at a warehouse in Tracy after it was packed until it was shipped to appellant's eastern plant where the paste was reprocessed. Other tomato paste which was to be processed in California, the taxability of which is not involved in this litigation, was also kept at the warehouse in Tracy. It was not certain at the time the packed tomato paste was delivered to the warehouse at Tracy which or how many cardboard cases filled with cans of tomato paste were to be shipped to appellant's eastern plant. On an average the cans which were ultimately shipped to plaintiff's eastern plant were kept in the warehouse at Tracy for a period of 9.7 months after they were filled and packed. On an average the cans of tomato paste shipped from Tracy were kept in plaintiff's eastern warehouse for six months prior to the time they were opened for reprocessing. After the cans containing the tomato paste were emptied at the eastern plant, the cans were discarded. The tomato paste which was removed from the cans was reprocessed for sale.

Appellant anticipated that 90 per cent of the cans and cases in which the tomato paste was packed would be shipped to eastern plants for reprocessing, and for the purposes of this case this percentage was in fact so shipped.

The State Board of Equalization determined that the cases and cans which were used in transporting the tomato paste to plants out of state were subject to tax under the Sales and Use Tax Law. Appellant paid the tax assessed under protest and then filed a claim for refund which was denied. This appeal followed an adverse decision on appellant's suit for a refund in the superior court.

Four sections of the Revenue and Taxation Code are involved. They read as follows:

Section 6201. "An excise tax is hereby imposed on the storage, use, or other consumption in this State of tangible personal property purchased from any retailer * * * for storage, use, or other consumption in this State * * *."

Section 6008. "'Storage' includes any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside this State of tangible personal property purchased from a retailer."

⊥Section 6009. "'Use' includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business." ⊥4

Section 6009.1. " 'Storage' and 'use' do not include the keeping, retaining or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the State for use thereafter solely outside the State, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the State and thereafter used solely outside the State."

It is the contention of appellant that section 6009.1 is applicable to the facts of the instant case and that the respondent Board of Equalization has improperly collected the tax and interest.

[1–3] The principal question to be determined on this appeal is whether the value of the cans and cases is exempt from taxation under section 6009.1. At the outset certain rules must be kept in mind. Exemptions from taxation are strictly construed against the taxpayer. (Santa Fe Transp. v. State Board of Equal., 51 Cal. 2d 531, 539, 334 P.2d 907.) "The party claiming tax exemption has the burden of showing that it comes clearly within the terms authorizing exemption." (Atchison etc. Ry. Co. v. State Board of Equal., 131 Cal.App.2d 677, 682, 281 P.2d 99, 102.) Section 6009.1 has been construed to be an exemption statute. (Atchison etc. Ry. Co. v. State Board of Equal., supra.)

[4] We believe that the following memorandum opinion of Honorable James H. Oakley correctly answers the contentions of appellant and we adopt the same as part of the opinion of this court:

> "In particular, plaintiff relies upon the provisions of Section 6009.1 as eliminating for tax purposes that exercise of dominion over these items which was 'for the purpose of subsequently transporting it outside the State for use thereafter solely outside the State', and also 'for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into, other tangible personal property to be transported' and used outside the State. It is plaintiff's position that its use is taken out of the taxing statute on both counts; i. e., that the cartons and cans were (1) stored for the purpose of subsequent transportation out of the State, and also ⊥5 (2) for the purpose of being attached to other tangible personal property (tomato paste) for similar permanent disposition out of the State.
>
> "The *average* of retention, storage and use in California was 9.7 months. The *average* of retention in the state to which the property was shipped was 6 months. (Paragraph VI of the Agreed Statement.) The containers were apparently disposed of (the term used in the Agreed Statement relating to the cans is 'discarded') at the end of the latter time. Thus the useful life of the containers averaged 15.7 months, upon termination of which they are to be considered as having been 'consumed'. Substantially more than one-half of this period was spent in storage in California. In addition to that 'use', the State points out, the process of filling of the containers is to be considered a 'use', and that also occurred in California.
>
> "The burden of establishing an exception from operation of the tax justly falls upon plaintiff who asserts it. It seems to this Court that the purpose of purchasing and using the containers was (1) to fill them with tomato paste, (2) to store and protect the latter within the State until determination of its ultimate allocation and disposition, and (3) thereafter to ship the product (and protect during shipping, handling and any subsequent storage) outside the State. When these uses had ceased, the containers, as noted, have ceased their usefulness and are discarded.
>
> "The first use was a *process*,—virtually momentary in point of time, but

> important to prepare and protect for subsequent handling. The second use was a form of storage. Its duration is of no great significance, except to illustrate that it was for the business convenience of the taxpayer. The tomato paste (the contents of the packages) was not being used during this interval —except only as it may be said that stocking or maintaining a supply of an ingredient in a warehouse constitutes a use. But the *containers* were obviously in use during all that time, and for the purpose for which they were purchased.
>
> "Under these circumstances it seems clear enough that the containers were not just being used incidentally within the State, merely awaiting shipment out of the State; they were put to a consumptive use in California. On that account it is believed they must bear their share of the tax burden."

[5] We agree with the trial court's analysis. We believe that the only reasonable construction of section 6009.1 is that ⌊6 it only intends to exclude from the tax property which is purchased and as so purchased is transported out of the state for use there. However, this does not mean that appellant can fill the cans with tomato paste and escape taxation of the container because by filling the cans with tomato paste appellant has used the cans for a purpose other than merely transporting them outside the state for use outside the state.

[6] The further contention of appellant that it is not subject to tax because the cans and containers were processed, fabricated or manufactured into, attached to or incorporated into other personal property to be transported outside of the state within the meaning of section 6009.1 is best answered by the case of Luer Packing Co. v. State Board of Equalization, 101 Cal. App.2d 99, 224 P.2d 744, which upheld a use tax on the use of sausage casings as forms and molds for wieners. (To the same effect see Briggs and Co. v. District of Columbia, 90 U.S.App.D.C. 404, 196 F.2d 241 (1952).) In the Luer case a producer of skinless wieners argued that cellulose sausage casings were an integral part of the wiener and, therefore, exempt under section 6364 as containers and under section 6359 as food products. The casings were necessary during the manufacturing process of the wiener and were only removed from the wiener prior to packaging for sale. The court held that the argument that the artificial casings became an integral or component part of the skinless wiener was fallacious because the casings were not sold but removed and destroyed.

No other points raised require discussion.

The judgment is affirmed.

PEEK, P. J., and PIERCE, J., concur.

Hearing denied; TRAYNOR and PEEK, JJ., not participating.

208 Cal.App.2d 799

⌊799 **In re ESTATE of Arnold O. MOHR, also known as A. O. Mohr, Deceased.**

Margaret SPARKS, Petitioner and Appellant,

v.

Eleanor A. MOHR, Respondent.

Civ. 20521.

District Court of Appeal, First District, Division 1, California.

Oct. 24, 1962.

Proceeding on an appeal from the Superior Court, County of Alameda, A. J. Woolsey, J., denying the motion to set aside a decree of settlement of final account and of final distribution. The District Court of Appeal, Sullivan, J., held that the order was not appealable.

Purported appeal dismissed.

Executors and Administrators
⊶314(12), 510(2)

Order of probate court denying motion to set aside decree of settlement of final account and of final distribution was not appealable. West's Ann.Code Civ.Proc. §§ 473, 1005.5; West's Ann.Prob.Code, § 1240.

Jos. M. Wapner, Martin B. Berman, Los Angeles, for appellant.

Robert J. Foley, Lawrence D. Saler, Richard L. Doutt, Albany, for respondent.

SULLIVAN, Justice.

Appellant Margaret Sparks has appealed upon a partial clerk's transcript from an order of the probate court denying her motion to set aside a decree of settlement of final account and of final distribution.

Appellant is the daughter and respondent Eleanor A. Mohr is the widow, executrix and sole legatee and devisee of the last will of Arnold O. Mohr, which was admitted to probate in the court below. The will, a holograph, made no provision for, or mention of appellant, in any way. It is conceded that appellant had notice of the will and of the filing of the petition for its probate. However, during the subsequent administration of the estate, appellant initiated no proceedings pursuant to section 1080 of the Probate Code to assert any claim that she was a pretermitted heir of the decedent or entitled to ⊥800 distribution of any part of his estate. On March 30, 1961, the court below entered its decree of final distribution under which all of the estate in the hands of the executrix and all after-discovered property was distributed to the respondent widow according to the terms of the will. The estate in the hands of the executrix consisted of three items of property, specifically described in the decree, which was all of the property described in the inventory. No appeal was taken from the above decree of distribution.

On September 15, 1961, almost six months after the entry of the above decree, and after it had become final, appellant filed a notice of motion to vacate it and set it aside "on the grounds that the inventory * * * filed in the within entitled matter did not include all of the decedent's assets." The notice recited that the motion would be based on the declaration of appellant filed therewith and on the records and files of the action. Appellant's declaration was generally to the effect that at the time of his death, her father owned certain personal property which had not been inventoried. Appellant's present counsel also filed a declaration stating that on June 13, 1961, he had written to respondent's counsel advising the latter that, according to information received from appellant, the executrix had not inventoried all of the decedent's assets and inquiring whether respondent's counsel would be willing to stipulate that the decree of distribution be set aside and an amended inventory filed. The declaration generally described the communications between counsel on the subject and the unsuccessful efforts of appellant's counsel to achieve the desired objective. The respondent Eleanor A. Mohr also filed a declaration in opposition to the motion, which we deem unnecessary to set forth in detail. In it respondent described the various articles of property claimed to have been omitted from the inventory and took the position that none of them were properly includable therein. A hearing was apparently had on the motion on October 4, 1961. The record before us contains no transcript of such proceedings. Thereafter, counsel presented certain arguments and authorities in letter form. On November 20, 1961, appellant's motion was denied, the court stating no reason for such action.

Appellant's motion does not indicate the legal theory upon which appellant invoked the relief sought. The letters from counsel to the probate judge, included in the present record, disclose that after the hearing appellant's counsel took the position that the basis of the motion was "because of the fraud ⊥801 perpetrated on the court in not setting forth all of the assets. This is extrinsic fraud, and in such situations, a motion is timely *whenever made*." (Original emphasis.)[1] In her opening brief filed here (appellant has filed no closing brief), appellant again adverts to the fact that her motion was timely made stating that "[w]hile it is true that at one time a motion under Section 473 of the Code of Civil Procedure had to be orally made within six months after a ruling," it is now settled that the motion is deemed to have been made when the notice thereof is duly served and filed, citing section 1005.5, Gardner v. Trevaskis (1958) 158 Cal.App.2d 410, 322 P.2d 545 dealing with section 473 and concluding with the statement that "[i]t is, therefore, obvious that the motion was timely." Despite the foregoing statement in her brief, appellant has in a letter to this court and on oral argument expressly stated that her motion was not based on section 473 but was based on extrinsic fraud. Although appellant bases such claim on the failure to inventory all assets, she does not point out either in the declarations filed in the probate court or in her brief here, how such failure, assuming it did exist, resulted in the denial or prevention of a fair adversary hearing to appellant so as to constitute extrinsic fraud.

Respondent contends that the order denying appellant's motion to set aside the decree of distribution is a nonappealable order. As we have pointed out, appellant has filed no closing brief answering this claim and has furnished this court with no authority establishing the appealability of the above order.

Section 1240 of the Probate Code specifies the orders in probate proceedings from which an appeal will lie. An order denying a motion to vacate and set aside a decree of settlement of final account and of final distribution is not one of the orders so specified and is therefore not appealable. (Estate of Glassgold (1950) 97 Cal.App.2d 859, 863, 218 P.2d 1016 (order denying motion under section 473 to vacate decree of final distribution); Estate of O'Dea (1940) 15 Cal.2d 637, 638, 104 P.2d 368 (order denying motion under section 473 to be relieved of default for failure to appear at trial); ⊥Estate of Smith (1959) ⊥80 175 Cal.App.2d 803, 805, 1 Cal.Rptr. 46 (order denying motion to vacate order appointing administrator); Estate of Nersisian (1957) 155 Cal.App.2d 561, 567, 318 P.2d 168 (order denying motion to vacate and set aside decree of partial distribution); Estate of Rouse (1957) 149 Cal.App.2d 674, 679, 309 P.2d 34 (order denying motion under section 473 to vacate order settling final account and judgment decreeing distribution).)[2] This is so whether the order denies relief sought under section 473 or under any other legal theory. As the court said in the Estate of O'Dea, supra, 15 Cal.2d 637, 639, 104 P.2d 368, 369, "[s]ection 1240 of the Probate Code is simply the reenactment of subsection 3 of section 963 of the Code of Civil Procedure, and this court has on numerous occasions held that no appeal will lie from an order in probate denying relief under section 473 of the Code of Civil Procedure, or from *any other order not specified* in subsection 3 of section 963 of the Code of Civil Procedure, * * *." (Emphasis added.)

The purported appeal is dismissed.

BRAY, P. J., and MOLINARI, J., concur.

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[1] The record also shows that appellant's counsel previously contended that the motion was timely because filed within six months of the entry of the decree, although heard after the expiration of such period (Code Civ.Proc. § 1005.5), citing a case dealing with section 473 of the Code of Civil Procedure. Such claim apparently conveyed the impression at the outset that appellant was seeking relief under section 473 although her counsel advised the court below that he was not.

[2] A well-established and long recognized exception exists in the case of an appeal from an order granting a new trial in certain probate proceedings, such as will contests. (Estate of Armstrong (1937) 8 Cal.2d 204, 208, 64 P.2d 1093; see Estate of O'Dea, supra; see generally 3 Witkin, Calif.Procedure, p. 2174.)

208 Cal.App.2d 848

848 **Marie PARSEKYAN, Plaintiff and Appellant,**

v.

Allen L. THOMPSON, Norma K. Nugent, Thomas P. Nugent and William G. Nugent, a partnership, doing business as A. E. Nugent Chevrolet Company, Defendants and Respondents.

Civ. 25827.

District Court of Appeal, Second District, Division 3, California.

Oct. 24, 1962.

Hearing Denied Dec. 19, 1962.

Action for injuries sustained by a pedestrian when struck in a crosswalk by defendants' automobile. Judgment for the defendants in the Superior Court of Los Angeles County, Kenneth W. Chantry, J., and the pedestrian appeals. The District Court of Appeal, Files, J., held that the evidence supported a finding that defendant driver was not negligent and that the question of the pedestrian's contributory negligence was one of fact.

Judgment affirmed.

Vacating, 24 Cal.Rptr. 393, opinion.

1. Automobiles ⚷160(4)

The statute does not necessarily require a motorist to anticipate that a pedestrian who has safely crossed in front of him will suddenly reverse his course and again step into the path of the vehicle. West's Ann.Vehicle Code, § 21950.

2. Automobiles ⚷244(6)

In action for injuries sustained by pedestrian struck in a marked crosswalk by defendants' automobile, where when pedestrian realized that an eastbound vehicle would not stop for her she moved backwards several steps into the extreme rear of the left side of the defendants' car, evidence supported finding that defendant driver was not negligent. West's Ann.Vehicle Code, § 21950.

3. Automobiles ⚷245(89)

In action for injuries sustained by pedestrian when struck by defendants' automobile in a marked crosswalk, question of whether pedestrian who made a sudden retreat and backed into the rear of the defendants' car was guilty of contributory negligence in light of the emergency was one of fact.

◆

Herbert A. Garabedian, Los Angeles, for appellant.

Stephen J. Grogan, Los Angeles, for respondents.

849 FILES, Justice.

Plaintiff, a pedestrian in a marked crosswalk, was struck by defendants' automobile. The case was tried without a jury and resulted in a judgment for defendants. The court found that defendant driver was not negligent and that the injury was caused by the negligence of the plaintiff. Plaintiff has appealed from the judgment. The sole issue on appeal is the sufficiency of the evidence.

The record contains evidence of these circumstances:

The accident occurred on November 11, 1958, at about 6 p. m. It was dark, the weather was clear and the street dry. Plaintiff was crossing Ventura Boulevard from north to south in a marked crosswalk near the intersection of Matilija Avenue. Ventura Boulevard is divided into six lanes. Traffic was heavy. Defendants' Buick was westbound in the first lane north of the center line, at a speed between 30 and 35 miles per hour. The posted speed limit there was 35 miles per hour. 850 The driver was looking ahead and his headlights were on. Plaintiff safely crossed the westbound lanes and arrived at or near the center of the street (two feet south of the center line according to defendant; two steps north of the center line according to plaintiff). When she realized that an eastbound vehicle would not stop for her she moved backwards three or four steps. The driver of the Buick applied his brakes and swerved to the right. The front of the Buick cleared the plaintiff, but she backed into the extreme rear of the left side of the car.

[1] Vehicle Code, section 560, subdivision (a) (section 21950 in the 1959 recodification) requires that a vehicle shall yield the right of way to a pedestrian in a marked crosswalk. This section does not necessarily require a driver to anticipate that a pedestrian who has safely crossed in front of him will suddenly reverse his course and again step into the path of the vehicle. (Giles v. Happely, 123 Cal.App.2d 894, 267 P.2d 1051.)

Plaintiff argues that in this case the fact that she reversed her course is immaterial because defendant did not see her pass in front of him the first time. The driver testified that when he first saw the plaintiff she was two feet south of the double line which marks the center of the street, and that she was then moving backwards towards the path of his car. Plaintiff's theory is that her right of way in a crosswalk is the same whether she is walking forwards or backwards; and that in evaluating the conduct of the driver, plaintiff must be regarded simply as a pedestrian lawfully moving across the center of the street from south to north. Even though we assume that a pedestrian running backwards has the full protection of Vehicle Code, section 560, it does not follow that there is no support for the trial court's finding that defendant was free from negligence.

[2] It must be borne in mind that the critical events of this case occurred in a very few seconds. No witness could describe the times and distances with such precision as to demonstrate conclusively just how the collision occurred. The trier of fact was required to draw inferences from the testimony and the physical facts. The driver, proceeding at a lawful 30 to 35 miles per hour, suddenly discovered a pedestrian across the center line and facing away from him. The physical facts, together with the driver's testimony, indicate that by the time he discovered plaintiff's presence it was too late to stop. The only possible negligence of the driver then would 851 be in his failure to discover her sooner than he did. It was dark, there were other cars directly in front of defendant, and plaintiff had arrived at the center of the street without stopping traffic. The evidence does not show just how long plaintiff was in the center of the street before she reversed her course. She testified that after reaching the center of the street she raised her hand to try to halt the eastbound traffic, and when she saw that the nearest vehicle would not stop she started to go back. Defendant testified there were other cars ahead of him, the nearest being about 50 feet ahead. The trial court was entitled to infer that plaintiff had crossed the westbound lanes in front of cars which were ahead of defendant, and that defendant's view of her was cut off by the cars ahead. The evidence supports the finding that the defendant was not negligent in failing to discover sooner that plaintiff was stranded in the center of the street.

The decisions in Novak v. Dewar, 55 Cal.2d 749, 13 Cal.Rptr. 101, 361 P.2d 709, and Gray v. Brinkerhoff, 41 Cal.2d 180, 258 P.2d 834, do not require a contrary result. In each of those cases the defendant driver had an adequate opportunity to observe the pedestrian's approach.

[3] As an alternate ground of decision, the evidence supports the finding that plaintiff was guilty of contributory negligence. Plaintiff argues that sudden retreat was not a negligent act because she was reacting to an imminent peril. The question of whether plaintiff acted properly in the light of the emergency was a question of fact. (James v. American Buslines, 111 Cal.App.2d 273, 244 P.2d 503.) If the trial court accepted plaintiff's testimony as to where she was, she started back before she reached the center line. On that hypothesis, she never was in any danger from an eastbound car, and there was no good reason for her to step back. The driver of the car which was following defendants' Buick testified that the Buick was traveling about three feet north of the double center line. Thus there was room for plaintiff to stand in safety, had she not gone back so far. We

cannot say, as a matter of law, that the trial court was required to find that plaintiff's retreat into the side of defendants' automobile was a reasonable and prudent act.

The judgment is affirmed.

SHINN, P. J., and FORD, J., concur.

209 Cal.App.2d 7

⊥7 ⊥**In the Matter of the ESTATE of Estella M. WIEMER, Deceased.**

Thomas LEE and Linda Lee, by and through their Guardian Ad Litem, Crystal Lee, Appellants,

v.

Estrellita ARMSTRONG, Alfred Lee, Jr., Vera Girard, Orlan Kiser and Maude Smith Gill, Respondents.

Civ. 7030.

District Court of Appeal, Fourth District, California.

Oct. 24, 1962.

Estate proceeding. The Superior Court, Riverside County, Russell S. Waite, J., entered a decree in regard to construction of two instruments admitted to probate as last will of testatrix, and an appeal was taken. The District Court of Appeal, Coughlin, J., held that holographic instrument which testatrix called a will controlled disposition of her estate where it was independently sufficient to dispose of the whole of her estate, did not indicate any intention to add specific bequests to a previously executed formal will, contained provisions which, when considered as a unit, were wholly inconsistent with dispositive provisions of the former will, and was latest testamentary expression of testatrix.

Order reversed in part with instructions and in part affirmed.

1. Wills 🔑182

Where two instruments are admitted to probate as last will and the later thereof independently disposes of decedent's entire property in a manner inconsistent with the dispositive provisions of the earlier declaration, provisions of the later instrument control.

2. Wills 🔑182

Holographic instrument, which testatrix called a will, controlled disposition of her estate where it was independently sufficient to dispose of the whole of her estate, did not indicate any intention to add specific bequests to a previously executed formal will, and contained provisions which, when considered as a unit, were wholly inconsistent with dispositive provisions of the former will.

◆

A. G. Ritter, Los Angeles, for appellants.

Gordon, Knapp, Gill & Hibbert, and B. Richard Marsh, Los Angeles, for respondent Maude Smith Gill.

⊥COUGHLIN, Justice. ⊥8

The issues on this appeal involve the construction of two instruments admitted to probate as the last will, and a codicil thereto, of Estella M. Wiemer, deceased.

Mrs. Wiemer executed a formal will on December 8, 1953 by which she disposed of her entire estate; devised and bequeathed specific property to her two sisters, her brother, a foster grand⊥daughter, a foster ⊥9 grandson, and a foster son-in-law, or to their heirs in the event they predeceased the testatrix; left the residue of her estate to the foster granddaughter and foster grandson; and named the latter executors of her will. In this will the testatrix declared that she had no natural children, but that she had raised Genevieve Lee for whom she had the same affection as a natural daughter. The persons referred to herein as the foster son-in-law, foster granddaughter, and foster grandson are the husband and children respectively of

Genevieve Lee. The foster grandson had two children who were not named in the formal will. After its execution, the foster son-in-law, the brother, and a sister died. On June 22, 1959, which was approximately 5½ years after execution of the formal will, Mrs. Wiemer wrote the following:

> "Monday June 22 – 59
> "Just came from Dr. Stititus office
> Heart Examined. Found it
> irregular due to breathing spell
> I was having.
> They took a Cardigraf
> Dont know what it shows?
> *"Will*
> "If I should die suddenly
> I want Maud to have 10,000
> Tommy—Lindy the rest of my
> property, $5,0000 [1] for Orlan Kiser
> Bury near Frank—Get Gertrude
> to take care of services and Bill
> & Janise with my own family
> Alfred—Estrellita
> Estella M. Wiemer."

Tommy and Linda were the children of the foster grandson Alfred; Maude was the surviving sister of the testatrix; Frank was the latter's deceased husband; Alfred and Estrellita were her foster grandson and foster granddaughter respectively; and Orlan Kiser was the former husband of Estrellita who lived near the testatrix at the time the holographic will was executed. It would appear that sometime after the execution of the formal will Estrellita married a man named Armstrong.

The foster grandson Alfred and the foster granddaughter Estrellita petitioned the court that the instruments of December 8, 1953 and June 22, 1959 be admitted to pro-
⊥10 bate, respec⊥tively, as the last will, and a codicil thereto, of Estella M. Wiemer, and that they be appointed executors thereof. The court made its order accordingly. Thereafter upon a petition to approve a current account, for partial distribution, and for other relief, construction of the two instruments in question was placed in issue by appropriate pleadings; the court determined that the provisions of both instruments respecting the specific bequests and devises therein should control distribution thereof, and that the residue of the estate, after satisfaction of all of said specific bequests and devises, should be distributed in accord with the residuary clause in the holographic will, i. e., to the foster great grandchildren Tommy and Linda; findings of fact in accord therewith were made and filed; an order was entered thereon decreeing partial distribution and also granting other relief; and the residuary legatees Tommy and Linda appeal from the whole order so entered. Although the executors, all of the heirs under the formal will who appeared in the proceedings before the trial court, and Orlan Kiser properly may be designated respondents herein, only Maude Gill, the decedent's surviving sister, has responded to the appeal by an appearance before this court.

In substance, the trial court concluded that the two instruments should be construed together to determine the intention of the testatrix; that there was no inconsistency between those provisions of the two wills directing specific bequests or devises; that distribution should be made to the specific legatees and devisees named in each of the two instruments as therein provided; that the provision in the holographic will "Tommy—Lindy the rest of my property" disposed of the residue of the estate after satisfaction of the specific devises and bequests in both wills; that this residuary provision was in conflict with the residuary provisions in the formal will; and that the residuary clause in the holographic will should prevail, as it was later in time.

The foster great grandchildren, Tommy and Linda, contend that the holographic will is an independent testamentary declaration of Mrs. Wiemer's intention; that its dispositive provisions are wholly inconsistent with those contained in the formal will; that these provisions disposed of the whole of her estate; that they alone control disposition of the estate; and that the order of the trial court to the contrary was error. We are in accord with this contention.

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[1] From extrinsic evidence the court determined that the figures "$5,0000" were meant to be $5,000.00. This finding is uncontested.

The conclusion reached by the trial court ⊥11 results from its ⊥ application of the rule that:

> "Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument." (Prob.Code, sec. 101; Estate of Iburg, 196 Cal. 333, 334, 238 P. 74; Estate of Cross, 163 Cal. 778, 781, 127 P. 70; In re Ladd's Estate, 94 Cal. 670, 674, 30 P. 99);

from its failure to consider the later instrument, i. e., the holographic will, as a unit of expression; and from its consequent conclusion that the residuary clause in the holographic will referred to the residuum of the estate after distribution of the specific bequests and devises designated in both that will and the former will, rather than to the property remaining after distribution of the specific bequests designated in the holographic will alone.

> "In the construction of wills the paramount rule, to which all others must yield, is that a will is to be construed according to the intention of the testator, as expressed therein," (Estate of Lawrence, 17 Cal.2d 1, 6, 108 P.2d 893, 896);

this intention must be determined from the language used in his will (Estate of Lawrence, supra, 17 Cal.2d 1, 6, 108 P.2d 893; Estate of Plumer, 159 Cal.App.2d 389, 392, 324 P.2d 346; Estate of Luckel, 151 Cal.App.2d 481, 487, 312 P.2d 24; Estate of O'Brien, 74 Cal.App.2d 405, 408, 168 P.2d 432; Estate of Moorehouse, 64 Cal.App.2d 210, 216, 148 P.2d 385; Estate of Mallon, 28 Cal.App.2d 106, 110, 81 P.2d 992; Estate of Bourn, 25 Cal.App.2d 590, 602, 78 P.2d 193); and the rule that two testamentary instruments should be construed together, "like any other rule of construction, is but a guide for the purpose of ascertaining" that intention. (Estate of Bergland, 180 Cal. 629, 632, 182 P. 277, 278, 5 A.L.R. 1363; Estate of Brodersen, 102 Cal.App.2d 896, 902, 229 P.2d 38.)

[1, 2] The trial court correctly determined that, by the provisions in the holographic will stating, "Tommy—Lindy the rest of my property", Mrs. Wiemer intended to devise and bequeath to her two foster great grandchildren the residue of her estate. The error committed by that court was in concluding that in so stating Mrs. Wiemer was not referring to the "rest" of her "property" after the payment of $10,000 to Maude, her sister, and $5000 to Orlan Kiser, but was referring to the "rest" of her "property" after the payment of these two legacies and compliance with the specific bequests and devises contained in her prior will. In Estate of Bergland, 180 Cal. 629, 632–633, 182 P. 277, 279, 5 A.L.R. 1363, the court stated:

> "The two wills should be read together in the sense that each should be read in the light of the other, and their terms ⊥ harmonized so far as possible, ⊥12 but this is a very different thing from changing the express terms of the later will by importing conditions into it without express warrant contained in it itself. We do not mean to say that a case is not possible where this may be properly done by implication only. But to justify this the circumstances must be such as fairly to show affirmatively that the testamentary intent of the decedent at the time of his last expression included not merely the matters which he then set down, but also those which he had set down on a previous occasion."

This statement is applicable to the case at bar. The holographic instrument of June 22, 1959 was an independent testamentary act; was entitled "Will"; was executed more than five years after the formal "Will"; made no reference to the latter; followed the death of some of the beneficiaries in the prior will; and was sufficient in itself to completely dispose of all of the property of the testatrix. Where two instruments are admitted to probate as the last will of a decedent and the later thereof, as such, fully and independently disposes of his entire property in a manner inconsistent with the dispositive provisions of his earlier declaration, the provisions of the later instrument control the disposition of his estate. (Estate of Salmonski, 38 Cal.2d 199, 209–212, 238 P.2d 966; Estate of Siemers, 202 Cal. 424, 435, 261 P. 298; Estate of Bassett, 196 Cal. 576, 580, 238 P. 666; Estate of Iburg, supra, 196 Cal. 333, 334–338, 238 P. 74; Estate of Marx, 174 Cal. 762, 764, 164 P. 640, L.R.A.1917F, 234; Estate of Brodersen, supra, 102 Cal.App.2d 896, 902, 229 P.2d 38; Estate of Martin, 31 Cal.App.2d 501, 506, 88 P.2d 234; Estate of Mallon, supra, 28 Cal.App.2d 106, 110, 81 P.2d 992.) Under these circumstances, although "the will and codicil together constitute the decedent's last will in testamentary disposition of his estate, they will not be regarded as a single instrument and as if both had been executed at the time of making of the codicil", because the manifest intention of the testator requires otherwise. (Estate of Salmonski, supra, 38 Cal.2d 199, 210, 238 P.2d 966.) In the instant case, the holographic instrument which the testatrix called a "Will", and the court in the order admitting it to probate called a "codicil", was independently sufficient to dispose of the whole of her estate; did not indicate any intention to add specific bequests to her previously executed formal will; contained provisions which, when considered as a unit, were wholly inconsistent with the dispositive provisions of the former will; and, being the decedent's 13 latest testamentary expression, controls the disposition of her estate. (Prob.Code, secs. 72, 103; Estate of Salmonski, supra, 38 Cal.2d 199, 212, 238 P.2d 966; Estate of Iburg, supra, 196 Cal. 333, 334, 238 P. 74.)

That part of the findings of fact and conclusions of law which construe the testamentary instruments in question, except as they determine that the bequest to Orlan Kiser is in the sum of $5,000.00, are set aside, and that part of the order appealed from which decrees partial distribution is reversed, with instructions to make and file findings of fact and conclusions of law respecting such issues in harmony with the views expressed herein, and to enter an order of partial distribution in accord therewith and in accord with the law and the facts in the premises. All other parts of the order appealed from are affirmed. The appellants Thomas Lee and Linda Lee will recover their costs on appeal.

GRIFFIN, P. J., and SHEPARD, J., concur.

58 Cal.2d 645, 375 P.2d 641

⊥645 ⊥**The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Robert Karl SIDENER, Defendant
and Appellant.
Cr. 7014.**

Supreme Court of California.
Oct. 25, 1962.
Rehearing Denied Nov. 21, 1962.

Convicted, in the Superior Court, Los Angeles County, John F. Aiso, J., of possession of a narcotic and found to have previously violated the same statutory provisions, the defendant appealed. The Supreme Court, Traynor, J., held that Health and Safety Code provision directing that charges of recidivism in narcotics cases not be dismissed except upon motion of district attorney embodies a part of the prosecutor's common-law power of nolle prosequi, presents a valid legislative determination under the constitution that district attorney rather than adult authority have primary responsibility for determining punitive consequences of recidivism and is not in conflict with constitutional provisions relating to judicial power.

Affirmed.

Schauer, McComb, and White, JJ., dissented.

Opinion 16 Cal.Rptr. 26 vacated.

**1. Constitutional Law 🔑80(1)
Criminal Law 🔑1201**

Health and Safety Code provision directing that charges of recidivism in narcotics cases not be dismissed except upon motion of district attorney embodies a part of the prosecutor's common-law power of nolle prosequi, presents a valid legislative determination under the constitution that district attorney rather than adult authority have primary responsibility for determining punitive consequences of recidivism in narcotics cases and is not in conflict with constitutional provisions relating to judicial power. West's Ann.Health & Safety Code, §§ 11500, 11501, 11502, 11530, 11531, 11532, 11540, 11557, 11715.6, 11718; West's Ann.Pen.Code, §§ 644, 1203, 3020, 3024, 3047–3048.5; West's Ann.Const. art. 3, § 1; art. 6, § 1; art. 10, § 1.

**2. Criminal Law 🔑302(1)
Indictment and Information 🔑144**

Power of dismissal is not vested exclusively in the courts but may be given to prosecutor by the legislature. West's Ann. Pen.Code, §§ 1099, 1385, 1386; West's Ann. Health & Safety Code, § 11718.

3. Criminal Law 🔑1208(5)

When narcotics charges have not been dismissed pursuant to authority granted by the legislature, the court must pass sentence prescribed by statute and may not impose sentence other than that prescribed. West's Ann.Pen.Code, §§ 12, 1203 et seq.; West's Ann.Health & Safety Code, § 11718.

4. Constitutional Law 🔑70(1)

Any attempt by court to dismiss charges of recidivism in narcotics case in face of statute directing that such be dismissed only on motion of district attorney would be flagrant usurpation of legislative power not conferred upon courts by constitutional provisions. West's Ann.Pen.Code, §§ 12, 1203 et seq.; West's Ann.Health & Safety Code, § 11718; West's Ann.Const. art. 3, § 1; art. 6, § 1; West's Ann.Pen.Code, § 969.

**5. Criminal Law 🔑302(1)
Indictment and Information 🔑144**

Broad constitutional principles of separation of powers and due process do not, while resting complete discretion in prosecutor as to dismissal of recidivism charges in narcotics case before case begins, deny him all such discretion once information is filed. West's Ann.Health & Safety Code, §§ 11500, 11501, 11502, 11530, 11531, 11532, 11540, 11557, 11715.6, 11718; West's Ann.Pen.Code, §§ 644, 1203, 3020, 3024, 3047–3048.5; West's Ann.Const. art. 3, § 1; art. 6, § 1; art. 10, § 1.

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Ellery E. Cuff, Public Defender, Fred Kilbride and James L. McCormick, Deputy Public Defenders, for defendant and appellant.

Stanley Mosk, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for plaintiff and respondent.

⊥646 ⊥TRAYNOR, Justice.

Defendant appeals from a judgment of conviction on an information charging him with possession of a narcotic (heroin) in violation of Health and Safety Code, section 11500. The trial court also found to be true the charge that defendant had been convicted of violating the same section in 1955. At the hearing on probation and sentencing the trial judge refused to consider dismissal of the charge of prior conviction on the ground that the district attorney had made no motion for dismissal as ⊥647 required by ⊥Health and Safety Code, section 11718.[1] Probation was denied (Health & Saf.Code, § 11715.6) and defendant was sentenced to an increased term as a second offender. (Health & Saf.Code, § 11500.)

The Legislature has determined that recidivists should be punished more severely than first offenders (e. g., Pen.Code, §§ 644, 1203, 3020, 3024, 3047–3048.5; Health & Saf.Code, §§ 11500, 11501, 11502, 11530, 11531, 11532, 11540, 11557, 11715.6) and has directed that charges of recidivism in narcotics cases shall not be dismissed except upon motion of the district attorney.

[1] Defendant contends that the power to dismiss such charges is vested exclusively in the courts by article VI, section 1[2] and article III, section 1[3] of the California Constitution, and that Health and Safety Code, section 11718 is therefore invalid. This contention is unsound. Any statements or implications in People v. Burke, 47 Cal.2d 45, 52, 301 P.2d 241, and People v. Valenti, 49 Cal.2d 199, 206, 316 P.2d 633, to the contrary were not necessary to the holdings in those cases and are disapproved.

In section 11718 the Legislature has adopted part of the prosecutor's common-law power of nolle prosequi, which included the power to strike allegations that would increase punishment. (State v. Burke, 38 Me. 574, 575; Anonymous, 31 Me. 590; Commonwealth v. Tuck, 37 Mass. (20 Pick.) 356, 364–367; Commonwealth v. Briggs, 24 Mass. (7 Pick.) 177, 178–179; Baker v. State, 12 Ohio St. 214, 217–218.) That power, hundreds of years old[4] and ⊥still ⊥648 recognized in many jurisdictions having constitutional provisions essentially identical with section 1 of Article VI (United

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[1] "In any criminal proceeding for violation of any provision of this division no allegation of fact which, if admitted or found to be true, would change the penalty for the offense charged from what the penalty would be if such fact were not alleged and admitted or proved to be true may be dismissed by the court or stricken from the accusatory pleading except upon motion of the district attorney."

[2] "The judicial power of the State shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, district courts of appeal, superior courts, municipal courts, and justice courts."

[3] "The powers of the government of the State of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted."

[4] An incident related in 2 Campbell's Lives of the Chancellors 173 is of interest in this connection. After he had ordered the imprisonment of a group of fanatics called "Prophets" for seditious language, Lord Holt was visited by Lacy, one of their friends, who informed a servant that he carried a message "from the Lord God." Lacy was admitted and told Lord Holt: "I come to you a prophet from the Lord God, who has sent me to thee, and would have thee grant a *nolle prosequi* for John Atkins, his servant, whom thou hast cast into prison." Lord Holt replied: "Thou art a false prophet, and a lying knave. If the Lord God had sent thee it would have been to the Attorney-General, *for He knows that it belongeth not to the Chief Justice to grant a nolle prosequi; but I, as Chief Justice, can grant a warrant to commit thee to bear him company.*" (See Wharton, Criminal Pleading and Practice (9th ed. 1889) § 383, p. 268, fn. 2.)

States v. Brokaw, D.C.Ill., 60 F.Supp. 100, 101; State v. Broussard, 217 La. 90, 95, 46 So.2d 48; State v. Kearns, Ohio Com. Pl., 129 N.E.2d 543, 545; State v. Charles, 183 S.C. 188, 194, 190 S.E. 466; see 69 A.L.R. 240, 241–243), was not abrogated by that section. The phrase "judicial power" cannot reasonably be given a meaning that it has never before been thought to have in this or any other state to invalidate an act of the Legislature. Courts are not the only public agencies constitutionally empowered to determine the punitive consequences of recidivism.

The contention that prosecutors have never had the common-law power of nolle prosequi in this state is based solely on the enactment at the first and second legislative sessions (Stats.1850, ch. 119, p. 323; Stats.1851, ch. 29, p. 279) of the predecessors of Penal Code, sections 1385 and 1386.[5] Thus it was a legislative act, not a constitutional provision, that deprived prosecutors of such power in California. In the exercise of the same power by which the 1850 and 1851 Legislatures rejected nolle prosequi, the 1959 Legislature chose to restore it in part. The fact that sections 1385 and 1386 were necessary to give to the courts this power traditionally vested in prosecutors demonstrates that the common-law rule was not abrogated by the general language of the Constitution vesting the "judicial power" in the courts.

The Legislature has never completely rejected the prosecutor's common-law power ⊥645 of nolle prosequi. The same Legislature that enacted the predecessors of section 1385 and 1386 in 1850 and 1851 also adopted the predecessor of Penal Code, section 1099 which provides: "When two or more defendants are included in the same accusatory pleading, the court may, at any time before the defendants have gone into their defense, *on the application of the prosecuting attorney,* direct any defendant to be discharged, that he may be a witness for the people." (Italics added.) In People v. Bruzzo, 24 Cal. 41, this court was confronted with the question whether a court had authority without a motion for dismissal by the district attorney to dismiss a joint defendant so that he might become a witness for the people. The district attorney, as in the present case, had declined to move for dismissal. It was held that "The Court has no power to discharge Bruzzo at common law, nor under the Act of 1851, on the motion of his own counsel." (24 Cal. at p. 51.)

[2] The Bruzzo case demonstrates that the power of dismissal is not vested exclusively in the courts, but may be given to the prosecutor by the Legislature. Health and Safety Code, section 11718 gives the district attorney the same power with respect to dismissal of charges of recidivism in narcotics cases that Penal Code, section 1099 gives him with respect to dismissal of charges against joint defendants. Both sections are a partial legislative adoption of the prosecutor's common-law power of nolle prosequi.

The Bruzzo case cannot be distinguished on the ground that dismissal of a charge of a prior conviction is effective only for sentencing purposes. The common-law power of nolle prosequi included dismissal of the prosecution entirely or any separable part thereof. Charges could be dismissed by entry of a nolle prosequi before the jury was impanelled, while the case was before the jury, or after verdict. (See Wharton, Criminal Pleading and Practice (9th ed. 1889) § 448, p. 313; 14 Am.Jur., Criminal Law, §§ 296–298, pp. 967–968; 22A C.J.S. Criminal Law § 457a, pp. 3–4.)

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[5] Section 1385 provides: "The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."

Section 1386 provides: "The entry of a nolle prosequi is abolished, and neither the Attorney General nor the District Attorney can discontinue or abandon a prosecution for a public offense, except as provided in the last section."

[3] The meaning of constitutional provisions, however, is not static, and the scope of judicial power is not found in history alone. The definition and classification of public offenses and the punishment therefor are legislative matters. (Board of Harbor Commrs. v. Redwood Co., 88 Cal. 491, 493, 26 P. 375; Ex parte Cox, 63 Cal. 21; Moore v. Municipal Court, 170 Cal.App.2d 548, 556, 339 P.2d 196.) If charges have not been dismissed pursuant to the authority granted by the Legislature, the court must pass sentence as ⊥650 prescribed by statute (Pen.Code, § 12) and may not impose any sentence other than that prescribed. (People v. Gonzales, 36 Cal.App. 782, 784, 173 P. 407; see also Pen.Code, § 1203 et seq. relating to probation and suspension of sentences.)

[4] The charge of a prior conviction in the present case has not been dismissed pursuant to legislative authority. The court found that the charge was true and was therefore bound to impose the sentence prescribed by law. The court could no more dismiss this charge without statutory authority than it could dismiss a charge against any defendant convicted of murder, arson, rape or any other crime. A court may feel that the punishment prescribed by the Legislature for a recidivist narcotics offender is too severe or that by dismissing one or more charges punishment can be imposed that would better serve to rehabilitate him. To dismiss the charges in the face of Health and Safety Code, section 11718, however, would be a flagrant usurpation of legislative power and an arrogant affectation of wisdom in the matter of punishment and rehabilitation superior to that of the Legislature. Certainly Article VI, section 1 and Article III, section 1 do not endow courts with such power.

[5] The fact that prior convictions are now given greater weight than they once were does not distinguish them from the host of other considerations of penology that are now given greater or lesser weight than they once were or compel the conclusion that their punitive effect is for the courts alone. Like premeditation or malice aforethought in homicide or bodily harm in kidnapping, prior convictions have been made operative facts for the determination of punishment. Every day prosecuting attorneys exercise broad powers in this respect. It is they who decide what crime is to be charged or if any crime is to be charged. (Board of Supervisors v. Simpson, 36 Cal.2d 671, 676, 227 P.2d 14; see Klein, District Attorney's Discretion Not to Prosecute, 32 L.A.B. Bull. 323–334; Note, Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction, 65 Yale L.J. 209; Remington & Joseph, Charging, Convicting, and Sentencing the Multiple Criminal Offender, 1961 Wis.L. Rev. 528, 530; Wright, Duties of a Prosecutor, 33 Conn. B.J. 293–295.) Moreover, it is only because the Legislature so directed that they are bound to charge all prior convictions (Pen.Code, § 969) once the decision to prosecute is made. It would exalt form over substance to hold that broad constitutional principles of separation of powers and due process of law permit vesting complete discretion ⊥651 in the prosecutor before the case begins, but deny him all such discretion once the information is filed.

There are innumerable facts other than the commission of the crime itself that may have far more bearing on the punishment imposed than prior convictions. If not only their existence but their effect on punishment must be determined solely by courts, the indeterminate sentence law and the legislative restrictions on the court's power to grant probation must fall. The indeterminate sentence law has been sustained, however, on the theory that a conviction carries with it judicially determined liability for the maximum sentence and that any remission from that maximum may be determined by an administrative agency (In re Lee, 177 Cal. 690, 692–693, 171 P. 958; In re Wells, 35 Cal. 2d 889, 893, 221 P.2d 947; In re Smith, 33 Cal.2d 797, 804–805, 205 P.2d 662), subject only to limited judicial review. (In re McLain, 55 Cal.2d 78, 87, 9 Cal.Rptr. 824, 357 P.2d 1080.) The Legislature could provide life imprisonment as the maximum term for all narcotics convictions without possibility of probation, and it could leave it solely to the Adult Authority to determine the punitive effect of prior convictions. It could set out standards to govern the Adult Authority and provide for judicial review of its findings with respect to relevant facts. It might, for example, provide that prior convictions should be determined, not at the trial but by the Adult Authority at a subsequent hearing subject to judicial review. Surely it could not reasonably be contended that in such a review proceeding the judicial power included not only a review of the facts, but the power to instruct the Adult Authority to ignore them.

The Legislature has been given express constitutional power to determine what officers, agencies or boards may exercise the power now exercised by the Adult Authority and the scope of such powers.[6] The Legislature is authorized to provide that part of the powers that might otherwise be exercised by the Adult Authority alone shall be exercised by district attorneys.

⊥In determining that the district attorney rather than the Adult Authority or the trial court shall have primary responsibility for determining the punitive consequences of recidivism in the individual narcotics case, the Legislature in the exercise of its constitutional power has simply chosen one public officer rather than another. Some judges may think they are best qualified to make this determination; some district attorneys may think they are; others may think that neither judges nor district attorneys should be entrusted with that responsibility. In section 11718 of the Health and Safety Code the Legislature has designated the district attorney as the officer that can best effect the public policy of the state. " '[I]t is not our concern whether the Legislature has adopted what we might think to be the wisest and most suitable means of accomplishing its objects.' " (Subsequent Injuries Fund, State of California v. Industrial Acc. Com., 48 Cal.2d 365, 372, 310 P.2d 7, 11, quoting City of Walnut Creek v. Silveira, 47 Cal.2d 804, 811, 306 P.2d 453.)

The judgment is affirmed.

GIBSON, C. J., and PETERS and TOBRINER, JJ., concur.

SCHAUER, Justice (dissenting).

In my view section 11718 of the Health and Safety Code[1] (both by its terms and as applied here during the trial of the defendant in the superior court on the felony charge of possessing a narcotic drug in violation of section 11500 of the same code) is unconstitutional under both the United States and California Constitutions in that it denies the defendant due process of law in the adjudication of material issues affecting probation and sentence (U.S.Const., 5th and 14th Amends.; Cal.Const. art. I, §

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[6] Article X, section 1 (formerly section 7) of the California Constitution provides: "The Legislature may provide for the establishment, government, charge and superintendence of all institutions for all persons convicted of felonies. For this purpose, the Legislature may delegate the government, charge and superintendence of such institutions to any public governmental agency, or agencies, officers, or board or boards, whether now existing or hereafter created by it. Any of such agencies, officers, or boards shall have such powers, perform such duties and exercise such functions in respect to other reformatory or penal matters, as the Legislature may prescribe."

[1] Health and Safety Code section 11718, enacted in 1959, provides:

"In any criminal proceeding for violation of any provision of this division ["Narcotics," §§ 11000–11797] *no allegation of fact* [in an indictment or information] which, if admitted or found to be true, would change the penalty for the offense charged from what the penalty would be if such fact were not alleged and admitted or proved to be true *may be dismissed by the court or stricken from the accusatory pleading except upon motion of the district attorney*." (Italics added.)

13). In particular, section 11718 has deprived the defendant at bench of his constitutional right to have a judicial officer (the trial judge) hear, and in the exercise of discretion vested exclusively in that officer determine, the important question of dismissal of a charge of a prior conviction (Cal. 653 Const. art. VI, §§ 1, 5; Pen. Code, §§ 995, 1238, and 1385 [2]); furthermore, by subjecting the exercise of an inherently judicial function to the unreviewable discretion of a member of the executive branch, the subject section violates the constitutional requirement of separation of powers (Cal. Const. art. II, § 1).

The general asseverations of the majority as to the powers of the Legislature to fix punishments for criminals, to differentiate among crimes and between first offenders and recidivists, and to prescribe the conditions for probation or parole, etc., are of course unquestioned. But the elaboration of such undoubted fundamentals should not be allowed to obscure the issue. Certainly the Legislature could absolutely prohibit the granting of probation or parole to anyone convicted of a narcotics (or any other) offense; or it could ordain any minimum and maximum terms it sees fit, or a mandatory life term without parole or even a nondiscretionary death penalty for such offenses. But the Legislature cannot—without transgressing our constitutional division of powers—transfer from the judicial to the executive branch of government the power either to grant or to deny, or to preclude judicial resolution of, a motion made prior to entry of judgment in a felony criminal action, the ruling on which will affect the substantial rights of the defendant under the judgment to follow.

Section 11718 actually goes farther than to transfer a segment of the judicial power 654 to the executive. It unquestionably purports to curtail the jurisdiction of the court by granting to the district attorney the unreviewable and absolute power (with no standard prescribed for its exercise) to preclude the judge from exercising any discretion in ruling on a motion in a criminal action for an order which would substantially affect the defendant's eligibility for probation, parole and the term of his imprisonment. It bears reiteration that the Legislature, of course, *by general laws* can control eligibility for probation, parole and the term of imprisonment, but it cannot abort the *judicial process* by subjecting a judge to the control of the district attorney.

Section 11718 by its very terms tacitly recognizes—as under the Constitution is implicit—that the court has jurisdiction to entertain and pass on a motion for the relevant relief. But as to the judge's exercise of the court's jurisdiction in ruling on any such motion the statute directs that "no allegation of fact [in an indictment or information filed witn the court] which, if admitted or found to be true, would change the penalty for the offense charged from what the penalty would be if such fact were not alleged and admitted or proved to be true *may be dismissed by the court or stricken* from the accusatory pleading *except upon motion of the district attorney.*" (Italics added.) Constitutional jurisdiction of the court to act cannot be turned on and off at the whimsy of either the district attorney or the Legislature. The power to act under our system of government means the power of an independent court to exercise its judicial discretion, not to servilely wait on the pleasure of the executive.

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[2] Section 1385 reads:

"The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."

Section 995 defines certain situations (none of which, as such, is material here except as recognizing the inherent power of the court to act) wherein the "indictment or information must be set aside" upon motion of the defendant.

Section 1238 evidences implied powers of the trial court by providing that "An appeal may be taken by the people:

"1. From an order setting aside the indictment, information, or complaint;

* * *

"5. From an order made after judgment, affecting the substantial rights of the people;

"6. From an order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed."

It should be noted here (as is hereinafter in the text shown in more detail) that the power to control the cause—including the power to dismiss or to set aside an accusatory pleading or portion thereof—is not created by the mentioned code sections. That power stems from the Constitution and is merely regulated *procedurally* by the directives of the pertinent statute, such as, e. g., section 1385, requiring that the reasons for the dismissal of an action be set forth in an order entered in the minutes.

The majority summarize (25 Cal.Rptr. 698, 375 P.2d 642) the trial court's action on the question of dismissal of the charge of defendant's prior conviction, but fail to quote the following illuminating language of the trial judge:

"THE COURT: * * * Is there any legal cause why judgment should not be pronounced and sentence passed?

"MR. KILBRIDE [deputy public defender]: I am in doubt—there is no legal cause other than I do not know yet what *the decision of the District Attorney was.*

"THE COURT: I will let that be made known to you at this time. The *District Attorney after due deliberation* has declined to initiate a motion to strike the prior conviction alleged. It [Health & Saf.Code, § 11718] therefore *ties the hands of this Court in which the Court has no discretion.*" (Italics added.)

Accordingly, the court (deeming the subject statute to be ⊥655 valid) did not in the exercise of its jurisdiction determine, but was compelled *by the district attorney's action* to deny, probation (Health & Saf.Code, § 11715.6 post, fn. 12) and to sentence defendant to state prison for an increased term (Health & Saf.Code, § 11500). The judge's action in imposing the increased term was compelled not by legislative determination that the longer term prescribed in section 11500 must in any event follow conviction of the offense, but only by the determination of the district attorney—*on no standard prescribed by law*—that as to this particular defendant *he* would preclude the court from exercising its discretion in a matter which otherwise was within the court's jurisdiction. In other words, the district attorney exercised *his absolute* discretion and section 11718 compelled the judge to abdicate the function of his office. In the next case to follow, before the same judge, the district attorney (again subject to no prescribed standard) might elect to permit *that defendant* to have the benefit of the judge's exercise of discretion on the same motion. Has the defendant here had due process and equal protection of the law?

The Legislature, of course, could have prescribed the longer punishment for conviction of the offense defined; but it could not transfer from the judicial tc the executive—from the judge to the lawyer for the state—any part of the judicial power; nor could it create in the executive a totalitarian type of superpower to curb the judiciary. As declared by this court, unanimously, in Vidal v. Backs (1933) 218 Cal. 99, 104 [2], 21 P.2d 952, 86 A.L.R. 1134, "[W]e must bear in mind a fundamental principle of government applying to constitutional courts to the effect that they constitute an independent branch of government which cannot be *hampered or limited* in the discharge of its functions by either of the other two branches." (Italics added.)

Article VI, section 1, of the California Constitution provides that "The judicial power of the State shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, district courts of appeal, superior courts, municipal courts, and justice courts." Section 5 of the same article specifies that "The superior courts shall have original jurisdiction in all * * * criminal cases amounting to felony * *" The criminal action against defendant, which was on trial in the superior court when the judge's power was curtailed by force of the district attorney's action in reliance on the statute, charged simple possession of a narcotic, a felony. Neither section 11500 nor ⊥656 section 11718 of the Health and Safety Code distinguishes between simple possession by a sick addict and like possession by a non-addict. A trial judge can—for obvious humanitarian reasons—make that distinction. It is this power of the trial judge to temper the universality of a harsh law which makes this case important to the cause of justice. It is important to the integrity of our constitutional government for reasons which will be more fully developed.

Significantly, neither in article VI nor elsewhere in the Constitution is there to be found a definition of the content of the phrase, "The judicial power of the State," as used in section 1. It follows that a necessary corollary to that general language is the principle that "Our courts are set up by the Constitution without any special limitations; hence the courts have and should maintain vigorously all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government." (Brydonjack v. State Bar (1929) 208 Cal. 439, 442 [1], 281 P. 1018, 66 A.L.R. 1507.) The latter principle was described by this court as long ago as 1929 as being "now undebatable" (Id. at p. 442, 281 P. at p. 1020); the integrity of this holding has heretofore been continuingly respected (see, e. g., Garrison v. Rourke (1948) 32 Cal.2d 430, 436 [3], 196 P.2d 884; Kirstowsky v. Superior Court (1956) 143 Cal.App.2d 745, 753 [6], 300 P.2d 163).

The implied powers of a constitutionally created court are those which are necessary to enable it to properly and effectively exercise the fundamental judicial power granted by article VI, section 1. "A court set up by the Constitution has within it the power of self-preservation, indeed, the power to remove all obstructions to its successful and convenient operation." (Millholen v. Riley (1930) 211 Cal. 29, 33 [4], 293 P. 69; Rivas v. County of Los Angeles (1961) 195 Cal.App.2d 406, 15 Cal.Rptr. 829; Arc Investment Co. v. Tiffith (1958) 164 Cal.App.2d Supp. 853, 856 [7], 330 P.2d 305.) Certain of these implied powers have received legislative definition;[3] but in each instance the enactment neither created nor circumscribed the powers thus defined. Thus, as ⊥657 hereinabove noted in footnote 2, the provision of Penal Code, section 1385 that "The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed" is not a *grant* of jurisdiction to dispose in a particular way of the actions pending before it. The court, by virtue of the constitutional provisions above mentioned, already has the complete power to fully adjudicate and, subject only to *judicial* review, finally dispose of, all causes encompassed in the constitutional grant. The additional language in section 1385 ("The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.") obviously does not limit the jurisdiction or power of the court to control the justice of the cause but relates only to procedural matters. The essentially inherent or implied powers of the court are by their nature impracticable if not impossible of all-inclusive enumeration.[4]

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[3] Code of Civil Procedure, section 128 provides:

"Powers respecting conduct of proceedings. Every court shall have power:

"1. To preserve and enforce order in its immediate presence;

"2. To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority;

"3. To provide for the orderly conduct of proceedings before it, or its officers;

"4. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein;

"5. To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto;

"6. To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this code;

"7. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties;

"8. To amend and control its process and orders so as to make them conformable to law and justice."

Code of Civil Procedure, section 177 provides:

"Powers of judicial officers as to conduct of proceedings. Every judicial officer shall have power:

"1. To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty;

"2. To compel obedience to his lawful orders as provided in this code;

"3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this code;

"4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties."

⊥658 ⊥The majority, trying to find support for the Legislature's attempt to empower the executive to curtail the superior court's jurisdiction in the premises, say that "In section 11718 the Legislature has adopted part of the prosecutor's common-law power of nolle prosequi, which included the power to strike allegations that would increase punishment." (25 Cal.Rptr. 698, 699, 375 P.2d 642, 643.) In so stating, the majority purport to proceed from the undocumented assumption (25 Cal.Rptr. 698, 699, 375 P.2d 642, 643) that in California the common law power of nolle prosequi "was not abrogated by" the adoption of article VI, section 1, of our Constitution. But the majority neglect to point out that historically *the common law doctrine of nolle prosequi appears never to have been in force in California.* It is not shown to have been a part of the Mexican law nor was it ever enacted by the Legislature or otherwise adopted by the People. As the majority appear to have overlooked these facts, a short excursion into legal history is necessary to demonstrate this proposition.

California, as a governmental entity, is not of common law ancestry. At the time of the first influx of American settlers in the early 1840's the operating judicial system was Mexican. That system appears to have been rudimentary at best in the southern portion of the province and nonexistent in the north. (See Mason, Constitutional History of California, in Constitution of the State of California and Other Documents (1961, Calif.State Senate), p. 319; Wilson, The Alcalde System of California (1852), in 1 Cal. 559, 574–575.) However, to the extent that any laws of the central government of Mexico were in fact observed in California, the province was governed by the Constitution of 1837 and the laws of March 20 and May 23 of the same year.[5] An examination of the law of May 23, relating to the organization and jurisdiction of the courts, the duties and powers of the Attorney General, and civil and criminal procedure, reveals no provision authorizing the Attorney General to exercise any power resembling nolle prosequi under the common law. And it may well be doubted that a custom to that effect existed, in view of (1) the traditional civil law emphasis on the authority of the magistrate, and (2) the necessarily broad powers exercised by the alcaldes and⊥justices of the ⊥659 peace in meting out the primitive justice of a remote and troubled province.[6]

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[4] This fact is implicitly recognized, in one context, in Code of Civil Procedure, section 187:

"Means to carry jurisdiction into effect. When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; * * *"

[5] The latter enactments are set forth in relevant part in Halleck, Translation and Digest of such portions of the Mexican Laws of March 20th and May 23d, 1837, as are supposed to be still in force and adapted to the present conditions of California (1849), reprinted in Browne, Debates in the Convention of California (1850), Appendix, pp. XXIV–XL.

[6] "The Mexican Constitution of 1844, partially adopted in Mexico, was never regarded as in force in California, nor was it known here that these laws [of March

Neither the proclamation of the California (Bear Flag) Republic on June 14, 1846, nor the military conquest and occupation of California beginning July 7, 1846, nor the ultimate cession of California to the United States by the treaty of Guadalupe Hidalgo (February 2, 1848) 9 Stat. 922, operated to abrogate existing local law although many of the American settlers conducted their personal and business affairs by the only guides they knew—the rules and customs of the common law—they did so out of necessity and without authorization of any governing body. By established principles of international usage, when conquered or ceded territory is transferred to a new sovereign "the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse, and general conduct of individuals, remains in force, until altered by the newly created power of the state." (American Insurance Co. v. Canter (1828) 26 U.S. (1 Pet.) 511, 542 [Louisiana]; accord, Cross v. Harrison (1853) 57 U.S. (16 How.) 164, 198 [California].)

The fact that existing Mexican municipal law remained in force in California to the extent that it was not in conflict with the Constitution or laws of the United States, was repeatedly recognized during the subject period. It was asserted, for example, in the proclamation of General Kearny (March 1, 1847) taking command of the military government of California under orders of President Polk; in the proclamation of Colonel Mason (August 7, 1848) announcing ratification of the treaty of Guadalupe Hidalgo; and in the proclamation of General Riley (June 3, 1849) calling the first constitutional convention.[7] The need to make more widely known the content of such existing local law led to the publication, by order of General Riley (July 2, 1849), of Halleck's Translation and Digest of Mexican Laws (ante, fn. 5), said to be "intended ⊥660 as a temporary guide and assistance to the inferior officers of Government, till more complete treaties can be prepared by competent persons." (Ibid.) And the early volumes of the California Reports are replete with decisions of this court applying such local law, often as elucidated by Spanish and Mexican writers, in causes which arose in the years prior to 1850. Thus, "Between the transfer of California to the United States, by the treaty of Guadalupe Hidalgo, and the admission of this state into the Union, no territorial government was here established. The purely municipal law of Mexico continued in force within this territory until modified or entirely changed by appropriate authority." (Lux v. Haggin (1886) 69 Cal. 255, 335, 4 P. 919, 10 P. 674.)

Nor did the adoption and ratification of the Constitution of 1849 operate to directly adopt nolle prosequi or even to abrogate existing local law in any material sense. It is true that most of the provisions of that Constitution were modelled on corresponding provisions of the Constitutions of Iowa, New York, and other common law jurisdictions (see Sanderson, C. J., dissenting in Bourland v. Hildreth (1864) 26 Cal. 161, 258; see generally Hunt, The Genesis of California's First Constitution (1895)) and that "In determining the meaning of a constitutional provision, it will be presumed that those who framed and adopted it were conversant with the interpretation which had been but upon it under the constitution from which it was copied" (Lord v. Dunster (1889) 79 Cal. 477, 485, 21 P. 865). But the latter is a rule of construction only, which must give way before contemporary evidence of a contrary intent. Here such evidence is ample to show that in adopting

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20 and May 23, 1837] were materially modified by any decrees or orders of the Mexican Congress." (Halleck, p. XXV (ante, fn. 5).)

[7] In the latter proclamation it was observed, for example, that "The laws of California, not inconsistent with the laws, Constitution and treaties of the United States, are still in force, and must continue in force till changed by competent authority." (Reprinted in Browne, Debates in the Convention of California (1850), p. 3.)

the Judicial Article—or any other provision—of the Constitution of 1849 the framers did not intend thereby to substitute the common law for existing Mexican law as the rule of decision in California. This intent was made plain by the adoption of section 1 of the Schedule to the Constitution, which provided in relevant part that "all laws in force at the time of the adoption of this Constitution, and not inconsistent therewith, until altered or repealed by the Legislature, shall continue as if the same had not been adopted." (Reprinted in Stats. 1850, p. 34.)

Any doubt that might otherwise exist as to the matter was set at rest by the first session of the Legislature. On April 13, 1850, that body passed an act declaring that "The Common Law of England, *so far as it is not repugnant to or inconsistent with* the Constitution of the United ⊥661 States, or the Constitution or *laws of the State of California*, shall be the rule of decision in all the Courts of this State." (Italics added.) (Stats.1850, ch. 95, p. 219.)[8] Shortly thereafter the Legislature explicitly provided in section 630 of the Criminal Practice Act (Stats.1850, ch. 119, p. 323) that "Neither the Attorney General, nor the District Attorney, shall hereafter discontinue or abondon a prosecution for a public offense, except as provided in the last section [§ 629, now Pen.Code, § 1385, ante, fn. 2]."[9] (See also Pen. Code, §§ 1099, 1100, 1101, specifically providing immunity for a party defendant when the charge against him is dismissed by the court in order that he may be a witness either for the People (§ 1099) or for a codefendant (§ 1100).) Finally, the Legislature passed an act declaring that "all laws *now in force in this State*, except such as have been passed or adopted by the Legislature, are hereby repealed * * *." (Italics added.) (Stats.1850, ch. 125, p. 342.)

As the common law power of nolle prosequi was manifestly "repugnant to or inconsistent with * * * the laws of the State of California" as expressed in section 630 of the Criminal Practice Act, supra, it is obvious that although the Legislature adopted the common law as the general rule of decision it expressly declined to adopt that portion of the common law which vested the power of nolle prosequi in the prosecutor. Section 630 of the Criminal Practice Act was reenacted almost verbatim by the second session of the Legislature as section 598 of the Criminal Practice Act of 1851 (Stats.1851, ch. 29, p. 279) and that statute remained in force until superseded in 1872 by Penal Code, section 1386.[10] The addition at that time of the words, "The entry of a nolle prosequi is abolished," was explanatory and confirmatory only; i. e., it ⊥662 added nothing except confirmation to the legal effect of its predecessors under the 1850 and 1851 acts for manifestly it could not then abolish that which had never existed in California.[11]

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[8] It is interesting to note that in his message to the Legislature (December 21, 1849) Governor Burnett had recommended the adoption of the English law of evidence and the English criminal and commercial law, and the Louisiana Civil Code and Code of Practice. A petition in support of the Governor's proposal was referred to the Senate Committee on the Judiciary, which filed a report (February 27, 1850), reviewing at some length the respective merits of the civil law and the common law, and recommending adoption of the latter. (Report on Civil and Common Law, reprinted in 1 Cal. 588–604.)

[9] Sections 629 and 630 were based, respectively, on sections 671 and 672 of the New York Code of Criminal Procedure.

[10] Section 1386 provides as follows: "The entry of a nolle prosequi is abolished, and neither the attorney-general nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in the last section."

[11] In this connection the majority cite People v. Bruzzo (1864) 24 Cal. 41, but the case is not relevant to the issue before us. The record there showed (id. at p. 51) "a case of joint indictment; joint trial; a request or call by the Prosecuting Attorney for one of the defendants for the purpose of examining him against the other two; he takes the stand voluntarily in answer to the call; he invites and without objection takes

The majority's appeal to the history of England and of such states as Maine, Massachusetts, Ohio, Louisiana and South Carolina serves but to emphasize the lack of authority under California law for the Legislature's attempt to transfer a portion of the superior court's constitutionally granted jurisdiction from the judicial to the executive department of government. The question of *how* the defendant's case is decided is of little importance to anyone other than the defendant; but the question of *who* decides it—the district attorney or the court—is of major importance to all citizens as well as to the defendant, to whom it denies due process.

As hereinabove observed, the implied powers of the courts are impracticable if not impossible of all-inclusive enumeration. Yet they flow from a common source—the authority of every court "to control the proceedings before it insofar as the essentials of the judicial process are concerned" (People v. Burke (1956) 47 Cal.2d 45, 52 [6], 301 P.2d 241). The concept of what is an essential part of the judicial process, however, is neither static in quality nor fixed in time. ⌊663 Its scope necessarily changes as the machinery of the administration of justice changes, to meet the new conditions and needs of a developing society. To define the essentials of the judicial process exclusively in terms of the law as it stood in earlier stages of that development "would be to make of stale usage a strait-jacket confining our constitutional grants of power, and would be directly contrary to the view of the Constitution as a document expanding '"to meet the advancing affairs of men."' (People v. Western Air Lines, Inc. [1954] 42 Cal.2d 621, 635[19] [268 P.2d 723].)" (Cal. M. Express v. St. Bd. of Equalization (1955) 133 Cal.App.2d 237, 242[5b], 283 P.2d 1063.) The real issue, therefore, is not whether the hearing and determination of the question of dismissing a charge of prior conviction was an essential part of the judicial process in 1849 or 1872 or 1879; rather, the issue is whether such hearing and determination is *today* an essential part of that process.

Only recently we had occasion to point out that "The statutory rules of pleading and procedure in criminal actions today are not only different from, but in certain aspects are contraversions of, those which existed under the Practice Act of 1851 and even under the Penal Code prior to the amendments of 1915 and 1927." (People v. Tideman (1962) 57 A.C. 619, 623[1], 21 Cal.Rptr. 207, 370 P.2d 1007.) In this century alone there have been many changes in the criminal law, both substantive and procedural, which give a force and effect to a charge of prior conviction, if found to be true, that could not have been foreseen by the framers of our two Constitutions and our first codes. This effect is now felt throughout the entire judicial process. To begin with, the charging of all known prior

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the oath in its most comprehensive form, and, under instructions which he has previously solicited, and to which he takes no exception when given, criminates his associates and himself; and on these antecedents the counsel of the witness, in pursuance of a notice previously given, moves the Court not merely to discharge the witness from the particular prosecution, *but to finally acquit him in effect, of the crime alleged against him.*" (Italics added.) It was held that "The Court has no power to discharge Bruzzo at common law, nor under the Act of 1851 [i. e., Stats.1851, ch. 29, p. 252, § 368, now Pen.Code, § 1099], on the motion of his own counsel." (Ibid.) But no such power is here in question, as the dismissal of a charge of prior conviction is effective only for sentencing purposes and does not expunge that conviction from the defendant's record. Nor is the reference in Bruzzo to the common law of any significance here. It cannot be taken to imply that the common law was adopted in this state by the Constitution of 1849, as it has been shown hereinabove that the fact was otherwise. And although the court in Bruzzo looked to the common law as well as to the statutes in search of evidence of the judicial power there under discussion, it does not follow from that fact that in the case at bench the common law power of nolle prosequi should be deemed to have somehow been adopted despite its express rejection by the first session of the Legislature.

convictions is now mandatory on the district attorney. (Pen.Code, § 969; In re Tartar (1959) 52 Cal.2d 250, 254–255[1a, 2, 1b, 3], 339 P.2d 553; see also People v. Williams (1961) 193 Cal.App.2d 394, 401 [9], 14 Cal.Rptr. 279; People v. Dunbar (1957) 153 Cal.App.2d 478, 479 [1], 314 P.2d 517; People v. Ashcraft (1956) 138 Cal.App.2d 820, 826 [5], 292 P.2d 676.) The finding that a defendant has suffered two or more prior convictions of certain felonies will now result in an adjudication of habitual criminality (Pen.Code, § 644), with its attendant effect in extending the minimum term of imprisonment that he must serve before being eligible for ⊥664 parole (id., §§ 3047–3048.5). Even if he is not adjudged an habitual criminal, a finding of prior conviction of certain felonies will now either diminish or destroy his eligibility for probation (id., § 1203), and may result in a mandatory increase in the minimum term that can be fixed by the Adult Authority under the Indeterminate Sentence Act (id., §§ 3020, 3023, 3024).

More particularly with respect to narcotics violations, the statutes (Health & Saf.Code, div. 10) in force at the time of defendant's conviction (5 October 1960) gave substantial effect to a finding of prior conviction. Eleven offenses were then defined in chapter 5 ("Illegal Narcotics") of division 10 of the code, and in regard to no less than eight of them the statute provided for mandatory charging of prior narcotics convictions and for increased punishment dependent on corresponding findings (id., §§ 11500, 11501, 11502, 11530, 11531, 11532, 11540, 11557). Thus, the court in the case at bench (presuming the validity of Health & Saf.Code, § 11718, ante, fn. 1) was compelled to deny probation (id., § 11715.6)[12] and to sentence defendant to state prison for the statutorily increased term of two to twenty years, rather than the basic term of not more than one year in county jail or not more than ten years in state prison.[13]

In this connection we may take note of the fact that the difference, from the standpoint of punishment and rehabilitation, between treating a man as a first offender and giving effect to a prior conviction will be even greater under the new narcotics laws. Section 11500 was amended in 1961 (Stats. 1961, ch. 274, § 1) to provide, in the case of one prior felony narcotics conviction,[14] that the defendant "shall be ⊥665 imprisoned in the state prison for not less than five years nor more than 20 years, and *shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than five years in prison.*" (Italics added.) In the case of two or more prior narcotics convictions the corresponding term is now from 15 years to life, with a required minimum time served of 15 years. (Ordinarily, of course, a prisoner "whose minimum term of imprisonment is more than one year, may be paroled at any time after the expiration of one-third of the minimum term." (Pen. Code, § 3049.)) The remaining sections of articles 1 and 2 of chapter 5 ("Illegal Narcotics") were similarly amended (Stats. 1961, ch. 274, §§ 2–11), increasing in each instance the punishment imposed and the required minimum time served in cases of one or more prior narcotics convictions.[15]

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[12] Section 11715.6 provided in relevant part as follows at the time of defendant's conviction: "In no case shall any person convicted of [any of the narcotics offenses defined in div. 10, ch. 5, of the code] * * * be granted probation by the trial court, nor shall the execution of the sentence imposed upon such person be suspended by the court, if such person has been previously convicted of any offense described in this division [except § 11721, use of narcotics] * * *."

The 1961 amendment to section 11715.6 (Stats.1961, ch. 274, § 12) adds references to two new narcotics offenses (§§ 11500.5 and 11530.5) but makes no substantial changes in the wording or effect of the section.

[13] Health and Safety Code, section 11500, as it provided at the time of defendant's conviction.

[14] Health and Safety Code, section 11504 (added by Stats.1961, ch. 274, § 5) provides:

"As used in this article [art. 1, "Illegal Sale, Possession, Administration and Transportation"] 'felony offense,' and offense 'punishable as a felony' refer to an offense for which the law prescribes imprisonment in the state prison as either an alternative or the sole penalty, *regardless of the sentence the particular defendant received.*" (Italics added.)

The conclusion is inescapable that a charge of prior conviction which is found to be true now has serious and farreaching effects on the punishment of the offender,

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[15] For convenience of reference, the following chart sets out the respective effects, under the new narcotics laws, of striking, or of not striking and finding to be true, one or more charged prior felony convictions:

Health & Saf. Code sections	Disposition of priors charged	Minimum Sentence (years)	Maximum Sentence (years)	Minimum Time served (years)
11500 Simple possession (except marijuana)	Prior struck or found not true:	2	10	2
	1 prior found true:	5	20	5
	2 or more priors found true:	15	life	15
11500.5 Possession for sale	Prior struck or found not true:	5	15	2½
	1 prior found true:	10	life	6
	2 or more true:	15	life	15
11501 Sale or gift or offer to give or transport or furnish	Prior struck or found not true:	5	life	3
	1 prior true:	10	life	10
	2 or more true:	15	life	15
11502 Sale or gift to minor	Prior struck or found not true:	10	life	5
	1 prior true:	10	life	10
	2 or more true:	15	life	15
11502.1 Minor's sale or gift to minor	Prior struck or found not true:	5	life	—
	1 or more found true:	10	life	—
11530 Simple possession of marijuana*	Prior struck or found not true:	1	10	1
	1 prior true:	2	20	2
	2 or more true:	5	life	5
11530.5 Possession of marijuana for sale	Prior struck or found not true:	2	10	2
	1 prior true:	5	15	3
	2 or more true:	10	life	6
11531 Sale or gift or import or transport of marijuana	Prior struck or found not true:	5	life	3
	1 prior true:	5	life	5
	2 or more true:	10	life	10
11532 Sale or gift of marijuana to minor	Prior struck or found not true:	10	life	5
	1 prior true:	10	life	10
	2 or more true:	15	life	15

* It may be observed that there appears to be medical opinion that marijuana is less habit forming and less toxic to the human system than is tobacco. It seems obvious, therefore, that at some later date a court may be considering some equally drastic enactment with respect to tobacco. It is not many years since we did face quite similar laws affecting possession of alcoholic beverages.

and hence on the possibility of his eventual rehabilitation. This being so, the hearing and determination of the important question of dismissing such a charge for the purpose of individualizing punishment and encouraging rehabilitation—which is to the ultimate benefit of society as a whole, and which chiefly distinguishes modern penology from the older concepts—must today, more importantly even than in the past, be deemed an essential part of the judicial process. And the power to hear and determine that question must, under the principles set forth hereinabove, be deemed an implied constitutional power of the courts of this state.[16]

Neither section 11718 nor section 11500 takes cognizance of the fact that there is a vast difference between the culpability of a *non-addict* possessor-pusher on the one hand, and on the other, that of the sick and impoverished addict who, desperate for the drug, pushes it in order to possess it. Trial judges—before enactment of section 11718—could recognize that difference and (by striking a charged prior in what the evidence and their experience told them was probably a ⊥667 deserving case) give to the Adult Authority greater scope to treat such an addict as an individual—a very sick and helpless individual, but in some cases a person who could be rehabilitated and cured.

Reference to the chart in footnote 15 makes it obvious that the need for judicial discretion (in contrast to prosecutor's zeal) may be even more important in cases wherein violation of Health and Safety Code, section 11532 is charged. Under that section a youth—exactly 21 years old (with one prior charged and found true)—who shared a marijuana cigarette with another youth *one day younger,* would be absolutely required to *actually serve* 10 years in prison. With the prior struck the youth, if the Adult Authority saw fit, might be paroled after a minimum of 5 years served. *In either case,* it is to be noted, whether the charge of prior conviction was struck or found true, the *maximum sentence* open to the Adult Authority *is life imprisonment.* In its application to a situation of this kind section 11718, aside from being unconstitutional, is a throwback toward an abandoned concept of penology. It works at cross-purposes with the indeterminate sentence plan and objectives.

In connection with the foregoing discussion it should be remembered that the dismissal or striking from an accusatory pleading of an allegation of prior conviction does not preclude the Adult Authority from considering the fact of a prisoner's prior conviction in fixing the term of imprisonment and the time for and conditions of parole, if any. The direct and important effect of the court's dismissal or striking of the charge is to broaden the area of the Adult Authority's discretion in fixing the *minimum* term of imprisonment in deserving cases. But solicitude of the law for the protection of society against confirmed offenders makes sure that the Adult Authority shall be acquainted with all facts which may militate against early, or even any, parole. The statutes provide that: "The Director of Corrections shall keep complete case records of all prisoners under custody of the department, * * *

"Case records shall include all information received by the Director of Corrections from the courts, probation officers, sheriffs, police departments, district attorneys * * and other interested agencies * * *." (Pen.Code, § 2081.5.) Reports of court dispositions are mandatory. (Pen.Code, §§ 11115, 11116; see also Pen.Code, §§ 3020, 3024, 3041, 3046.) Furthermore ⊥668 "Any person who * * * is hereafter discharged or paroled from a penal institution where he was confined because of the commission of any such [narcotics] offense * * * shall within thirty days * * * of his coming into any county or city * * * register with the chief of police * * * or the sheriff" (Health & Saf.Code, § 11850).

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[16] I am thus in full agreement with the Committee on Criminal Law and Procedure of the State Bar of California which, in its recent report to the Board of Governors recommending that the State Bar sponsor the repeal of section 11718, gave as its opinion that "To make the prosecuting officer the only person who can move to set aside a prior conviction, takes away all judicial discretion in pronouncing sentence and is a legislative encroachment upon proper judicial power." (35 State Bar J. 432 (1960).)

Just six years ago in a substantially similar context the same question was presented to us and we deliberately considered and passed on it (People v. Burke (1956) 47 Cal.2d 45, 301 P.2d 241). We were then unanimous and we held (at p. 51[4], 301 P.2d at pp. 244, 245): "The power to strike or dismiss the proceeding as to a prior conviction is within the power referred to in section 1385 of the Penal Code, which provides that 'The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed * *.' The authority to dismiss the whole includes, of course, the power to dismiss or 'strike out' a part * * *.

"[6] The People argue that by providing in section 11712 of the Health and Safety Code that if a prior conviction, whether of misdemeanor or felony, 'is admitted by the defendant, he *shall* be imprisoned in the state prison' (italics added) the Legislature intended to take from the court the power to dismiss or strike a charge of prior conviction if the defendant admits the charge. According to the People, the trial court was required to sentence defendant to state prison and the judgment should be reversed for the purpose of directing it to do so * * *.

"[P. 52, 301 P.2d p. 245] The cited cases —and the statutes referred to—do not purport to divest the trial court (or to hold that the court constitutionally could be divested) of the power to control the proceedings before it insofar as the essentials of the judicial process are concerned; i. e., to find the defendant guilty or not guilty of any offense charged, or of a lesser included offense, or to dismiss the action *in toto* or to strike or dismiss as to any or all of multiple counts or charges of prior conviction. The statutes in question do validly—and in respect to constitutionally vested judicial power they neither purport to nor validly could do more than—prescribe the sentence which must be imposed upon the appropriate adjudication of guilt of the substantive crime and judicial determination of the factor which results in increased punishment. Such adjudication and judicial determination are inherently and essentially the province of the court even as the punishment which may or must follow the offense adjudicated, either with or without a punishment augmentation factor, is essentially for the Legislature except as it may vest an area of discretion in the court or administrative body. (See People v. Gowasky (1927) 244 N.Y. 451 [155 N.E. 737, 749, 58 A.L.R. 9, 17].)" (See also People v. Benjamin (1957) 154 Cal.App.2d 164, 173[15], 315 P.2d 896; People v. Green (1957) 152 Cal.App.2d 886, 891[6], 313 P.2d 955; People v. Harris (1956) 146 Cal.App.2d 142, 147–148[7], 304 P.2d 178.) And only five years ago, again unanimously, in People v. Valenti (1957) 49 Cal.2d 199, 206[9], 316 P.2d 633, we further recognized that a charge of prior conviction may be dismissed by the court "in the exercise of [its] inherent power to control the proceedings before it," and that section 1385 is merely "evidential of" that power.

The broad scope of the judicial power in this area of its jurisdiction, although sometimes attacked by zealous prosecutors, has not been seriously doubted until today. As the District Court of Appeal said in People v. Superior Court (1921) 53 Cal.App. 185, 186, 199 P. 840 (relying on this court's decision in People v. More (1886) 71 Cal. 546, 12 P. 631), "We think that respondent [superior court] has jurisdiction to dismiss the action for any reason that it determines to be in furtherance of justice." To the same effect is People v. Martin (1924) 70 Cal.App. 271, 276[6], 233 P. 85: "The action of the trial court on such a motion [to dismiss under Pen.Code, § 1385] is discretionary." In People v. Smith (1925)

76 Cal.App. 105, 111[5], 243 P. 882, the court declared: "At most, the motion [by the district attorney] for a dismissal is merely a recommendation to the court. If the court, for any reason, differs with the district attorney * * * there can be no doubt that the court has a full right to refuse such dismissal." And in People v. Ward (1890) 85 Cal. 585, 590, 24 P. 785, we held, "It is clear * * * 'the court' alone has the power to dismiss a criminal action."

The Legislature may enact reasonable regulations to be observed in carrying out the constitutional functions of the courts (such as prescribing the records to be kept and the procedure by which jurisdiction is to be exercised) "provided they do not defeat or materially impair the exercise of those functions." (Brydonjack v. State Bar (1929), supra, 208 Cal. 439, 444[4], 281 P. 1018, 1020, 66 A.L.R. 1507.) Here, it is apparent that the effect of Health and Safety Code, section 11718 was to utterly defeat the exercise by the trial court of the above delineated judicial ⊥670 function. The court felt that it had "no discretion," and that the statute "tied the hands" of the court. It follows that section 11718 effectively deprived defendant of his constitutional right to a "judicial determination of the factor which results in increased punishment" (People v. Burke (1956), supra, p. 52[6] of 47 Cal.2d, p. 245 of 301 P.2d), and hence denied him due process of law in the important matter of probation and sentencing. (U.S.Const. 5th and 14th Amends.; Cal. Const. art. I, § 13.)

Furthermore, it is to be noted, the jurisdiction held by the majority to be excised by force of Health and Safety Code, section 11718 is not only the original jurisdiction of the superior court but also the potential appellate jurisdiction of this court. In People v. Valenti (1957), supra, 49 Cal.2d 199, 207, 316 P.2d 633, we specifically approved the holding in the Burke case that the trial court's order striking the allegation of prior conviction "was appealable, not because it was made 'in furtherance of justice,' but because, as we there stated (p. 53[8] of 47 Cal.2d [p. 246 of 301 P.2d]) it 'was in its nature one of the order specified as appealable either by paragraph 1 or by paragraph 6 of section 1238 of the Penal Code. That statute provides that the People may appeal "1. From an order setting aside the indictment, information or complaint; * * * 6. From an order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed." The trial court's action was in substance "an order setting aside [a part of] the * * * information."' Since the Burke case order did not involve either the cause of action itself or any question of jeopardy it was clearly proper to hold, as we did, that it 'was in substance "an order setting aside [a part of] the * * * information"' and, consequently, that as to appealability it should be governed by the rules applicable to orders setting aside the information rather than by those applicable to orders dismissing the action." Thus it is established law that if the district attorney feels that the trial court has abused its discretion or erred in an order setting aside or striking a part of an accusatory pleading the remedy of appeal is available. But if, as the majority today hold, section 11718 effectively transfers to the district attorney unreviewable authority to compel the trial court to deny the motion —or to not even consider and pass on it—then indeed is the defendant denied due process both in the trial court and (to resist on plaintiff's appeal) in this court.

⊥671 *The Separation of Powers*

Article III, section 1, of the California Constitution provides—as it has provided in substance since adoption of our first Constitution (i. e., since 1849)—that "The powers of the Government of the State of California shall be divided into three separate departments—the Legislative, Executive, and Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted." It is my view that section 11718 of the Health and Safety Code is unconstitutional for the further reason that, both on its face and as here applied, it violates this requirement of separation of powers by subjecting the exercise of an inherently judicial function to the unfettered and unreviewable discretion of the district attorney, a member of the executive branch of government.

It will be remembered that section 11718 (ante, fn. 1) prohibits the trial court from hearing and determining the question of whether a charge of prior conviction should be dismissed, "except upon motion of the district attorney." Under this statute, no matter how deserving the individual case may be for judicial action, the court must wait upon the permission of the district attorney before proceeding further, and if such permission is not forthcoming the court's hands are "tied" and it cannot act. As defendant correctly points out, "The court is precluded from exercising its judgment in a fact situation before it, unless the district attorney gives the judicial prerogative what might be termed a 'prior approval.'" To endow a member of the executive department with such a power is in effect to authorize him, in the language of article III, section 1, to "exercise" one of the "functions appertaining to" the judicial department.

It is true, of course, that in the complex state of modern government the principle of the separation of powers should not be treated as absolute, and that each branch of government must of necessity and in some degree exercise certain functions of the others. But that principle nevertheless requires, when a judicial function is exercised by a member of the executive branch, that ultimate control over its exercise be retained by the courts through the medium of judicial review. Much of the increasingly elaborate structure of our administrative agencies, as is well known, has been erected and sustained upon 672 this foundation. Under the subject statute, however, a decision of the district attorney not to initiate a motion to dismiss is not reviewable by any court in any type of proceeding. Thus, on the present appeal, we cannot review the propriety of the district attorney's decision itself, but must confine ourselves to examining the authority under which it was made. Indeed, even in a case where, for example, the prior narcotics offense occurred a half century earlier and the defendant successfully served a period of probation, was rehabilitated and became a useful member of society, the district attorney would not be judicially accountable for a refusal to allow the trial court to consider dismissing the charge of the old conviction and treating the defendant as a first offender. Section 11718 is therefore invalid for this reason also, as non-reviewable or ultimate judicial power may not constitutionally be delegated to a member of the executive department. (Cal.Const. art. III, § 1; Laisne v. Cal. St. Bd. of Optometry (1942) 19 Cal.2d 831, 835 [3], 123 P.2d 457.)

Nor can it be presumed that the district attorney will act with judicial impartiality in exercising this power. The majority as- 25 Cal.Rptr. 701, 375 P.2d 645 that "The Legislature is authorized to provide that part of the powers that might otherwise be exercised by the Adult Authority alone shall be exercised by district attorneys." But the Adult Authority has nothing whatsoever to do with the judicial process leading to entry of judgment. It has no power to superintend the trial of cases in the courts or to participate in any way in the determination of the guilt or innocence or the scope of the judgment of conviction of any person who is brought to trial in the superior court on a charge of felony. Manifestly the power of the Legislature to provide for the administration of prisons and prisoners is not the equivalent of authority to transfer a judicial function to the executive department.

The proposition asserted by the majority is based on article X, section 1, of our Constitution, which provides in relevant part that "the Legislature may delegate the government, charge and superintendence of [state prisons] to any public governmental agency or agencies, officers, or boards or boards * * *." In enacting section 11718, say the majority, "the Legislature in the exercise of its [just quoted] constitutional power has simply chosen one public officer rather than another." (25 Cal.Rptr. 701, 375 P.2d 645) It appears to me that this contention lacks substance as support for the majority's essential conclusion that the Legislature effectively transferred from the superior ⊥673 court judge to the district attorney the jurisdiction to adjudicate this phase of the criminal action against defendant. To authorize the prosecutor to sit in final judgment on the resolution of one of the substantial issues in the case of People v. Sidener while this case was on trial in the superior court is, in my opinion, flagrantly to disregard the painfully learned truths which are the very foundation of our constitutional system of government. If indeed the Legislature has here "simply chosen one public officer rather than another," the choice is not only a dangerous and unwise one—it nakedly violates the letter and spirit of both the Constitution of California and the Constitution of the United States.

If Health and Safety Code, section 11718, in seeking to secure its objective, went one step further and declared that no application to the Governor for pardon, or commutation of sentence, imposed for a narcotics offense "may be" granted "except upon motion of the district attorney," would such transfer of jurisdiction even from one executive officer to another in the same department of government be sustained? The vesting in the Governor of the constitutional powers of pardon and commutation, subject to control in certain situations by the Supreme Court, is no more exclusive than is the vesting of judicial power in the constitutional courts.

I am not unmindful of our duty to so construe legislation as to save its constitutionality if that can reasonably be done (Erlich v. Municipal Court (1961) 55 Cal. 2d 553, 558 [1], 11 Cal.Rptr. 758, 360 P.2d 334; Geiger v. Board of Supervisors (1957) 48 Cal.2d 832, 839 [11], 313 P.2d 545; Palermo v. Stockton Theatres, Inc. (1948) 32 Cal.2d 53, 60 [5], 195 P.2d 1), but in my view section 11718 of the Health and Safety Code admits of no doubt either as to its meaning or as to its effect. In these circumstances "the duty of the court is plain, and should be fearlessly performed." (Van Harlingen v. Doyle (1901) 134 Cal. 53, 56, 66 P. 44, 54 L.R.A. 771; cf. City of Los Angeles v. Offner (1961) 55 Cal.2d 103, 113 [7], 10 Cal.Rptr. 470, 358 P.2d 926.)

Apart from principle the step taken by the majority today may not be a big step. But in principle it is indubitably a step toward totalitarian concentration of power in the executive; a power to be exercised without any legislative standard and without possibility of judicial review. As applied here it deprives the defendant of due process and of equal protection of the law.

The judgment should be reversed and the cause remanded ⊥674 for *judicial* determination, which in the circumstances means for redetermination in the light of the views herein expressed, of the question of dismissal of the charge of defendant's prior conviction, and for pronouncement of a new (but not necessarily different) judgment in accordance with such determination.

McCOMB, J., concurs.

WHITE, Justice (dissenting).

I am in accord and concur with the historical narrative and legal reasoning contained in the dissenting opinion prepared by Mr. Justice Schauer.

While the Legislature is empowered to place certain reasonable restrictions upon constitutional functions of the courts, nevertheless, as pointed out by Mr. Justice Schauer, the legislative prerogative in that regard is limited to such restrictions as "do not defeat or materially impair the exercise of those [judicial] functions." And, as recently as 1956, in People v. Burke, 47 Cal.2d 45, 301 P.2d 241, this court held that the determination of the factor which results in the imposition of increased punishment is inherently vested in the courts.

I view with alarm this invasion of the powers of the judicial department of government by the legislative department. If the power of the courts, in the interest of justice, to control the dismissal of a prior conviction can be made subject to the approval of the district attorney, then what is to prevent the Legislature from providing that the finding as to whether an allegation of a prior conviction is true or untrue under the laws of this state shall also be vested in the district attorney? I sometimes think we are inclined to forget that under our philosophy of government the district attorney is but the representative of just another litigant in a criminal prosecution. He is invested with the power to institute prosecutions but once he has done so, the determination of the truth or falsity of such accusations is for the courts.

Another alarming feature of the statute here under consideration is that, as pointed out by Mr. Justice Schauer, it takes away all judicial discretion in the pronouncement of sentence and invests the district attorney with plenary power to control the pronouncement of judgment *without any right of judicial review.*

Such an enactment under the American way of life seems to me the very essence of slavery and a return to the philosophy of "the Divine Right of Kings." After all, the district ⌊attorney cannot be regarded as ⌊675 impartial. He is essentially an advocate who, believing in the justice of his cause, is seeking conviction and punishment of the accused. To make him also the court of last resort as to what punishment should be imposed, without any impartial tribunal to review his decision in the matter of sentencing, seems to me to do violence to our concept of constitutional government, and offends our oft repeated and proud boast that we are a government of law and not of men.

I regard section 11718 of the Health and Safety Code, now engaging our attention, as a legislative encroachment upon proper judicial power and therefore, unconstitutional.

I would reverse the judgment and remand the cause to the court below for further proceedings as set forth in the last paragraph of the dissenting opinion of Mr. Justice Schauer.

McCOMB, J., concurs.

Rehearing denied; SCHAUER and McCOMB, JJ., dissenting.

209 Cal.App.2d 82

⊥82 ⊥**The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

A. D. FAIRCHILD, Defendant and Appellant.

Cr. 4095.

District Court of Appeal, First District, Division 3, California.

Oct. 29, 1962.

Prosecution for first degree robbery. The Superior Court, County of Santa Clara, Harold Holden, J., entered a judgment of conviction and an order denying a new trial and the defendant appealed. The District Court of Appeal, Draper, P. J., held that the refusal to grant a new trial on ground of newly discovered evidence, based on an affidavit of a co-defendant that defendant was in a drunken stupor and did not participate in the robbery, was not an abuse of discretion.

Affirmed.

1. Criminal Law 🔑945(1)

One element which must be established to warrant new trial on ground of newly discovered evidence is that evidence must be such as to render different result probable on retrial.

2. Criminal Law 🔑945(1)

Whether newly discovered evidence is such as to render different result probable on new trial is particularly addressed to sound discretion of trial court.

3. Criminal Law 🔑1156(3)

Generally, motions for new trial on ground of newly discovered evidence are looked upon with disfavor and an appellate court will not interfere with ruling thereon in absence of clear showing of abuse of discretion. West's Ann.Pen.Code, § 1237.

4. Criminal Law 🔑938(1)

Refusal to grant a new trial on ground of newly discovered evidence, based on affidavit of co-defendant that defendant was in drunken stupor and did not participate in robbery, was not an abuse of discretion. West's Ann.Pen.Code, §§ 211, 1237.

◆

Andrew H. D'Anneo, San Francisco, for appellant.

Stanley Mosk, Atty. Gen. of the State of California, John S. McInerny, Eric Collins, Deputies Atty. Gen., San Francisco, for respondent.

⊥DRAPER, Presiding Justice. ⊥83

A jury found appellant and one McKnight guilty of first degree robbery (Pen. Code, § 211). Appellant moved for new trial on the ground of newly discovered evidence. His motion was denied, and he was sentenced to prison. He properly asks that we review the order denying new trial upon this appeal from the judgment (Pen. Code, § 1237).

At 2:45 a. m. two men entered a service station. One asked Schumann, the operator, for change. As Schumann opened the cash box, one of the men, identified as McKnight, pointed a gun at Schumann, and said "this is a stickup". McKnight and his companion, identified by Schumann as appellant, then took all the money from the cash box, plus Schumann's wallet, and left. Another service station in a nearby city was robbed some 45 minutes later, and a description of the automobile used in that robbery was broadcast by police radio. At about 4 a. m. a police officer saw a car answering the description, gave chase, and, when he stopped the car, found it driven by McKnight with appellant occupying the front seat. They were arrested, identified by Schumann, and tried. A police officer testified that several days after the arrest he interviewed McKnight, who said that he and appellant had discussed, before the robbery, which of them should handle the gun.

McKnight did not testify at trial. Appellant did, asserting that: he was drunk on the night in question; he got into the back seat of McKnight's car; he remembered that another man whom he did not know occupied the front seat with McKnight; appellant went to sleep in the back seat and did not awaken until roused by the lurching of the speeding car as McKnight fled from the pursuing police vehicle.

McKnight's affidavit in support of appellant's motion for new trial alleged that McKnight and a man known to him only by his first name, Floyd, robbed Schumann, and that appellant was in a drunken stupor in the back seat of the McKnight car and did not participate in the robbery. McKnight averred that he would testify to these facts if new trial were granted to appellant.

[1–3] One of the elements which must be established to 84 warrant new trial on the ground of newly discovered evidence is that the evidence be such as to render a different result probable on retrial. (People v. McGarry, 42 Cal.2d 429, 433, 267 P.2d 254; People v. Beard, 46 Cal.2d 278, 281, 294 P.2d 29). This issue is particularly addressed to the sound discretion of the trial court (People v. Sing Yow, 145 Cal. 1, 4, 78 P. 235). While in some cases the record may be so clear as to require holding on appeal that denial of the motion is an abuse of discretion (People v. Williams, 57 A.C. 289, 18 Cal.Rptr. 729, 368 P.2d 353; People v. Shepherd, 14 Cal.App.2d 513, 58 P.2d 970) such instances are rare. In general, such motions are looked upon with disfavor (People v. Yeager, 194 Cal. 452, 491, 229 P. 40), and an appellate court will not interfere in the absence of a clear showing of abuse of discretion (People v. McGarry, supra, at pp. 432–433 of 42 Cal.2d, at p. 256 of 267 P.2d).

[4] Here the trial court could consider that McKnight's affidavit gave only a most limited identification of his alleged accomplice, and carefully refrained from any evidence which would permit discovery of this vague person. McKnight's extrajudicial statement that he and appellant were the robbers was admitted only against McKnight at the trial, but could be looked to as impeachment of the story told by his affidavit. The affidavit also was contrary to evidence that appellant was not intoxicated when arrested and booked. Moreover, the trial judge saw and heard the victim, Schumann, as he identified appellant to the jury. Appellant now argues that Schumann's identifying testimony was somewhat weakened on cross-examination. But he reaffirmed it on redirect, and the trial judge can best evaluate its weight. We are satisfied that the discretion of the trial court was fairly and reasonably exercised.

Judgment affirmed.

SALSMAN and DEVINE, JJ., concur.

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209 Cal.App.2d 62

62 **The DUNCANSON–HARRELSON CO., a corporation, Plaintiff and Respondent,**

v.

The TRAVELERS INDEMNITY COMPANY, a corporation, Defendant and Appellant.

Civ. 20396.

District Court of Appeal, First District, Division 2, California.

Oct. 29, 1962.

Action by supplier against surety on contractor's public works bond. The Superior Court, County of San Francisco, George W. Schonfeld, J., rendered judgment for supplier and surety appealed. The District Court of Appeal, Agee, J., held that supplier, who had direct contractual relationship with contractor, was not required to give notice to contractor as condition precedent to maintaining direct cause of action against contractor's surety on contractor's public works bond for amount allegedly due for furnishing of materials.

Affirmed.

1. Principal and Surety 🔑139

Although charge for use of materials furnished contractor on contract for public works was on monthly basis until termination of rental in 1960, each month would not be considered as new and separate furnishing of materials and, inasmuch as no materials or labor were furnished after October, 1958, statute which became effective in 1959 and which required furnisher of materials to notify contractor in order to have right of action against surety upon public works bond was not applicable. West's Ann.Gov.Code, § 4209.

2. Statutes 🔑200

While not controlling, punctuation is to be considered in interpretation of statute.

3. Principal and Surety 🔑139

Supplier who had direct contractual relationship with contractor, engaged in constructing sewer for sanitary district, was not required to give notice to contractor as condition precedent to maintaining direct cause of action against contractor's surety on contractor's public works bond for amount allegedly due for furnishing of materials. West's Ann.Gov.Code, § 4209.

4. Novation 🔑7

Essential element of novation is agreement of all parties to contract. West's Ann. Civ.Code, § 1530.

5. Novation 🔑7

Even if sanitary district assumed contractor's obligations under agreement whereby equipment was rented from supplier, that was matter between district and contractor; contractor must look to district for redress; and rental agreement would still be controlling as between contractor and supplier in absence of valid novation. West's Ann.Civ.Code, § 1530.

6. Appeal and Error 🔑762

Point raised in reply brief for first time will not be considered, unless good reason is shown for failure to present such point before.

7. Appeal and Error 🔑762

Point raised in closing brief could not be considered where respondent was not apprised of it either during trial or in appellant's opening brief and point was not raised in pleadings or in written stipulation signed by respective counsel setting forth "only" issues in case.

8. Bailment 🔑5
Principal and Surety 🔑63

Contractor became bailee of material furnished to it under agreement requiring monthly rental charge therefor upon its delivery; contractor was liable for agreed charge until it was redelivered to supplier, even if contractor left material in place until its successor completed project or pulled it out and stored it in warehouse; and surety on contractor's public works bond was liable for rent. West's Ann.Gov.Code, § 4209.

9. Bailment 🔑22

Bailment is not terminated until goods are redelivered to bailor.

◆

Tinning & DeLap, Dana Murdock, Robert N. Sanford, Jr., Richmond, for appellant.

Boekel, Moran & Morris, San Francisco, for respondent.

⊥AGEE, Justice. ⊥64

In May, 1958, the Central Contra Costa Sanitary District awarded to M. Miller Company a contract for the construction of a portion of an outfall sewer designed to empty into Suisun Bay. Defendant was the surety on Miller's public works bond. (Gov.Code §§ 4200, 4204.) Plaintiff recovered a money judgment upon the bond and defendant has appealed.

On September 3, 1958, respondent subcontracted with Miller to do some of the work called for under Miller's contract. This work was completed by November 3, 1958. Respondent was allowed $9,017.10 by the trial court for said work, and this portion of the judgment is not an issue on this appeal.

Soon after the making of the foregoing subcontract, respondent agreed to and did furnish Miller with steel sheet piling, together with pile driving equipment, to be used by Miller in the performance of its contract. The material and equipment so furnished are set forth in Miller's purchase orders No. 9898, undated, No. 9900, dated October 13, 1958, and No. 9904, dated October 17, 1958. The agreed monthly rental charge for the piling, based upon the tonnage furnished, was specified therein, as was a charge of 8 cents per pound for "spoilage," i. e., sheet piling not returned or returned in such a damaged condition that it was not re-usable.

The rental period terminated June 10, 1960. The trial court allowed $24,613.38 for rental and "spoilage." The correctness of this amount was arrived at by stipulation and the necessity of producing the invoices and supporting data was dispensed with.

The principal issue on appeal is whether respondent was required to comply with the notice provision in section 4209 of the Government Code in order to have a right of action against the surety upon the bond. The section was enacted in 1959 and became effective September 18, 1959. (Stats. 1959, ch. 1594, § 1.) The enacting statute expressly provided that it was not retroactive. (Stats.1959, ch. 1594, § 2.)

In recognition of the effective date of the section, appellant states that its appeal is "from that portion of the judgment in the trial Court awarding damages to respondent for the furnishing of materials to appellant's principal, * * * *after September 18, 1959.*" (Emphasis ours.)

Appellant further states: "Appellant concedes that Section 4209 does not apply to the furnishing of materials prior to September 18, 1959, by respondent. * * * [but]
⊥65 It would seem⊥clear that Government Code Section 4209 would apply to all materials furnished by respondent to Miller after September 18, 1959."

[1] Appellant contends that, because the charge for the use of the pilings was on a monthly basis, each month is to be considered as a new and separate "furnishing of materials." We do not agree. Respondent correctly points out that no materials or labor were furnished by it after *October 1958,* by which time all of the pilings had been delivered by respondent to the jobsite. The judgment should be affirmed on this ground alone.

However, with the passage of time since the effective date of section 4209, it is unlikely that this particular contention will ever again be presented to us. Therefore, we think it is proper to discuss the principal issue on this appeal, as stated above, because it may arise again.

Section 4209 provides: "In any case in which the law of this State requires that a contractor for construction of a public work file a payment bond, every person to whose benefit the bond inures who has not been paid in full, other than a person who performs actual labor for wages, and who has no direct contractual relationship with the contractor furnishing said bond shall have a right of action upon the bond only upon having given written notice to said contractor within 90 days from the date on which such person furnished the last of the labor or materials for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the labor or materials were furnished. Such notice shall be served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or by personal service."

Appellant contends that this section should be so interpreted as to arrive at the following result: "In other words, persons who perform actual labor for wages and persons who are not in a direct contractual relationship with the contractor are given no direct right of action upon the prime contractor's payment bond. Only those persons who have a direct contract with the contractor are given a direct right of action upon the payment bond and then only if they comply with the notice requirements of Section 4209." We do not agree with this interpretation.

Does Section 4209 Require Respondent To Give |66 Notice To The Contractor As a Condition Precedent To Maintaining a Direct Cause of Action Against the Surety?

[2] For the purpose of clarification, the clause in section 4209, "other than a person who performs actual labor for wages," should be eliminated from our discussion of this issue, since respondent is obviously not such a person. The clause is set off from the rest of the main sentence by commas and should be read as a parenthetical clause. It clearly indicates an intent to segregate this clause from the rest of the sentence. While not controlling, punctuation is to be considered in the interpretation of a statute. (45 Cal.Jur.2d, Statutes, § 154, "Punctuation"; Estate of Coffee, 19 Cal.2d 248, 251, 120 P.2d 661.)

If it were not for this exclusionary clause, a person "who performs actual labor for wages" *but* who does not have a direct contractual relationship with the general contractor would be required to give the notice in question. This result would obviously be contrary to the express wording of the statute.

Deleting this clause for the sole purpose of the instant case, the pertinent provision of section 4209 would then read: "[E]very person to whose benefit the bond inures who has not been paid in full, *and* who has no direct contractual relationship with the contractor furnishing said bond shall have a right of action upon the bond *only* upon having given written notice to said contractor * * *" (emphasis ours).

[3] While respondent comes within the first category, it does not come within the second, since it is not disputed that respondent *did* have a direct contractual relationship with Miller. We therefore conclude that respondent was not burdened with the notice requirement imposed by section 4209.

It may be noted that section 4210 of the Government Code provides as follows: "In any case in which the law of this State affords a right to a person furnishing labor or materials for a public work who has not been paid therefor to file a stop notice with the public agency concerned and thereby cause the withholding of payment from the contractor for the public work, *any such person having no direct contractual relationship with the contractor, other than a person who performed actual labor for wages,* may file such a notice, but no payment shall be withheld from any such contractor pursuant to any such notice, unless such person has given written |67 notice to said contractor and the public agency concerned within 90 days * * *." (Emphasis ours.)

The similarity in the wording of these two statutes is of significance. Both were enacted into law in the same Act. (Stats. 1959, ch. 1594.) They are essentially notice statutes which grant different remedies to a person who has no direct contractual relationship with the contractor on a public works project. Each is conditioned by notice requirements in order to protect the contractors from so-called "secret liens" arising under work and materials furnished by subcontractors. Each contains the exclusionary clause, "other than a person who [performed or] performs actual labor for wages," which clause is set off by commas, leaving the notice requirement applicable to all others "[having] no direct contractual relationship with the contractor."

In comparing section 4210 with section 1193 subdivision (a) of the Code of Civil Procedure, also enacted in 1959 (Stats. 1959, ch. 2034), the Attorney General of California opined: "Similarly to Government Code section 4210, persons having a direct contractual relationship with the owner or those performing actual labor are excepted from the notice requirements. As respects these exceptions, the Legislature apparently felt there existed no need for such preliminary notification either because the owner would already have cognizance of such potential claims or for other reasons." (35 Ops.Cal.Atty.Gen. 136, 139.)

Section 1193 subdivision (a) of the Code of Civil Procedure provides: *"Except one under direct contract with the owner or one performing actual labor for wages,* every person who furnishes labor, service, equipment or material for which a lien otherwise can be claimed under this chapter, must, as a necessary prerequisite to the validity of any claim of lien subsequently filed, cause to be given not later than 15 days prior to the filing of a claim of lien a written notice as prescribed by this section, to the owner or reputed owner and to the original contractor." (Emphasis ours.)

The foregoing section, of course, deals with mechanics' liens on real property arising under private construction contracts, but the interpretation of the italicized clause, as quoted above, is of assistance herein. In Alta Bldg. Material Co. v. Cameron, 202 A.C.A. 330, at page 336, 20 Cal.Rptr. 713 at page 716 (April 11, 1962), it was said: "The section does not require a pre-lien notice by those under direct contract with the owner or ⌊68 those who perform actual labor for wages on the property. The logical reason for this distinction is that the owner would in the usual situation be apprised of potential claims by way of lien in connection with those with whom he contracts directly, as well as those who perform actual labor for wages upon the property.

"However, as to materials furnished or labor *supplied* by persons not under direct contract with the owner, it may be difficult, if not impossible, for the owner to be so apprised .* * *."

If the word "owner," as used above, is changed to "contractor," as used in section 4209 of the Government Code, the same principle is presented and the same reasoning applies.

Appellant places significance on a notice sent out by respondent's counsel, dated June 13, 1960, in compliance with the notice provision of section 4209, contending that this demonstrates that respondent itself believed that it was required to do so. However, the covering letter makes no such admission. It states: "In the light of the 1959 enactments to the California Government Code and the California Code of Civil Procedure relating directly or indirectly to claims of a subcontractor furnisher of materials and labor upon a public works contract we, as counsel for The Duncanson-Harrelson Co., have concluded that, *in excess of precaution,* the enclosed notice should be served upon each addressee thereof." (Emphasis ours.)

There being no appellate court decision on the precise question at the time the notice was sent, it was commendable of respondent's counsel to exercise such "excess of precaution." This, however, does not affect the holding herein that respondent was not required to give such notice and it is immaterial whether the notice that was given was or was not timely.

In support of its contention that the notice came too late, appellant relies upon testimony that the District had declared Miller to be in default and had terminated its contract on March 3, 1960. The notice of June 13, 1960, was given more than 90 days after Miller had ceased work. The project was completed by another contractor, but, according to the testimony of Miller's accountant, the District agreed to pay all rentals on the sheet piling until such completion. As stated before, the rental period ended June 10, 1960.

The foregoing gives rise to the second point made by appellant ⌊69 in its opening brief. As far as we can determine from the record, this point was never presented to the trial court. Appellant now states: "Neither appellant nor Miller is liable for any charges incurred after March 3, 1960. Particularly is this true in view of the express contract between Miller and the District that the latter would assume all liability for rental charges incurred for steel sheet piling after March 3, 1960. * * * Miller did not and in fact could not rent any steel sheet piling from respondents [sic] after March 3, 1960, and the award of damages for monthly rentals between March 3, 1960, and June 10, 1960, was clearly erroneous."

Appellant's contention is unsound. The agreement between respondent and Miller called for delivery of the sheet piling to Miller by respondent, to be used for the period required to complete the work called for under Miller's contract with the District. The rental charge was agreed upon at a monthly rate to be computed upon the basis of the tonnage furnished. The piling was in fact used until the completion of the project. No complaint is made as to the termination date of June 10, 1960. Appellant does not deny that respondent is entitled to rental for the period from March 3, 1960, to June 10, 1960. It simply says that Miller does not owe it but the District does, under its agreement with Miller.

Respondent's position is that it entrusted the piling to Miller, as a bailee, and that it was the absolute duty of Miller to redeliver the piling upon the termination of the bailment. (1 Witkin, Summary of California Law, p. 826.) Respondent has not elected to treat Miller's unauthorized reletting of the piling as a conversion, but rather as a continuation of the bailment. Respondent's agreement was with Miller, not with the District or the contractor who replaced Miller. Respondent was not a party to the agreement of the District to pay the rental charges accruing after March 3, 1960, and it is not bound to look only to the District for its rent.

[4] What appellant is really contending for is a novation. The Civil Code, section 1530, defines this as the "substitution of a new obligation for an existing one." An essential element of a novation is the agreement of all of the parties to the new contract. (36 Cal.Jur.2d 427, Novation, § 3.) This is completely lacking herein.

[5] Nowhere in the record is there any evidence, nor does appellant assert in its
70 briefs, that respondent was a party to the alleged agreement of March 3, 1960, between the District and Miller. If the District did assume Miller's obligations under the rental agreement, this is a matter between those parties, and Miller would have to look to the District for redress. There being no valid novation, the rental agreement would still be controlling as between Miller and respondent.

What we have said about Miller's continuance of the hiring agreement with the District may also be in point as to whether the notice of June 13, 1960, comes within 90 days after the last materials were furnished to the contractor. If Miller purported to re-let the piling to the District, then, so far as respondent was concerned, the piling was material which was still being furnished by respondent to Miller for use on the job.

Appellant raises an entirely new point in its reply brief. This point is that the bond only covered materials that were *used by its principal* (Miller) on the job and that, because Miller ceased its use of the piling after March 3, 1960, appellant is not liable on the bond for the use of the piling thereafter by the District or the contractor who succeeded Miller.

Thus, appellant attempts to distinguish its liability under the bond from any independent liability which Miller, as bailee, had by reason of its alleged agreement with the District to leave the piling until the job was completed.

[6, 7] We are not required to consider the point. It is well settled that a point raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present such point before. (3 Witkin, California Procedure, pp. 2341–2342, Appeal, § 155; Monk v. Ehret (1923) 192 Cal. 186, 190, 219 P. 452; Richard v. Richard (1954) 123 Cal.App.2d 900, 903, 267 P.2d 867; Wilson v. Board of Retirement (1957) 156 Cal.App.2d 195, 207, 319 P.2d 426; 4 Cal.Jur.2d 324, Appeal and Error, § 488.)

No reason has been shown for the withholding of this point until the closing brief. Respondent was not apprised of it either during the trial or in appellant's opening brief and has not had an opportunity to answer or defend against it.

As stated in Witkin, supra, at page 2341: "Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission."

We also have in mind that this point was never raised in ⊥71 the pleadings or in the written stipulation, signed by respective counsel, setting forth "the *only* issues of this case." The "Pre-Trial Conference Order" is in accord with this stipulation and, in the "Issues" set forth therein, no mention is made of the contention now under discussion.

What appellant termed, in its opening brief, as an "express contract between Miller and the District that the latter would assume all liability for rental charges incurred for sheet steel piling after March 3, 1960," may well have been the subject of cross-examination by respondent as to the terms of this alleged "express contract." As it was, no attention at all was paid to the matter during the trial.

Certainly, the leaving of the piling to be used on the job until completion would reduce the damage caused to the District by Miller's default in the performance of its contract, and it may well have been that appellant, as Miller's surety, consented to this arrangement and agreed to treat it as an "alteration or addition" to the contractual obligation of Miller to furnish the materials necessary to do the work provided for in its contract with the District. The clause in the bond which would be involved, in such an event, provides as follows: "And the said Surety * * * hereby stipulates * * * that no change, extension of time, alteration or addition to the terms of the contract or to the work to be performed thereunder * * * shall in any wise affect its obligations on this bond, * * *"

We do not have the Miller-District contract before us nor do we have the alleged "express contract" relating to the assignment or transfer to the District of Miller's rights, as bailee, to the use of the piling until completion of the job. Our purpose in stating the hypothetical situation described above is merely to demonstrate the unfairness to respondent of raising a point for the first time in appellant's closing brief.

Moreover, the point is without merit. The bond provides as follows: "The condition of this obligation is such, that if said Principal [Miller], * * * shall fail to pay for any materials * * * used in, upon, for, or about the performance of the work contracted to be done, * * * then said Surety [appellant] will pay the same * * *."

[8] The piling was material admittedly used in, upon and about the performance of the work contracted to be done by Miller. Miller became the bailee of this material upon its ⊥72 delivery by respondent. The agreement with respondent called for a fixed monthly charge during the period of the bailment.

[9] It is fundamental that a bailment is not terminated until the goods are redelivered to the bailor. (1 Witkin, Summary of California Law, p. 826, Personal Property, § 65.) The piling was not redelivered to respondent until after June 10, 1960. Hence, Miller was liable for the agreed monthly rental charge from October, 1958, to June 10, 1960. During this period it had actual or constructive possession of the piling as the bailee thereof.

Whether Miller left the piling in place until its successor completed the project or pulled it out and stored it in a warehouse (as some of it apparently was) has no effect on appellant's liability under the terms of its bond.

The piling comes squarely within the clause imposing liability under the bond for "materials * * * used in, upon, for, or about the performance of the work contracted to be done, * * *"

Assuming, without deciding, that the bond only covers work done by Miller under its contract, the fact remains that the period for which it was required to pay respondent for the use of the piling did not terminate on March 3, 1960, but continued until the redelivery of the piling to respondent. Hence, Miller comes within the description contained in the bond of a Principal who has failed to pay for materials used in, upon and about the performance of the work contracted to be done by the Principal.

Judgment affirmed.

KAUFMAN, P. J., and SHOEMAKER, J., concur.

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209 Cal.App.2d 201

201 **Nelson Hyde CHICK, dba Underground Construction Company, and F. P. Lathrop Construction Company, Petitioners,**

v.

SUPERIOR COURT of the State of California IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent,

Claude JONES, dba Claude Jones Company, and State Compensation Insurance Fund, Real Parties in Interest.

Civ. 20799.

District Court of Appeal, First District, Division 1, California.

Nov. 2, 1962.

Hearing Denied Dec. 26, 1962.

Negligence action by subcontractor's injured employee, who had received workmen's compensation benefits, against general contractor. The general contractor petitioned for writ of mandate to compel the court to allow amendment of answer alleging negligence of subcontractor and writ prohibiting court from proceeding without permitting amendment. The District Court of Appeal, Bray, P. J., held that the decisional rule that contributory negligence of a plaintiff's employer bars recovery from a third person of workmen's compensation payments made by the employer and its insurer applies to causes of action which accrued prior to the passage of statutes permitting contribution between judgment joint tortfeasors only.

Alternative writ of prohibition discharged and peremptory writ of mandate issued.

1. Workmen's Compensation 🔑2212

Decisional rule that contributory negligence of plaintiff's employer will bar recovery from third person of workmen's compensation payments made by employer and its insurer does apply to causes of action which accrued prior to passage of joint tortfeasors statute which modifies common law doctrine of noncontribution among joint tortfeasors. West's Ann.Code Civ. Proc. §§ 875–880.

2. Workmen's Compensation 🔑2188

Because covered employer is not liable in tort to injured employee, statute permitting contribution between judgment joint tortfeasors only has no application as between covered employer and third party tortfeasors, as employee's remedy under Workmen's Compensation Act is exclusive and he could not recover judgment in personal injury action against employer whether singly or with other tortfeasors. West's Ann.Code Civ.Proc. §§ 875–880; West's Ann.Labor Code, § 3201 et seq.

3. Courts 🔑100(1)

Generally, decisions which reverse prior rulings have retroactive effect.

4. Workmen's Compensation 🔑2084

Neither decisional rule that contributory negligence of plaintiff's employer will bar recovery from third person of workmen's compensation payments made by employer and its insurer, nor the joint tortfeasors statute permitting contribution between judgment joint tortfeasors only, affect statute providing that an injured employee's right to workmen's compensation benefits is exclusive remedy against a covered employer. West's Ann.Code Civ.Proc. §§ 875–880; West's Ann.Labor Code, §§ 3601, 3852–3862.

5. Workmen's Compensation 🔑2224

Party sued as third party tortfeasor by injured employee of another who had paid compensation benefits could, under most feasible method, join injured employee's employer and his carrier by cross-complaint, upon showing that justiciable issue of employer's concurrent negligence existed. West's Ann.Code Civ.Proc. § 389.

◆

Russ & Moore, San Francisco, for petitioners.

Gonick & Schmid, Oakland, T. Groezinger, Loton Wells, Charles M. McMillan, Henry F. O'Connell (State Comp. Ins. Fund), San Francisco, for real parties in interest.

⊥202 ⊥BRAY, Presiding Justice.

Petition for writ of mandate and writ of prohibition.

QUESTION PRESENTED.

Does the rule set forth in Witt v. Jackson (1961) 57 Cal.2d 57, 17 Cal.Rptr. 369, 366 P.2d 641, that the contributory negligence of a plaintiff's employer will bar recovery from a third person of workmen's compensation payments made by the employer and its insurer, apply to causes of action accruing prior to the passage in 1957 of the joint tortfeasor statute (Code Civ.Proc. §§ 875–880)?

RECORD.

Petitioners were the general contractors for the construction of a building in Oakland. Claude Jones, doing business as the Claude Jones Company, was a subcontractor on the project. Plaintiff in the court below was an employee of the subcontractor and was injured in 1954 while working on the building. He received workmen's compensation benefits from his employer and the latter's compensation carrier. Plaintiff sued petitioners, the general contractors, to recover for the injuries sustained. Jones, the subcontractor, and his insurance carrier, seek in that action to recover from defendants therein, petitioners in this proceeding, the workmen's compensation disability and medical payments made to plaintiff. Petitioners filed a motion in that action to amend its answer theretofore filed to allege that Jones was negligent in the performance of the construction work, which negligence was the proximate cause of plaintiff's injuries, and that said negligence bars Jones and his carrier from recovery of said compensation payments. Petitioners also moved to compel joinder of Jones and his carrier as necessary parties plaintiff in the event the court deemed their presence necessary for petitioners to raise the proposed defense.

⊥The trial court denied both motions. Petitioners seek a writ of mandate compelling the respondent court to allow the amendment and a writ of prohibition prohibiting that court from proceeding to trial without permitting the amendment. ⊥203

THE DEFENSE IS AVAILABLE.

In 1954 it was the law in California that the concurring negligence of a workman's employer did not bar the employer's recovery, in an action brought by the injured employee, from a third party tortfeasor of compensation benefits paid to the injured employee. (Finnegan v. Royal Realty Co. (1950) 35 Cal.2d 409, 434–435, 218 P.2d 17; Pacific Ind. Co. v. Cal. Electric Works., Ltd. (1938) 29 Cal.App.2d 260, 84 P.2d 313.)

In December, 1961, the Supreme Court held in Witt v. Jackson, supra, 57 Cal.2d 57, 69–73, 17 Cal.Rptr. 369, 366 P.2d 641, that a third party tortfeasor could invoke the concurrent negligence of an employer to defeat the latter's rights to recover for the benefits paid to an injured employee.

At the time of the plaintiff-employee's injury, it was also the rule in California that there was no right of contribution among joint tortfeasors. (Smith v. Fall River J. U. High School Dist. (1934) 1 Cal.2d 331, 34 P.2d 994; Dow v. Sunset Tel. & Tel. Co. (1912) 162 Cal. 136, 121 P. 379.) However, in 1957, this doctrine was partially abrogated by the enactment of sections 875–880 of the Code of Civil Procedure so as to permit contribution, under certain conditions, "Where a money judgment has been rendered jointly against two or more defendants in a tort action * * *." This modification of the common law doctrine of noncontribution among joint tortfeasors was discussed in the Supreme Court's decision in Witt v. Jackson, supra.

It is the contention of Jones and his carrier, the real parties in interest, and it was the holding of the trial court, that the ruling in Witt was not available to petitioners since to apply it would entail retroactive applications of sections 875–880.

[1, 2] Such reasoning is erroneous: First, because it is obvious that since a covered employer is not liable in tort to his injured employee (Lamoreux v. San Diego etc. Ry. Co. (1957) 48 Cal.2d 617, 624–626, 311 P.2d 1), sections 875–880, permitting contribution between judgment joint tortfeasors only, could have no application as between a covered employer and a third party tortfeasor. The employee's remedy is provided ⌊204 by the Workmen's Compensation Act; hence he could not recover a judgment in a personal injury action against his employer whether singly or with other tortfeasors.

This was explained in the recent case of American Can Co. v. City & County of San Francisco (1962) 202 A.C.A. 580, 583, in footnote 2, 21 Cal.Rptr. 33, 35, which stated, "It would seem evident that section 875 would never be applicable in situations where the injured party is the employee of one of two tortfeasors and the employer has secured Workmen's Compensation insurance. Since the employee's 'exclusive remedy' against his employer is the right to recover compensation (see Labor Code, § 3601), he may not bring a tort action against the employer, and the two tortfeasors will never be held jointly liable as required by Code of Civil Procedure, section 875. (See Witt v. Jackson * * *, where the court indicated that a negligent third party could obtain contribution pursuant to Code Civil Procedure, section 875, only in the *absence* of Workmen's Compensation.)"

Secondly, the Supreme Court in Witt did not in any sense indicate that its decision was compelled by sections 875–880. Rather, the court's sole reference to sections 875–880 of the Code of Civil Procedure was made during its demonstration that the rationale of prior decisions was no longer sustainable. These sections are not cited by the court among the reasons for its decision.

[3] It is the general rule that decisions which reverse prior rulings have retroactive effect. (Aced v. Hobbs-Sesack Plumbing Co. (1961) 55 Cal.2d 573, 12 Cal.Rptr. 257, 360 P.2d 897; 3 Witkin, Cal.Proc., Appeal, § 238, p. 2459.) However, the court in Witt did not overrule prior decisions to the contrary, but merely distinguished them on the basis of the intervening enactment of Code of Civil Procedure sections 875–880.

In Witt the Supreme Court stated that the reasoning in Pacific Ind. Co. v. Cal. Electric Works, Ltd., supra, 29 Cal.App.2d 260, 84 P.2d 313, and Finnegan v. Royal Realty Co., supra, 35 Cal.2d 409, 218 P.2d 17 (upon which cases the trial court relied) "has been rendered obsolete" (57 Cal.2d p. 70, 17 Cal.Rptr. 369, 366 P.2d 641) because to follow such reasoning would permit a negligent employer to profit by his own wrong.

The opinions in the Pacific Indemnity, Finnegan and Witt cases make clear the fact that the rules announced in each case are rules of decisional law. There is no doubt but that the court in Witt was influenced by the expression of ⌊205 legislative will as set forth in Code of Civil Procedure sections 875–880. However, the two rules are related only because of the extent to which they are impelled by the same policy considerations. The decision in Witt is in terms not made to depend upon these sections, which have, in fact, no direct bearing on the question decided in the Witt case. It follows that the application of that decision to the case at bar does not involve retroactive application of sections 875–880, and that the court below erred in basing its ruling on that ground.

In Witt the court discussed the Pennsylvania rule which permits a third party tortfeasor against whom an injured employee has recovered a judgment to secure contribution from the negligent employer, limited to the amount of compensation payments the employer has made to the employee. It then discussed the North Carolina rule which holds that the third party is entitled to have the judgment against him reduced by the amount of compensation paid to the injured employee if he can prove that the concurrent negligence of the employer contributed to the injuries suffered by the employee. The court then stated, "We find the reasons supporting the North Carolina rule persuasive." (P. 71 of 57 Cal. 2d., p. 377 of 17 Cal.Rptr., p. 649 of 366 P.2d.) Then, after quoting from Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886, 891, " 'It is contrary to the policy of the law for the employer, or his subrogeee, the insurance carrier, to profit by the wrong of the employer,' " the court said (p. 72, of 57 Cal. 2d, p. 377 of 17 Cal.Rptr., p. 649 of 366 P. 2d): 'This policy should prevail here since there is nothing in the Labor Code to suggest that the Legislature contemplated that a negligent employer could take advantage of the reimbursement remedies that those sections provide. In the absence of express terms to the contrary, these provisions must be deemed to be qualified by Civil Code, section 3517 which provides that 'No one can take advantage of his own wrong.' Thus, whether an action is brought by the employer or the employee, the third party tortfeasor should be able to invoke the concurrent negligence of the employer to defeat its right of reimbursement, since, in either event, the action is brought for the benefit of the employer to the extent that compensation benefits have been paid to the employee. (See Lovette v. Lloyd, supra, 73 S.E.2d at p. 892.)"

[4] Respondent, however, characterizes the decision in the Witt case as involving an "interpretation" of sections 875–880 of the Code of Civil Procedure, and contends that these sections and the court interpretation operate to alter a right vested in a covered employer which respondent contends is provided by section 3601 of the Labor Code. This section, insofar as is pertinent here, provides that an injured employee's right to workman's compensation benefits is his exclusive remedy against a covered employer. Respondent contends that to apply the "interpretation" of sections 875–880 set forth in Witt so as to give these sections retroactive application impairs a constitutionally protected, vested right. The answer is that (a) the decision in Witt neither calls these sections into play, nor purports to apply them to that case; and (b) neither Witt nor these sections affect the provisions of Labor Code section 3601.

Respondent also urges a totally inapplicable analogy based upon the presumption that the court in Witt "declared and interpreted C.C.P. §§ 875–880 so as to conclude that the employer in certain circumstances no longer is afforded a statutory right of subrogation" as provided by sections 3852–3862 of the Labor Code. As pointed out above, sections 875–880 were not the rationale of the Witt decision.

[5] The petitioners' motion to compel joinder of the Claude Jones Company and its carrier indicates that petitioners seek to have them joined as plaintiffs. The real parties in interest contend that there are no rules by which to compel them to become parties plaintiff against their wishes. It would appear that the court denied the motion to compel joinder solely because it denied the motion to amend the answer. Hence, there is no actual ruling of the court as to the propriety of the manner of joinder. In City of Sacramento v. Superior Court (1962) 205 A.C.A. 455, 23 Cal.Rptr. 43, the court held that a third party tortfeasor in the position of the petitioners may join the employer and his carrier by cross-complaint *upon a showing that a justiciable issue of the employer's concurrent negligence exists.* While the court did not intimate that this mode of joinder was exclusive, it would appear to be the mode most

reasonably adapted to facilitate the action. The trial court may so order. (Code Civ. Proc. § 389.) However, so far as the record discloses, this is an issue which was not passed on by the court below, and which, therefore, is not seasonably before this court.

The alternative writ of prohibition heretofore issued is discharged, and it is ordered that a peremptory writ of mandate issue requiring the respondent court to set aside its order denying petitioners' motions and to permit petitioners to amend their answer and to act upon petitioners' motion to compel joinder of Jones and his insurance carrier as parties ⌊207 plaintiff in the event the court deems their presence necessary to raise the proposed defense.

SULLIVAN, J., and AGEE, J. Assigned, concur.

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209 Cal.App.2d 233

⌊233 **James William SPEER, Plaintiff and Appellant,**

v.

Margaret Lillian SPEER, Defendant and Respondent.

Civ. 26268.

District Court of Appeal, Second District, Division 1, California.

Nov. 5, 1962.

As Modified on Denial of Rehearing Dec. 3, 1962.

Hearing Denied Jan. 3, 1963.

Divorce suit by husband. The wife cross-complained for separate maintenance. The Superior Court of Los Angeles County, David Coleman, J., entered judgment denying the husband a divorce and granting separate maintenance to the wife and dividing the property. The husband appealed. The District Court of Appeal, Lillie, J., held that husband's mere expectancy in assets of corporation was not subject to division as community property.

Affirmed in part; reversed in part.

1. Divorce ⚷124

The evidence, including that relating to the marital relations and the wife's housekeeping activities and the presence of 5 to 8 noisy dogs in the small home, failed to show grounds for granting divorce to husband.

2. Divorce ⚷184(10)

Considerable latitude is allowed to trial court in determining whether certain acts constitute extreme cruelty of nature and kind as to make mandatory a severance of marital bonds.

3. Divorce ⚷184(10)

On appeal from judgment in divorce action, every intendment is in favor of findings of trial court.

4. Husband and Wife ⚷297

The evidence, in wife's cross-complaint for separate maintenance, sustained findings of husband's cruelty and misconduct arising out of his association with another woman.

5. Husband and Wife ⚷297

Evidence of activities indicating husband's adulterous disposition supports general charge of cruelty of husband sued for separate maintenance.

6. Husband and Wife ⚷297

Even if husband's activities indicating his adulterous disposition took place after separation, evidence of such activities was admissible for corroborative purposes in wife's cross-complaint for separate maintenance.

7. Husband and Wife ⚷290

Wife cross-complaining for separate maintenance rather than divorce was not required to serve copy of pleadings on corespondent with whom the husband had allegedly associated during the marriage. West's Ann.Code Civ.Proc. § 1019.

8. Divorce ⚷249(3)

In dividing property incidental to granting divorce, court is limited by amount of property in its hands for division.

9. Husband and Wife ⚷298¾

Husband's mere expectancy in assets of corporation was not subject to division as community property with wife who was entitled to separate maintenance.

10. Husband and Wife 🔑298(3)

Award of alimony payable to wife seeking separate maintenance at rate of $250 bi-monthly and of $25,200, payable in monthly installments, for her share of community interest in corporation and partnership was unreasonable where husband's monthly salary was $1,000, he had been ordered to pay past-due federal income taxes of $12,000 and other obligations aggregating more than $19,000, and he had mere expectancy based on claims against corporation.

11. Husband and Wife 🔑301

Award of $7,000 to attorneys of wife seeking separate maintenance was unreasonable although they put in several hundred hours of work, where results of litigation were inconclusive.

12. Husband and Wife 🔑131(1), 262(1)

Where lot was originally held by husband and wife in joint tenancy, husband subsequently deeded his interest to third party, third party deeded that interest back to husband, and source of funds procuring second conveyance was not shown, it was presumed that wife held undivided half interest as her separate property and that remaining half was community property. West's Ann.Civ Code, § 164.

Walter H. Young, Los Angeles, for appellant.

Bailie, Turner, Lake & Sprague, Los Angeles, for respondent.

⊥235 ⊥LILLIE, Justice.

Plaintiff husband appeals from a judgment denying him a divorce and granting defendant wife a decree of separate maintenance as prayed for in her cross-complaint. In addition to an award of permanent support, the decree also divided the property of the spouses between them and contained other provisions which are here challenged.

The parties were married in 1936 and separated in 1957. The present action was instituted in January of 1958, and the judgment appealed from was entered on April 17, 1961—the delay incident to the culmination of the trial is likewise made the subject of plaintiff's criticism. Differences arose rather early in the marriage. We mention a few which, according to the plaintiff, reveal such an unwholesome relationship that its perpetuation would be a mockery of marriage. (De Burgh v. De Burgh, 39 Cal.2d 858, 867, 250 P.2d 598.)

[1] First, plaintiff complains that he was generally unable to have satisfactory marital relations for several stated reasons; however, it appears that plaintiff knew of these matters before the marriage and it further appears, at least by inference, that he was generally not too dissatisfied with the situation. In 1940 the parties moved to a small house on Twickingham Avenue, Los Angeles, where they continuously resided until their separation. With them moved defendant's mother at whose home the parties had theretofore lived. The mother did most of the cooking and ironing, and all of the mending. The house was so crowded that it became necessary to convert a stall shower into a storage closet. During this time the parties had dogs, of various breeds and five to eight in number, living with them. Two were males which fought with each other; certain rooms in the house had to be partitioned off to keep the dogs from fighting. All the dogs slept in the house; whenever there was an unusual noise (and this happened almost nightly) they would bark—always in unison. On several occasions defendant threatened suicide when plaintiff complained about getting rid of the dogs. There were two beds in the bedroom. Defendant moved out of this room about 15 years prior to the separation; thereafter she slept in the den with the dogs. During the last year of their life together,⊥ she ⊥236 denied him intercourse. Plaintiff usually returned from work at 6:00 o'clock. He ate his meals on a chair with the plate on his

lap; defendant ate her meals in the den. The mother usually prepared the meals; she ate off the breadboard. There was also testimony that defendant was not a good housekeeper in other respects. The overall picture presented, if believed by the trier of fact, would indeed suggest that, "the purposes of family life [were] no longer served and divorce [should] be permitted." (De Burgh v. De Burgh, supra, 39 Cal.2d 858, 864, 250 P.2d 598, 601.)

On the other hand, plaintiff expressly concedes that there was "much disputed evidence" on the matters heretofore related; specifically, whether plaintiff complained about "the foregoing items," whether defendant actually refused him intercourse, whether defendant was or was not a good housekeeper—to mention a few. In this connection, it appears that plaintiff was not altogether unhappy about the fact or extent of the canine companionship with which he was daily (and nightly) confronted; in 1937 he bought defendant their first dog as a Christmas present, and another dog was purchased when the parties thereafter decided to raise puppies and sell them. The trier of fact was also entitled to infer that plaintiff ate his meals in the manner already described because, like many other normal persons, he was a devotee of television and watched these programs while seated in a special reclining chair.

[2–4] In the last analysis, therefore, it seems that this particular phase of the appeal is controlled by the principle that "considerable latitude is allowed to the [trial] court in determining whether such acts constituted extreme cruelty of the nature and kind as to make mandatory a severance of the marital bonds." (Polk v. Polk, 50 Cal.App.2d 653, 656, 123 P.2d 550, 551.) After stating that the trial court is aided by the opportunity of having the witnesses before it and observing their candor and truthfulness, the Polk case declares: "Whether in a given case the conduct of one of the spouses was such as *wrongfully* to inflict upon the other party to the marriage the 'grievous bodily injury' or 'grievous mental suffering' referred to in the statute, is a pure question of fact, to be deduced from all the circumstances of each particular case, and as stated in Van Camp v. Van Camp, 53 Cal.App. 17, 199 P. 885, 887, 'no arbitrary rule of law as to what particular probative facts shall exist in order to justify a finding of the ultimate facts of its existence can be given.'" (p. 657, 123 P.2d p. 551.) ⊥237 Too, "On appeal from a judgment in a divorce action, as in other actions, every intendment is in favor of the findings made by the trial court." (Manzanares v. Manzanares, 190 Cal.App.2d 771, 778, 12 Cal.Rptr. 239, 242.) With one exception (to be presently noted) plaintiff's whole argument, extensively and vigorously pursued, simply "splinters on the familiar rock that the trial court resolves such questions of fact and that the findings will not be disturbed if supported by substantial evidence." (Clevenger v. Clevenger, 189 Cal.App.2d 658, 675, 11 Cal.Rptr. 707, 717.) Here the findings of plaintiff's cruelty and misconduct are sufficiently supported by the evidence.

There is this somewhat singular situation in the present case, as plaintiff points out. Since De Burgh, supra, 39 Cal.2d 858, 250 P.2d 598, it has been both proper and common to grant a divorce to both parties when the circumstances warranted. One of the problems argued pro and con, from the trial's inception to its end, was the authority of the court to grant a divorce and separate maintenance in the same action. Plaintiff concedes that no case, directly in point, for the unprecedented step he asked the trial court to take has been found. However, at several sessions the trial judge indicated that "there should be a complete divorce here, no matter what is done"; but always recognizing the problem "whether or not divorce and separate maintenance can be granted at the same time." Defendant persisted in her prayer for separate maintenance, she did not ask for a divorce; on the other hand, plaintiff prayed for a divorce. Finally, after much colloquy, the trial judge said that "a very substantial divorce cause was presented by the wife" and indicated he would grant her decree of separate maintenance. Plaintiff argues, however, that it was the lower court's doubt that the law would support the granting of a divorce and a separate maintenance in the same action, not the weakness of his case in chief that motivated the trial court's action in denying him a divorce. But this is not true for it is apparent from the evidence, the findings of the trial judge and the court's statement to the parties, that on the evidence plaintiff was not entitled to a divorce; thus the "comparative guilt" of the parties mentioned in De Burgh v. De Burgh, 39 Cal.2d 858, 250 P.2d 598, has little bearing on the case at bar. It is important to note, that the De Burgh opinion does not compel an award to both parties in all cases of dual marital fault. See, for example, Mueller v. Mueller, 44 Cal.2d 527, 530, 282 P.2d 869, 870, where the court ⌊238⌋ (citing De Burgh) declared that, "The comparative guilt of the parties 'may have an important bearing upon whether or not either one or both should be granted * *.'" Implicit in the comments of the court, just quoted and to follow, is the recognition of this factor of comparative guilt: "* * it seems to the court that the case is a one-sided case from the standpoint of the defendant and cross-complainant and I would think regardless of this attempt of showing adultery, which I assume could have been gone into more thoroughly except that the court more or less restricted proof on that subject, the issue of cruelty is directly proved." Continuing, "I think that the evidence of association with another woman while the plaintiff was still married and is still married to the defendant here, created a situation that was intolerable from the standpoint of any person with normal sensibilities and reactions. If he had just walked out, having become fed up, so to speak, with the situation to the extent that he could no longer stand it, we could possibly recognize that as a reaction that might be anticipated, but the walking out and getting surfeited with the kind of existence he said he led seemed to have developed quite spontaneously, if not spontaneously, at least fairly rapidly after he encountered Mrs. M. * * *" Accordingly, Finding VI is to the effect that "at various places since April of 1957, plaintiff has committed adultery with one (naming her) within the County of Los Angeles, State of California."

[5–7] In the exercise of sound discretion, therefore, the court could have granted a divorce to the wife, had she sought such relief. Plaintiff admitted to defendant in August of 1957 that there was a liaison between himself and the woman named in the cross-complaint; this was some three months before the date of separation which, according to plaintiff's complaint, occurred on November 15, 1957. Too, there was evidence of activities indicating an adulterous disposition (at the very least) which supports a general charge of cruelty. (San Chez v. Superior Court, 153 Cal.App.2d 162, 164, 314 P.2d 135.) Even if it be conceded that these activities took place after the separation, such evidence was admissible for corroborative purposes. (Garten v. Garten, 140 Cal.App.2d 489, 492, 295 P.2d 23.) There is no merit, of course, to plaintiff's argument that the co-respondent was never served with a copy of the pleadings; the governing statute (Code Civ.Proc. § 1019) limits the above requirement to an action for divorce. (San Chez v. Superior Court, supra, 153 Cal.App.2d 164–165, 314 P.2d 135.)

⌊239⌋ Moreover, the trier of fact freely expressed his opinion that plaintiff had in fact failed to establish his case. The court said: "Well, as a matter of fact, I have never considered that the plaintiff had an action for divorce here based on the evidence presented. * * * I have sometimes wondered at his courage, if that is a proper word, in filing an action for divorce in view of the situation in which he found himself."

For the above reasons we conclude that whether, as a matter of law, relief could have been granted to each party—a divorce to the husband and separate maintenance to the wife—is really an academic question undeserving of further discussion here.

Plaintiff challenges the determination below respecting the character of certain properties, the disposition of property found to be community, the amount of alimony awarded and the fees (said to be excessive) awarded defendant's attorneys. We shall first consider the last two contentions.

Plaintiff was ordered to pay alimony at the rate of $250.00 bi-monthly. A certified public accountant, appointed by the court, testified (after access to pertinent books) that plaintiff's monthly salary from a wholesale meat business known as Day-Lee Meats, Inc. was slightly over $1,000.00 per month. In this connection, it appears that plaintiff also owns a one-half interest in Day-Lee Meats, a co-partnership, out of which the above corporation was formed. The trial court found that plaintiff and defendant were 50 and 49 years of age respectively; that defendant had undergone surgery for various ailments and has neither the ability nor training to support herself. In view of defendant's established needs, it may not be said that the sum awarded is unreasonable provided it is within plaintiff's ability to pay; this is particularly true in light of the length of marriage. Difficulty is encountered, however, when consideration is given to plaintiff's ability to pay at the time of entry of the judgment.

According to defendant, as of May 31, 1960, the corporation's assets reflected in the balance sheet aggregate slightly in excess of $189,000.00. Offsetting these assets are obligations of $60,000.00 approximately, listed as accounts receivable, due plaintiff and his partners as officers. A further receivable, owed to the partnership, totals approximately $63,000.00. According to the capital account, there is no issued capital stock. Retained earnings total $18,381.98. Without further statement of financial figures, defendant says that plaintiff owns a one-half interest in each of the two accounts receivable, mentioned above, as well as a one-half interest in the retained earnings. ($18,381.98.) Plaintiff was ordered to pay to defendant for her share of the parties' community interest therein the sum of $25,200.00 in monthly installments of $700.00 for a period of 36 months. 240

But neither the corporation nor the partnership were made parties to the present action, nor is it claimed that the corporation was plaintiff's alter ego. Mr. Marks (plaintiff's partner) was a co-owner, and the corporation is as much indebted to him as to plaintiff. Too, the record appears to be silent as to when the accounts receivable to Marks and plaintiff were due or the ability of the corporation to pay them. There is the further difficulty of creditors' claims, actual or contingent. It was suggested by defendant's counsel at the trial's closing session, that plaintiff could "factor his accounts receivable or assign them and get some money out of it." But, as stated in plaintiff's reply brief, this suggestion "completely disregarded the corporation, disregarded Mr. Marks, amounted to a conversion of corporate assets to pay personal debts of a shareholder and treated the business as though it were the sole property of Mr. Speer." In short, the judgment ordered plaintiff to make specific payments as and for alimony, attorney's fees and other costs, leaving it to him to determine how the necessary monies were to be secured or, as further noted in plaintiff's brief, "how he would make peace with Mr. Marks, if this were possible."

[8, 9] The law is clear that in dividing property incidental to the granting of a divorce decree, the court is limited by the amount of property in its hands for division. (Hill v. Hill, 82 Cal.App.2d 682, 187 P.2d 28.) Plaintiff has a mere expectancy in the assets of the Day-Lee operation; such expectancy is not subject to division as community property. (French v. French, 17 Cal.2d 775, 778, 112 P.2d 235, 134 A.L.R. 366.) Until his present claims against the business are made enforceable by an accounting or other appropriate proceeding, they remain a mere expectancy,

Incidentally, it has been represented to us, although no part of the record, that such a suit is presently pending.

[10] While the foregoing discussion relates to the determination and disposition of the parties' property, it also bears on the award of alimony. Defendant's argument in support of the reasonableness of such award is premised on the assumption that plaintiff had certain liquid assets, additional to his salary, which established his ability to pay. We have determined otherwise. ⊥241 It also appears that plaintiff was ordered⊥to pay past-due federal income taxes in the sum of $12,000.00 and other obligations (including attorney's fees) aggregating more than $19,000.00. Manifestly it is impossible for plaintiff with a monthly salary of $1,000.00 to pay the sum awarded for permanent support unless other creditors are to be disregarded. Upon retrial or following the outcome of other litigation marshalling the assets of the community in the Day-Lee enterprise, the award in question may prove reasonable; in the present state of record, however, it is not.

[11] The same conclusion must be reached with respect to the matter of attorney's fees. Counsel were awarded $7,000.00, representing several hundred hours of work. We do not question the hourly or daily court rate charged; but the results of this litigation have been inconclusive, and one of the factors determinative of an attorney's fee is the result achieved. The portion of the judgment fixing such fees must also be reversed.

[12] Save for that portion of the judgment which determined defendant's interest in the Day-Lee operation, the only other challenged provisions dispositive of the parties' property interests relate to Lot 97 (on East Beverly Boulevard) and the assignment to defendant of a homestead on the Twickingham house, being Lot 216 of Tract 4777. When defendant filed a homestead, there was included in her declaration an adjoining lot—Lot 215. The sole question is whether this contiguous lot was utilized in connection with the enjoyment of the house on Lot 216. Photographs and other evidence were introduced which showed such use. The trial court's finding was proper and in accord with established precedent. (Englebrecht v. Shade, 47 Cal. 627.)

With respect to Lot 97, it appears that this property was originally held by the parties in joint tenancy. Subsequently, plaintiff deeded his interest to a third party who, as a consequence, became a tenant in common with defendant. Thereafter this grantee deeded her interest back to plaintiff—evidence of this conveyance, although perhaps not the best evidence, was received without objection (Deft. Ex. "AA"). Dunn v. Mullan, 211 Cal. 583, 296 P. 604, 77 A.L.R. 1015, is controlling. That case holds that where, as here, there is no evidence as to the source of funds procuring the second conveyance, the presumption created by statute (Civ.Code, § 164) must prevail; namely, one joint tenant (the wife) held an undivided one-half interest therein as her separate property, while the remaining half was the community property of the husband and wife. The trial court correctly so held.

⊥Insofar as the judgment awards $500 per month permanent support, fixes attorney's fees, declares that there is a community interest in the corporation and partnership known as Day-Lee Meats, Inc. and Day-Lee Meats and orders plaintiff to pay defendant the sum of $25,200.00 as her share thereof, it is reversed; in all other respects, it is affirmed. ⊥242

WOOD, P. J., and FOURT, J., concur.

208 Cal.App.2d 785

⌊785⌋ **The PEOPLE, Plaintiff and Respondent,**

v.

Ralph Ellis GUTHAUS, Defendant and Appellant.

Cr. 8161.

District Court of Appeal, Second District, Division 4, California.

Oct. 23, 1962.

Rehearing Denied Nov. 9, 1962.

Hearing Denied Dec. 19, 1962.

Prosecution on charge of selling and furnishing narcotics. From an adverse judgment of the Superior Court, Los Angeles County, H. Burton Noble, J., and from an order denying a motion for new trial, the defendant appealed. The District Court of Appeal, Jefferson, J., held that experienced members of narcotics squad, who had given marked money to a former narcotics user, who went into defendant's house and returned with narcotics, had reasonable cause to believe that felony of possessing and selling narcotics was being committed in the house, and officers were entitled to conclude in good faith that if they informed defendant of their presence and demanded admission before breaking into the premises he might attempt to dispose of the narcotics then in his possession, and evidence obtained by police officers by crashing in doors without identifying themselves was admissible.

Judgment affirmed and order denying new trial dismissed.

1. Searches and Seizures 🔑7(1)

Only unreasonable searches and seizures are prohibited by the constitution and in each instance primary question is whether search and seizure was reasonable. West's Ann.Const. art. 1, § 19; U.S.C.A. Const. Amend. 14.

2. Searches and Seizures 🔑7(10)

When a police officer has reasonable cause to enter a dwelling to make an arrest and reasonable cause to make a search incident to the arrest, his entry and his search are not unreasonable. West's Ann. Const. art. 1, § 19; U.S.C.A.Const. Amend. 14.

3. Criminal Law 🔑394.4(10)

Experienced members of narcotics squad, who gave marked money to former narcotics user, who went into defendant's house and returned with narcotics, had reasonable cause to believe that felony of possessing and selling narcotics was being committed in house, and officers were entitled to conclude in good faith that if they informed defendant of their presence and demanded admission before breaking into premises he might attempt to dispose of narcotics then in his possession, and evidence obtained by police officers by crashing in doors without identifying themselves was admissible. West's Ann.Health & Safety Code, § 11501; West's Ann.Pen.Code, § 844; West's Ann.Const. art. 1, § 19; U.S. C.A.Const. Amend. 14.

4. Criminal Law 🔑956(13)

Affidavits in support of defendant's motion for new trial failed to show that any out-of-court evidence was received by jury in hallway of courthouse during trial recess. West's Ann.Pen.Code, § 1181, subd. 2.

5. Criminal Law 🔑964

Decision of trial court in denying motion for new trial after considering conflicting affidavits is final in absence of a showing of abuse of discretion.

6. Criminal Law 🔑857(1), 1158(1)

General discussion of case between jurors during trial recess, while not approved, is not as a matter of law prejudicial, and in absence of a showing of an abuse of discretion, finding of trial court as to absence or existence of prejudicial misconduct will not be disturbed on appeal. West's Ann.Pen.Code, § 1181, subds. 2, 3.

7. Criminal Law 🔑720(6), 919(3)

Subtle suggestions by prosecutor of conclusions allegedly not supported by the evidence were entirely proper as reasonable inferences which might be drawn from the evidence, and such suggestions did not entitle defendant to a new trial on ground of prejudicial misconduct.

◆

George E. Shibley, Long Beach, for defendant and appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and George W. Kell, Deputy Atty. Gen., for plaintiff and respondent.

⊥787 ⊥ JEFFERSON, Justice.

An information filed by the District Attorney of Los Angeles County charged that defendant sold a narcotic, to wit, heroin, in violation of section 11501 of the Health and Safety Code. Pursuant to section 995 of the Penal Code, defendant made a motion to set aside the information. Following the denial of this motion, defendant entered a plea of not guilty. The jury returned a verdict finding defendant guilty as charged. Defendant's motion for new trial was denied. Probation was denied and defendant was sentenced to state prison for the term prescribed by law. This is an appeal from the judgment of conviction and order denying motion for new trial.

Basil Clark testified that he had formerly been a user of narcotics and had been acquainted with defendant. On April 24, 1961, Clark was taken to a substation of the sheriff's department where he placed a telephone call to defendant which was monitored by a sheriff's deputy over an extension⊥788 telephone. Clark dialed a telephone number which he had on previous occasions used to contact defendant. He recognized the answering voice as that of defendant, and he told him that he wanted "to make it," which in the jargon of narcotics' users means "to purchase some heroin." Defendant replied that "he had some" and he asked Clark to come to his house. Defendant inquired as to how much he wanted, and Clark told him that he wanted three grams.

Clark further testified that while at the sheriff's office he was asked to remove all his clothing and was searched to the skin by sheriff's deputies. Clark's automobile was also searched. Clark was then given $40 in four $10 bills, the serial numbers of which had been typed on a separate sheet of paper, which was retained by the sheriff's department. Clark proceeded to defendant's home in his automobile followed by members of the sheriff's narcotics squad in an unmarked vehicle. Clark stated he approached defendant's house alone, knocked on the door and was admitted by a man named Robert Patterson. A fourth person, Donald Coon, was also present in the home. Clark was directed to the bathroom where he observed defendant "capping up" some heroin which was in a green plate and which he was putting into small gelatin capsules. Defendant gave Clark eighteen filled capsules in exchange for the four $10 bills which were supplied by the sheriff's department.

Defendant told Clark he could "fix" there if he wanted to. Clark declined, stating he had some girls waiting for the heroin. Clark took the capsules, which defendant had placed in an empty cellophane package, and left with Patterson and Coon. Clark then gave the package of capsules to Coon to hold while he was driving, and Coon placed the package in his right sock. Before they left, one of the men said he wanted to get his "outfit" from his car which was parked across the street. He returned with something wrapped in a towel. They had driven approximately two blocks when the sheriff's deputies stopped their car, searched all three men, discovered the heroin, and placed them under arrest.

One of the deputies took Clark back to defendant's home and furnished him with another $10 bill. The deputy watched through the rear side window of Clark's automobile while Clark entered defendant's home. Clark told defendant that Coon and Patterson "had burnt him," meaning that they had stolen the heroin. He told defendant he had $10 more and wanted another half gram. Defendant started to go to the⊥789 bathroom to get the heroin when footsteps were heard on the porch and instantly the door was caved in by the sheriff's deputies.

The deputy who had remained in Clark's automobile testified he had waited twenty or thirty seconds, at which time the other deputies drove up in their automobile. He then got out of Clark's car, jumped over the fence; ran across the lawn to the front porch; pulled open the screen door which was secured by a hook; and with two kicks crashed open the front door. He ran through the living room into a bedroom and a closet before he discovered defendant in the bathroom where he was standing over the sink rinsing off a green plate. Nothing remained on the plate, and a later investigation failed to find any traces of heroin in the sink plumbing. Defendant was immediately placed under arrest, and four $10 bills were removed from his wallet. Immediately the bills were compared with, and found to correspond to, the list of serial numbers taken from the bills previously furnished to Clark. The search also revealed two boxes of gelatin capsules which were in the bathroom.

Defendant took the stand on his own behalf and denied many of the material facts which were testified to by Basil Clark, Donald Coon and three sheriff's deputies, all of whom testified in behalf of the People. He admitted he had a phone conversation with the witness Clark but said Clark called him because he owed defendant $50. He told Clark to come over, Clark arrived and gave him $40 and said he would give him the other $10 as soon as he could get it. He admitted Clark returned and while Clark was there the officers broke down the door, searched his house and arrested him. Defendant admitted a prior narcotic conviction for which he served a term of imprisonment in the federal prison. He admitted he was familiar with the way capsules of heroin are prepared. He said a gram of heroin will make ten capsules. He agreed it is more or less customary on the part of narcotic peddlers to keep narcotics near the toilet so they can be flushed down in case of danger.

Defendant contends that the mode of entry of his home was illegal, being in violation of art. 1, section 19 of the California Constitution and the Fourteenth Amendment of the United States Constitution, and that this illegal mode of entry makes any evidence obtained thereby illegal and inadmissible. The specific testimony which defendant contends should be ⌊ex- ⌊790 cluded as evidence concerns testimony of the serial numbers of the bills furnished to Clark by the sheriff's department.

[1, 2] The United States annd California constitutional provisions prohibit only unreasonable searches and seizures (Harris v. United States, 331 U.S. 145, 150, 67 U.S. 1098, 91 L.Ed. 1399; People v. Dillard, 168 Cal.App.2d 158, 164, 335 P.2d 702), and in each instance the primary question is whether the search annd seizure was reasonable. (People v. Brown, 45 Cal.2d 640, 643, 290 P.2d 528.) When a police officer has reasonable cause to enter a dwelling to make an arrest and reasonable cause to make a search incident to the arrest, his entry and his search are not unreasonable. (People v. Maddox, 46 Cal.2d 301, 306, 294 P.2d 6.

[3] The mode of entry in this case which is alleged to have violated constitutional guarantees, was the violation of section 844 of the Penal Code which requires that a police officer demand admittance and give an explanation of the purpose for which admittance is desired before forcibly breaking into a person's home. Illegally obtained evidence is excluded "on the ground that the government must not be allowed to profit by its own wrong and thus encouraged in the lawless enforcement of the law." (People v. Martin, 45 Cal.2d 755, 761, 290 P.2d 855, 857.) It is true that the government may profit by noncompliance with section 844 in that the demand and explanation requirements may cause a delay which would permit destruction or secretion of the evidence. But as stated in People v. Maddox, supra, 46 Cal.2d at 306, 294 P.2d at 9, "Suspects have no constitutional right to destroy or dis-

pose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844. Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. [Citations.] Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance.

* * * * *

"[W]hen there is reasonable cause to make an arrest and search and the facts known to him before his entry are not inconsistent with a good faith belief on the part of the ⊥791 officer that compliance with section 844 is excused, his failure to comply with the formal requirements of that section does not justify the exclusion of the evidence he obtains."

In this case the sheriff's deputies had reasonable cause to believe that a felony was being committed in the house, to wit, the possession and sale of narcotics. As experienced members of a narcotics squad, they were entitled to conclude in good faith that if they informed the defendant of their presence and demanded admission before breaking into the premises, he might attempt to dispose of the narcotics then in his possession. While an officer does not have the benefit of hindsight in determining whether compliance with section 844 is excused prior to the entry, it should be noted that in this case the reasonableness and good faith of the officers' conclusion was supported by the fact that defendant was able to dispose of the narcotics in spite of the noncompliance with the statute.

[4] Defendant's next contention involves three affidavits (those of defendant's wife, defendant's brother, and a personal friend of defendant's brother) which were filed in support of the motion for new trial. Read together the affidavits describe fragments of conversations between jurors who were in the hallway of the courthouse during the second day of the trial. The affidavits declare that the conversations "appeared to be about the testimony of defendant." Such characterizations as "far-fetched * * * fantastic * * * ridiculous" were alleged to have been used by the jurors, together with such statements as, "his story is just too unbelievable * * *." One affidavit also alleged, "I heard one of the women jurors in the group who was seated on the bench ask in substance, 'Did he say it was for a soap dish or an ash tray?'" Defendant contends that this last statement was obviously in reference to his testimony regarding his use of the green plate. Defendant admits that he cannot ascertain the identity of any of the particular jurors who took part in this conversation.

Defendant contends that the court erred in accepting counter-affidavits of the jurors which stated in substance that they did not engage in any conversation concerning defendant's case other than in the jury room at the time of deliberation. Defendant's motion for new trial was based on section 1181, subsections 2 and 3 of the Penal Code. Subsection 2 provides that the court may grant a new trial where the jury received evidence out of court. The affidavits submitted by defendant make no showing that any out-of-court evidence had in fact ⊥792 been received. Defendant states that subsection 3 is applicable in that the conversation constituted misconduct. The subsection provides that the court may grant a new trial "When the jury has * * * been guilty of any misconduct by which a fair and due consideration of the case has been prevented."

[5, 6] "[T]he decision of the trial court in denying a motion for a new trial after considering conflicting affidavits is final in the absence of a showing of abuse of discretion * * *." (People v. Henderson, 79 Cal.App.2d 94, 124, 179 P.2d

406, 426.) While the affidavits of the jurors which generally denied the alleged misconduct is admittedly weak evidence that such misconduct did not occur (see In re Winchester, 53 Cal.2d 528, 533, 2 Cal.Rptr. 296, 348 P.2d 904), on the other hand, affidavits of defendant's friends and relatives, which allege fragments of conversations between jurors which, in their opinion, appeared to be about defendant's case is equally weak as evidence of prejudicial misconduct, especially where the affidavits fail to name any specific juror. (See Stickel v. San Diego Electric Ry. Co., 32 Cal. 2d 157, 170, 195 P.2d 416.) A general discussion of the case between jurors during recess, while not to be approved, is not as a matter of law prejudicial (People v. Henderson, supra, 79 Cal.App.2d at 123, 179 P. 2d at 425), and in the absence of a showing of an abuse of discretion the finding of the trial court as to the absence or existence of prejudicial misconduct will not be disturbed on appeal.

[7] Defendant's final contention is that the prosecuting attorney was guilty of prejudicial misconduct in making several remarks to the jury which gave evidence not presented by the testimony of witnesses; also that he misquoted testimony given; and gave subtle suggestions of conclusions not supported by evidence.

After carefully reviewing the alleged prejudicial statements of the prosecutor, we feel that this contention is trivial and without merit. The statements did not present new facts which could have been considered as evidence by the jury; the alleged misquotations were not changes in the substance of what had been said, and it was obvious from the context of these statements that the prosecutor was not attempting to quote testimony verbatim. The subtle suggestions of conclusions allegedly not supported by evidence were entirely proper as reasonable inferences which may be drawn from the evidence. (See People v. Hoyt, 20 Cal.2d 306, 318, 125 P.2d 29.)

"'The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury.' People v. Sieber, 201 Cal. 341, 355–356, 257 P. 64, 70. In the argument before the jury, any reasonable inference may be drawn from the evidence, and it is a matter within the discretion of the trial court to determine whether counsel stays within the permissible range of discussion. [Citation.]" (People v. Eggers, 30 Cal.2d 676, 693, 185 P.2d 1, 10.) 793

The judgment of conviction is affirmed and the purported appeal from the order denying new trial is dismissed.

BURKE, P. J., and FORD, J.,* concur.

209 Cal.App.2d 262

In re Harry ELIAS On Habeas Corpus. 262

Cr. 60.

District Court of Appeal, Fifth District, California.

Nov. 5, 1962.

Proceeding in habeas corpus by contractor to secure his release from custody after he had been committed for civil contempt when he refused to deposit certain sums with the clerk of the Superior Court of Fresno County. The District Court of Appeal, Conley, P. J., held that where subcontractor brought action against contractor and surety on bond and contractor had not filed an answer and there was no admission by either contractor or surety that either owed any amounts to subcontractor or anyone else, and there was no evidence that surety's bonds had not been completely exonerated by contractor's payments of amounts due to others, order requiring contractor to deposit in court amount received from state as payment on contract was beyond court's jurisdiction.

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* Assigned by Chairman of Judicial Council.

Petitioner discharged from custody.

1. Habeas Corpus 🔑22(1)

Judges of superior court had duty to consider application for writ of habeas corpus, and if petition was meritorious, to issue writ, even though legality of order of commitment previously made by that court was under attack. West's Ann.Const. art. 6, § 5.

2. Habeas Corpus 🔑30(1)

Habeas corpus is concerned only with jurisdiction and cannot be invoked for purpose of correcting errors in trial record, except those relating to jurisdiction.

3. Deposits in Court 🔑1

Where subcontractor brought action against contractor and surety on bond and contractor had not filed an answer and there was no admission by either contractor or surety that either owed any amounts to subcontractor or anyone else, and there was no evidence that surety's bonds had not been completely exonerated by contractor's payment of amounts due to others, order requiring contractor to deposit in court amount received from state as payment on contract was beyond the court's jurisdiction and subsequent contempt proceedings were void. West's Ann.Code Civ.Proc. § 572.

George & Powell by Jay W. Powell, Fresno, for petitioner.

E. Clarke Savory, Dist. Atty., by John D. McFeeters, Deputy Dist. Atty., Fresno, and Daniel C. Miller, San Francisco, for respondents.

⊥CONLEY, Presiding Justice. ⊥263

Harry Elias petitioned this court for a writ of habeas corpus by which he seeks release from the custody of the Sheriff of Fresno County by reason of a commitment for civil contempt ordered by the superior court in the case of Industrial Asphalt of California, Inc. v. Harry Elias and Columbia Casualty Company, Fresno County no. 115247.

One of the considerations leading to the issuance of the writ by this court was the recital in the petition that upon the presentation of a substantially identical petition to the Fresno County Superior Court said court "* * * took no formal action and refused to entertain * * * such petition * * * on the ground it had no jurisdiction to hear the petition, and that the proper court to hear it was the Fifth Appellate District Court of Appeal."

[1] Assuming that the sole ground for the refusal was as alleged, the superior court was in error, for the judges of that court had the duty to consider the application and, if the petition was meritorious, to issue the writ even though the legality of an order of commitment previously made by that court was under attack.

Historically and practically, the writ of habeas corpus is one of the most important legal safeguards of the American citizen.

> "A free people venerate this ancient writ * * * as a fundamental guaranty and protection of their right of liberty and as the most effective remedy known to the law for securing release from unlawful restraint." (25 Am.Jur., Habeas Corpus, § 2, p. 144.)

⊥By our state Constitution the judges of ⊥264 the superior court are expressly authorized to issue the writ (Cal.Const., art. VI, § 5), having an equal initial right in this respect with the justices of the Supreme Court and of the District Courts of appeal.

[2] Habeas corpus is concerned only with jurisdiction; it can not be invoked

for the purpose of correcting errors in a trial record, except those relating to jurisdiction; the superior court should not refuse to consider a petition for a writ of habeas corpus on the ground that the validity of an order of the same court is under attack. For obvious reasons, particularly where the taking of evidence is involved, the local court is often better able to render timely and effective relief than a court of appeal, and it is for this reason that appellate courts frequently refuse to issue the writ unless application has first been made therefor to the superior court or unless a good reason is shown in the petition for failure to have made such application. (24 Cal.Jur.2d, Habeas Corpus, § 68, pp. 522–526; § 76, pp. 541–542; In re Brune, 113 Cal.App. 254, 298 P. 80; In re Trainor, 5 Cal.App.2d 593, 43 P.2d 579; 39 C.J.S. Habeas Corpus § 78, pp. 623–624.)

The return filed by the sheriff showed that Harry Elias is in custody by virtue of a warrant of commitment issued October 3, 1963, for contempt in that, having the ability to do so, he failed and refused to pay into court the sum of $39,000, as ordered by the Superior Court of Fresno County. The petition for the writ was by agreement of the parties considered to be the traverse of the return. It was further stipulated that for the purpose of this proceeding the entire contents of the file in Industrial Asphalt of California, Inc. v. Harry Elias and Columbia Casualty Company, Fresno County no. 115247 should be considered in evidence. No additional evidence was offered by either party.

Action no. 115247 was commenced in the Superior Court of the County of Fresno on May 18, 1962, by the filing of a complaint by Industrial Asphalt of California, Inc., a California corporation, against Harry Elias and his surety, Columbia Casualty Company, a New York corporation. The complaint is in two counts. In the first cause of action it is alleged that the County of Kings, State of California, entered into a contract with Harry Elias on February 21, 1961, by which he promised and agreed to install street paving, a domestic water supply, a sewer system and a drainage system in Armona Estates, a subdivision in Kings County, and that before entering into the performance of said work Mr. Elias, as principal, and the defendant surety company made, executed and delivered to the County of Kings their written contract and bond, by the terms of which it was provided that if the contractor or any subcontractor failed to pay for materials or supplies or for work or labor done, the principal and the surety would pay for the same and that in case an action were brought upon the bond a reasonable attorney's fee would be paid to the prevailing party; that said bond inured to the benefit of all materialmen and laborers who might work upon the project; that the work called for by said contract was completed, that it was accepted by Kings County and that notice of acceptance and completion was recorded November 22, 1961; that between August 25 and November 16, 1961, the plaintiff sold and delivered to the defendant contractor, goods, wares and merchandise including rock, sand, gravel, untreated rock base and asphalt paving materials, furnished transportation thereof and paid the sales tax thereon in the total reasonable and agreed sum of $27,855.62. The complaint further alleges that during the years 1961 and 1962 plaintiff furnished material and labor to the defendant contractor on various jobs and that one of them was for the Department of Public Works of the State of California involving the construction and improvement of a portion of Mt. Whitney Avenue near Riverdale in Fresno County; that from time to time plaintiff received sums of money from the defendant contractor on account of said various jobs; that on February 6, 1962, plaintiff received from defendant contractor the sum of $44,898.27, of which plaintiff applied the sum of $22,938.34 in full payment of the balance owing to plaintiff from said defendant contractor, on the Armona Estates contract; that the balance of said payment of $44,898.27, being the sum of $21,959.93, was applied by plaintiff on account of said Mt. Whitney job; that a dispute has arisen between the defendant contractor and plaintiff as to the correct application of said sum of $44,898.27 in that the defendant contractor contends that all of said sum should have been applied to said Mt. Whitney job. The pleading continues by stating that in the event such contention of defendant contractor is determined to be correct, there would remain an unpaid balance due plaintiff for materials and labor furnished on said Armona Estates job in the sum of $22,938.34; that in such event no part of such sum would have been paid to plaintiff, and defendants would be liable to plaintiff in said amount under ⊥266 ⊥the provisions of the bond above alleged. The further request is made for $2,500 as attorneys' fees.

The second cause of action in the complaint alleges that on or about September 15, 1961, the State of California entered into a written contract with Elias by the terms of which he agreed to furnish work and materials for the grading and servicing of a section of the state highway in Fresno County on Mt. Whitney Avenue, which was known as the Mt. Whitney road job; that the contractor entered upon the performance of said work and that a bond was furnished by the defendant surety company; that by its terms said bond inured to the benefit of any and all materialmen, persons, companies or corporations furnishing materials or labor; that the work was finished and a notice of acceptance and completion was filed and recorded on or about April 6, 1962; that between December 26, 1961, and April 4, 1962, plaintiff sold and delivered to the contractor at his special instance and request materials, together with the transportation of the same, of the reasonable and agreed sum of $127,500.66 and that payment for the materials, equipment and labor so furnished was covered by the bond in question; that the application made by the plaintiff of the payment of $44,898.27, as alleged in the first cause of action, namely, $22,938.34 in payment of the balance of the Armona Estates job and $21,959.93 on the Mt. Whitney job, was correct in the opinion of plaintiff; that said sum of $21,959.93 was the only amount paid to plaintiff by the contractor on said Mt. Whitney job and that there is left a balance unpaid on account of said job of $105,540.73. Request is also made for the payment of a $2,500 attorney's fee.

The prayer of the complaint on the first cause of action is that if the defendant contractor's contention relative to the application of payments to plaintiff is determined to be correct, plaintiff be awarded judgment for $22,938.34, together with interest, $2,500 attorneys' fees and costs. The prayer as to the second cause of action asks for the sum of $105,450.73, less any amount that the court may award plaintiff as principal under the first cause of action, together with interest, attorneys' fees and costs.

The defendant surety company filed an answer denying that any sum is due plaintiff and a cross-complaint alleging that in reliance upon an agreement of indemnity executed by the cross-defendants, Harry Elias and Patricia Elias, his wife, the cross-complainant executed its bonds no. 449564 and 405412 in the penal sums of $126,141.25 and $55,423, as surety⊥ for the contractor; ⊥267 that the surety has been sued by a subcontractor for sums in excess of $105,000; that by the agreement of indemnity above referred to the contractor agreed to indemnify the surety against any and all liability arising out of the matters bonded against; that the contractor and his wife further agreed in their contract that they would hold all money derived from construction contracts in trust for the benefit of the surety and that such money would be used for the purpose of completing and performing their construction contracts and discharging the obligation of the bonds and for no other purpose. The cross-complaint further alleges that the cross-defendants have failed and refused to deposit collateral or other security or to apply the proceeds derived from their construction contracts toward discharging the obligation of the surety on its bonds, despite demand having been made therefor; that the said Harry

Elias has withdrawn from deposit cash in excess of $65,000 and refuses to apply the same toward the claims of plaintiff or the claims of other subcontractors, laborers and materialmen or to deposit the same with the cross-complainant, or with his attorneys or in any other place of safekeeping to secure it against claims of plaintiff and of other subcontractors, laborers and materialmen; that of the funds so withdrawn from deposit, the sum of $51,741.32 was received by him on the 6th day of April, 1962, as the proceeds of the Mt. Whitney contract; that said sum was produced as the result of the work, labor and materials furnished by the plaintiff subcontractor herein and other claimants. It is further alleged that pursuant to the law of the State of California such funds are required to be applied in the first instance to the payment of claims of such subcontractors, laborers and materialmen whose work and materials were used in completing the Mt. Whitney job and in producing the said funds; that Harry Elias has recently performed other allegedly irrational, unusual and peculiar acts in the presence of and to the knowledge of the cross-complaint and that it ap- 268 prehends the loss or destruction of the said sum by fire, theft, burglary, diversion, dissipation or other hazards; that the said contractor appears to have no other estate or assets sufficient to indemnify and secure the surety company from the claims of plaintiff herein or to pay other claimants on works of improvement described in the complaint. The surety asks that all persons having claims against the contractor be joined as parties to the litigation.

Petitioner Harry Elias has never answered the cross-complaint, he having secured time from the court by successive orders within which to file an answer. The last order extends his time to answer to November 23, 1962.

There are, however, other pleadings in the case. The defendant Elias filed a demurrer to the cross-complaint, which in due course was overruled. His demurrer to the complaint was also overruled, and he filed an answer to the original complaint denying that any sum is due or payable to plaintiff and a cross-complaint in which he claims that by reason of carelessness and negligence of the plaintiff in the supplying of aggregates and other paving material he has been damaged in the sum of $94,818.96.

We now come to the particular proceedings which led to the commitment of the petitioner for contempt. On May 31, 1962, the court commenced a hearing at the instance of the Columbia Casualty Company on an order to show cause why Elias should not be required to deposit in court any sum of money in his possession derived from the State by reason of the Mt. Whitney job. Extensive evidence was received, and the matter submitted for decision on August 16, 1962. The result was an order for deposit in court by Elias of the sum of $39,000 pursuant to the provisions of section 572 of the Code of Civil Procedure. The court made findings of fact preliminary to the order as follows:

> "That on or about the first day of April, 1962, Harry Elias received a warrant from the State of California in partial payment of work performed by him as general contractor upon the Mt. Whitney job and that he converted said warrant into cashier's checks and thereafter changed the checks into cash; that ever since the 11th day of June, 1962, he has had in his possession or within his immediate custody and control and now has at the time of the making of the order the sum of $39,000 constituting the balance now remaining of the proceeds of the said State Warrant of $51,741.32 and that he presently has the ability to deliver up the said sum of $39,000 and to deposit it with the clerk of the court."

The court held as conclusions of law that the $39,000 in the possession or within the immediate custody and control of the cross-defendant, Harry Elias, are trust funds for the benefit of the cross-complainant, Columbia Casualty Company, a corporation; that

> "[a]s stipulated by counsel for the parties hereto, the said funds so received from the State of California ought to be applied first to the payment of claims of subcontractors and materialmen and laborers on 269 said work of improvement before being used for any purpose, so that the cross-complainant, Columbia Casualty Company, a corporation, may be relieved, to that extent, from the claims of subcontractors, materialmen and laborers of the said cross-defendant, Harry Elias, arising out of the performance of said work of improvement"; and that the cross-complainant is entitled to have an order of the court requiring the cross-defendant, Harry Elias, forthwith to deliver up to and deposit with the clerk of the court said sum of $39,000.

The order follows:

> "Good cause appearing therefor, it is hereby ordered that the cross-defendant, Harry Elias, deliver up to and deposit with the clerk of this court at the offices of the County Clerk of Fresno County, California, and within 72 hours from the time of the service of the certified copy of this order, the said sum of $39,000, the same to be held and safely kept by said Clerk pending the further order of this court."

The attorney for Columbia Casualty Company filed an affidavit on September 17, 1962, which recited the making of the order, service of a certified copy thereof upon Elias in the County of Fresno on the 4th day of September, 1962, and the fact that "* * the said defendant and cross-defendant, HARRY ELIAS, having the ability to do so, has failed and refused to deposit the said sum of $39,000 with the clerk of this court." The affidavit concludes with the prayer that an order to show cause be issued requiring him to appear before the court in department 5 thereof on September 24, 1962, at 9 a. m. to show cause, if any he have, why he should not be punished for contempt. The file shows that petitioner was served with a certified copy of this order to show cause on September 17, 1962. Apparently in the absence of Elias, the court held the hearing and thereafter made its order under date of October 3, 1962, finding the said cross-defendant in contempt and directing that he be committed to the custody of the Sheriff of the County of Fresno, unless and until he should deliver up and deposit with the clerk of the court the said sum of $39,000. The order for the issuance of the commitment and the commitment itself are in due form.

[3] The sole contention made by petitioner's counsel upon the hearing is that the commitment is void because the superior court had no jurisdiction to order the deposit of the $39,000 and that the disobedience of such void order did not constitute contempt. In this connection, it is urged that Mr. Elias denies in his answer to the complaint that he owes any sum to plaintiff 270; that he has never as yet filed an answer to the cross-complaint of the Columbia Casualty Company and that he therefore has never admitted by any pleading any of the allegations of Columbia Casualty Company; that this case has not been tried, and there is therefore no proof that Elias owes anything to plaintiff or to any other person based on the Mt. Whitney job or that the Columbia Casualty Company will be required to pay any claim by reason of the surety bonds which it has issued; that the counterclaims against plaintiff urged by Elias in his cross-complaint have not been determined; that there is no basis for the contention that he or his surety may be required ultimately to pay any sum to any subcontractor; that the case does not directly involve title to the $39,000; that, therefore, the court had no right under section 572 of the Code of Civil Procedure to require the deposit of $39,000 or any other sum, at least at this stage of the case; and that the order requiring him to do so and the contempt proceedings are consequently void.

The validity of petitioner's contention depends on whether the prerequisites for an order for deposit in court specified by section 572 of the Code of Civil Procedure have been established. That section reads as follows:

> "When it is admitted by the pleadings, or shown upon the examination of a party to the action, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court."

As we have seen, there is no admission by Harry Elias in any pleading filed up to date that any sum is owed by him to the plaintiff or to any other person; both he and the surety company deny any indebtedness on his part; and it has not been proven that any such sum is in fact due, because the trial has not as yet been held.

The court below found upon conflicting evidence that Harry Elias has in his possession or under his control the sum of $39,000 and that it is capable of delivery; this issue was hotly contested upon the hearing of the order to show cause, as Elias claims that this money disappeared as the result of a burglary; the petitioner, however, does not raise the point in this court, apparently conceding that the court 271 below had sufficient indirect evidence before it by way of inference that his admitted previous possession still continues, to support the finding.

Is this money the "subject of litigation"? Certainly, no one can claim that this particular sum is sued for directly. Plaintiff's complaint alleges that a certain balance is due to it from the defendant Elias, but the specific sum here in question is not the subject of the suit.

Is the money held by Elias as trustee for the Columbia Casualty Company within the meaning of the code section? The "General Application and Indemnity Agreement" executed by Elias and his wife in favor of Columbia Casualty Company reads in part as follows:

> "We will hold all money or other proceeds of the contract, whether received as payment or loan, as a trust for the benefit of the Company, and use such money or other proceeds for the purpose of performing the contract and discharging the obligation of the bonds, and for no other purpose, until the bonds are completely exonerated."

Thus, under the agreement the "trust" is to continue only "until the bonds are completely exonerated"; there has been no showing as yet that the bonds are not completely exonerated; if all legal payments which were due from the contractor to subcontractors and others have been made, the bonds would be completely exonerated; proof of this question must abide the trial.

We turn to cases construing the meaning and effect of section 572 of the Code of Civil Procedure. Ex parte Casey, 71 Cal. 269, 271–272, 12 P. 118, 119, holds:

> "Section 572, of the Code of Civil Proc., refers to property which, is without question, in the hands of a trustee as trust property, or which belongs to or is due to another. It does not refer to that where the party alleged to hold as a trustee claims title to it in his own right."

In Burke v. Superior Court, 7 Cal.App. 178, 181, 93 P. 1058, the plaintiff filed a complaint against stockholders of a corporation, claiming that they owed balances on their subscriptions and alleging that he had been authorized by the corporation to take such steps as might be deemed necessary to obtain an accounting and wind up its affairs, pay its debts and distribute the remaining assets to the stockholders. In their answers and cross-complaints the defendants alleged that plaintiff, as an officer of the corporation, held $2,050 of the corporate funds in trust for its use and benefit and prayed that 272 he be required to deposit said money in court. In his answer to these cross-complaints, plaintiff admitted that he held the funds as trustee but alleged that he was entitled to certain offsets against it and that part of the monies were in truth and in fact due to him. Upon the pleadings, cross-complainants moved for an order requiring plaintiff to deposit the $2,050 in court. The lower court granted the motion, and thereafter plaintiff unsuccessfully moved to vacate the order; thereafter the plaintiff was served with an order to show cause why he should not be adjudged guilty of contempt, and he applied for a writ of prohibition, which was granted by the District Court of Appeal. In the opinion written by Mr. Justice Shaw it is pointed out:

> "His answer showed that petitioner claimed the right to part of the fund in his possession, and the court was without jurisdiction to compel him to surrender to another what he claimed to be his property, until there had been a judicial determination, upon the hearing of all the facts, that he had no right to it. To justify the making of the order, the admission in the pleadings of having money in possession belonging to another must be free from any claim thereto * * *.
>
> "Furthermore, the fund must, under the provisions of said section, be the 'subject of the litigation.' 'If the money in the possession of the party is not the subject of the litigation, but its payment is an incident thereto, dependent upon the judgment to be rendered in the action, as in the case of an action for * * * accounting * * * the provisions of this section do not authorize such order.' Green v. Duvergey, 146 Cal. 379, 80 P. 234. The pleadings clearly show the action to be one having for its purpose the procuring of an accounting between the corporation and its stockholders, and to determine the amount of money in the possession of any of the parties to the action belonging to the corporation, with a view of having it paid into court and winding up the corporate affairs.
>
> "In our judgment the pleadings do not disclose the requisite facts necessary to confer jurisdiction upon the court to make the order requiring a deposit of the money in court. The order is, therefore, void, and being void, it follows that the court had no jurisdiction to entertain any subsequent proceedings based thereon and instituted for the purpose of having the petitioner adjudged guilty of contempt for disobedience of such order."

In the leading case of Green v. Duvergey, 146 Cal. 379, 385, 80 P. 234, 236, it is said:

> "A party to a controversy ⌊273 involving a right to a certain sum of money cannot be required to pay that money into court, unless it is either clearly admitted by him in his pleading, or shown in some proceeding in the cause, that he has himself no right to retain it, and that his antagonist is entitled to it, or at least has an absolute interest therein. Such admission must be free from any condition, and the antagonist must himself claim an immediate right to the money before he can ask that it be deposited in court. If the admission make the right of the other party dependent upon his performance of some condition, or if the other party does not claim any right to the money, or disputes the existence of the condition, the court will not order the money to be deposited before a hearing in the cause and a judicial determination of the respective rights of the parties, for the reason, as given by Lord Cairns in Hagall v. Currie, L.R. 2 Ch.App. 449, that 'if money is ordered to be brought in, which is not clearly due, very gross injustice may be done, as the defendant may be put to great inconvenience, and afterwards be told that his view of the case was correct.' A court ought not to require a litigant to surrender his property to another, or for his benefit, until there has been a judicial hearing and determination that he has no right to such property; but an order that he pay money into court without such hearing is, in effect, an arbitrary

> judgment against his right to its possession. The principle upon which the rule rests was very fully considered in McKim v. Thompson, 1 Bland, 150, wherein it was held that the order for such payment must depend upon a judicial determination, upon the facts as then shown to the court, that the party from whom the payment is asked has no right or title to hold the money, and that he cannot be allowed at any subsequent stage of the cause to contradict or explain away those facts. The same principle was declared by Lord Cottenham in Richardson v. Bank of England, 4 My. & Cr. 165. See, also, Peacham v. Daw, 6 Madd. 98; Hopkins v. McEldery, 4 Md.Ch. 23; McTighe v. Dean, 22 N.J.Eq. 81; Daniell on Ch. Prac.* 1780. * * * If the money in the possession of the party is not the subject of the litigation, but its payment is an incident thereto, dependent upon the judgment to be rendered in the action, as in the case of an action for redemption, specific performance, accounting, rescission, or the like, the provisions of this section do not authorize such order; and in all cases when it may be made it must appear that the party holds ⌊274 the money as trustee, or that it 'belongs or is due to another party.'"

The following comment on the case of Green v. Duvergey, supra, is made in Frey v. Superior Court, 22 Cal.App. 421, 425, 134 P. 733, 735:

> "The rule recognized in interpreting section 572, of the Code of Civil Procedure, is laid down in Green v. Duvergey, 146 Cal. 386, 80 P. 234, which, in substance, is that the right to make the order depends upon the facts shown to the court; an essential being that the party from whom the payment is asked has no right or title to hold the money, and that it belongs to or is due another."

A summarization of California law on the subject is thus made in 23 California Jurisprudence 2d, Funds and Deposits in Court, section 5, pages 568–569:

> "The right of the court to make an order for deposit or delivery depends on the facts as shown to the court. A party to a controversy involving a right to a certain sum of money or thing cannot be required to deposit that money or thing in court unless it is either clearly admitted in his pleading or shown in some proceeding in the cause that he has himself no right to retain it and that the other party to the action is entitled to it or at least has an absolute interest in it. In all cases it must appear that the party holds the money as trustee, or that it belongs or is due to another party. If the party alleged to hold as trustee claims title or right to all or part of the funds in his possession, the court is without jurisdiction to compel him to surrender them by ordering a deposit in court, since this constitutes an issue which should not be tried in this summary manner, but one which requires a judicial determination, on the hearing of all the facts, that he has no right to the funds. If it appears from the proceedings that the right of the other party is dependent on his performance of some condition, or if the party applying for the order does not claim an immediate right to the money, or disputes the existence of the condition, the court will not order the money to be deposited before a hearing and judicial determination, in order to avoid the gross injustice of putting a party to great inconvenience before finding his view of the case to be correct.
>
> "The statute does not authorize an order unless it is shown that a party to the action actually has a fund or property in his possession or under his control. Furthermore, an order is not authorized if the fund or property is not the subject of the litigation, but its payment is merely an incident thereto dependent on the judgment to be ren-

⊥275 dered, as in the case of ⊥an action for redemption, specific performance, accounting, rescission, or the like."

In the instant case there is no admission in the pleadings, and there is no proof that either defendant owes any amount to the plaintiff or to anyone else. There is no evidence that the surety company's bonds have not been "completely exonerated" and therefore no proof that any "trust" exists under the "General Application and Indemnity Agreement." The $39,000 is not "the subject of litigation," but is only incidental to it.

By virtue of the foregoing facts and the authorities cited, the court was without jurisdiction to order the deposit with the clerk, and all subsequent proceedings on the contempt charge, including the commitment, are void.

The petitioner is discharged from custody on the commitment described in the return.

BROWN and STONE, JJ., concur.

Emmett O'MALLEY, Petitioner and Appellant,
v.
WILSHIRE OIL COMPANY, a corporation, Defendant and Respondent.
Civ. No. 26290.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1962.

For Opinion on Hearing, see
30 Cal.Rptr. 452, 381 P.2d 188.

Proceeding on petition to require employer to proceed to arbitration. The Superior Court, Los Angeles County, Bayard Rhone, J., entered judgment denying the petition, and the union appealed. The District Court of Appeal, Fourt, J., held that under federal law, union was not entitled to arbitration of controversy concerning employer's contracting-out of some transportation work, where collective bargaining agreement restriction on contracting-out of work was limited solely to performance of upkeep and repair work normally performed by employee, and arbitration clause provided that arbitration decision may not change terms or conditions of agreement.

Affirmed.

1. Labor Relations 🔑433

State court, in interpreting and applying applicable agreement on arbitration between employer and union, must apply federal substantive law governing collective bargaining agreements.

2. Arbitration and Award 🔑1

Under federal law, arbitration is matter of contract.

3. Labor Relations 🔑434

Under federal law, courts may not examine merits of union's grievance but must limit their inquiry to whether claim on its face is governed by collective bargaining agreement; doubt as to arbitrability thereof is resolved in favor of arbitrability, and unless excluded, disputes pertaining to agreement are arbitrable.

4. Labor Relations 🔑434

Under federal law, union was not entitled to arbitration of controversy concerning employer's contracting-out of some transportation work, where collective bargaining agreement restriction on contracting-out of work was limited solely to performance of upkeep and repair work normally performed by employees, and arbitration clause provided that arbitration decision may not change terms or conditions of agreement.

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Levy, Russell, DeRoy & Glow, Mervin N. Glow, Los Angeles, for appellant.

Curtis, Laymon & Vail, Richard W. Curtis, Los Angeles, for respondent.

FOURT, Justice.

Petitioner appeals "from the judgment * * * denying Petitioner's Petition for

Order Directing Arbitration." The petition was brought in the name of "* * * EMMETT O'MALLEY individually and in a representative capacity for and on behalf of OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION LOCAL 1–128, AFL-CIO, an unincorporated association; its officers and members, for an Order Directing Wilshire Oil Company, a corporation, to Proceed to Arbitration."

A résumé of some of the facts is as follows: in April 1959 Wilshire Oil Company (hereinafter referred to as the "Company") and the Oil, Chemical and Atomic Workers International Union, Local 1–128, AFL-CIO (hereinafter referred to as the "Union") entered into a written collective bargaining agreement under which the Company recognized the Union as the exclusive bargaining agent of the employees of the Company in the divisions therein enumerated. This agreement was negotiated through the process of collective bargaining and superseded and cancelled prior agreements similarly negotiated between the Company and the Union, with reference to said employees, respectively, dating back to April 29, 1948, when the Union was certified by the National Labor Relations Board as the duly authorized bargaining agent for the employees of the Company.

During the year 1950 the Union served written notice upon the Company of its desire to modify and amend the collective bargaining agreement then in effect between the Company and the Union and served its proposed written amendments to said agreement upon the Company. One of the proposed amendments provided in effect that *no work* as listed in the schedules attached to the agreement (transportation work was then embraced in said schedules) would be let to any contractor or subcontractor unless agreed upon by the Employer and the Union's committee. The Company rejected this proposal but finally agreed to the insertion of a provision, Article 15, placing certain restrictions upon the Company's contracting-out of upkeep and repair work.[1]

On December 27, 1960, the Union submitted a grievance which in substance protested the contracting-out by the Company of some of its transportation work.[2]

The collective bargaining agreement between the Company and the Union, which was in effect at the time that the grievance was presented, contained a provision for the processing and arbitration of disputes and grievances relating to the application and interpretation of said agreement, subject to the following condition, to wit:

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[1] Article 15 provides in pertinent part as follows:

"*CONTRACT WORK*

"*General*

"1. Except for office janitorial services or in case of an emergency the Company *shall not employ or otherwise engage contract labor to perform up-keep and repair work* normally performed by employees covered by this Agreement until all laid off employees who still retain their rehiring rights * * * have been offered reemployment with the Company * * *.

"*Preference to Wilshire Employees*

"2. When it is necessary for the Company to employ contract labor to supplement its work force *for upkeep and repair work*, preference shall be given to Wilshire employees for the jobs paying the higher wage rates provided such employees are qualified.

"*Contractors' Wage Rates*

"3. * * *

"*New Construction or Additions*

"4. This Article shall not apply to work in connection with the construction of new facilities or additions to existing facilities." (Emphasis added.)

[2] The "Complaint or Grievance Report" submitted to the Company provides in pertinent part as follows:

"On December 20, 1960, the Adjustment Committee became aware that the Company was using contractors to do work normally covered by the Agreement while employees of the Company in the Truck Driver classification were laid off. The Adjustment Committee contends that the Company is in violation of the current Articles of Agreement between the * * * Company * * * and * * * Union, Article 15, and any other Article or Articles that may be found to be violated in the process of settling this complaint.

"We therefore contend that the Company will have to pay their employee or employees in the Truck Driver classification who were on the laid-off status and who would be doing this work if it were not for a contractor, all lost monies due them since their layoff, and reinstate them with full continuity of seniority."

> "ARTICLE 22
> "GRIEVANCES
>
> "Right of Grievance
>
> "1. * * *
>
> "Procedure for Handling Grievances
>
> "2. * * *
>
> "(a) * * *
>
> "(b) * * *
>
> "(c) Arbitration
>
> "* * * Under no circumstances may an arbitration decision in any manner nullify, amend, modify, extend, reduce or otherwise change any of the terms or conditions of this Agreement or any amendments hereto, or establish or change wage rates or classifications * * *
>
> "General
>
> "3. * * *"

Since the contract between the Company and the Union in force in December 1960 was to be opened by the Union for the negotiating of amendments, the parties agreed that said grievance be held in abeyance pending the conclusion of such negotiations. The Union sought to obtain an amendment of Article 15. The proposed amendment sought to enlarge the restrictions placed upon the Company relative to contract work is as follows:

> "1. Except for office janitorial services or in case of an emergency the Company shall not employ or otherwise engage contract labor *to perform any work* * * *" (Emphasis added.)

Throughout all of the 1961 negotiations between the Company and the Union, which consumed a period of approximately six months, the Company resisted the proposed change in the contract relating to contract work. Ultimately the parties entered into a new Agreement which contained the same contract work clause as is contained in the Articles of Agreement dated 1959. (See footnote 1.)

At that point the Union elected to prosecute further its grievance under the former contract and demanded that said grievance be submitted to arbitration. The Company refused to submit this grievance to arbitration and the Union filed a petition in the Superior Court to compel the Company to arbitrate this dispute.

On November 14, 1961, the findings of fact and conclusions of law were filed.[3]

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[3] The findings of fact and conclusions of law provide as follows:

"FINDINGS OF FACT

"1. That at all times mentioned herein Respondent has been engaged in an industry affecting interstate commerce and has employed in said industry employees for whom the Oil, Chemical and Atomic Workers International Union Local 1–128, AFL–CIO has been certified by the National Labor Relations Board as the duly authorized bargaining agent.

"2. That the dispute which forms the basis for the grievance referred to herein grew out of the contracting out by Respondent of a portion of its transportation and trucking requirements during the term of the Articles of Agreement dated April 10, 1959.

"3. That contracting out of transportation work is and has been for many years a policy of Respondent.

"4. That the only article contained in said Articles of Agreement dated April 10, 1959, which purports in any way to impose restrictions upon the contracting out of work by Respondent is an article numbered Article 15, entitled 'Contract Work,' the scope of which article is and was intended to be limited to the contracting out of upkeep and repair work.

"5. The said Article 15 of said Articles of Agreement dated April 10, 1959, does not and was not intended by the parties to extend to or impose any restrictions upon the contracting out of transportation work by Respondent.

"6. That during the collective bargaining negotiations carried on between the Petitioner and Respondent in the year 1960, Petitioner sought unsuccessfully to extend the scope of the restrictions to be contained in said Article 15 to include

The judgment after hearing on motion was filed November 27, 1961, and entered December 4, 1961. It provides in pertinent part that "the motion be denied and that said petition be dismissed." This appeal followed.

[1] There is no dispute of the fact that the Company is an industry affecting interstate commerce within the meaning of section 301 of the Labor Management Relations Act of 1947 as amended, 29 U.S.C.A. § 141 et seq. The state court in the interpretation and application of the applicable agreement on arbitration between the Company and the Union must apply federal substantive law governing collective bargaining agreements. (Charles Dowd Box Company v. Courtney, 368 U.S. 502, 82 S. Ct. 519, 7 L.Ed.2d 483; 49 L.R.R.M. 2619; Local 174, Teamsters, etc. v. Lucas Flour Co., 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593; 49 L.R.R.M. 2117; Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S. Ct. 912, 1 L.Ed. 972; McCarroll v. Los Angeles County District Council of Carpenters, 49 Cal.2d 45, 315 P.2d 322.)

[2, 3] The gist of the federal law is that: (1) arbitration is a matter of contract; (2) courts may not examine the merits of the grievance but must limit their inquiry to whether the claim, on its face, is governed by the agreement; (3) doubt as to arbitrability is to be resolved in favor of arbitrability; and (4) unless excluded, disputes pertaining to the agreement are arbitrable. (See United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403; United Steelworkers of America v. Warrior & Gulf Navigation Company, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed. 1409.)

[4] Appellant states the issue to be resolved on this appeal as follows:

> "Under applicable law may arbitration be denied in the absence of uncontravertible proof that the contract specifically excludes the subject matter from the grievance and arbitration procedures of the collective bargaining agreement?"

Respondent chooses to state the issue as follows:

> "Where, as in the case at bar, the parties to a collective bargaining agreement have negotiated concerning demands made by the Union to amend said agreement so as to restrict the Company's right to contract out all work, and have in fact amended the

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among other things the contracting out of transportation work.

"7. That during the collective bargaining negotiations carried on between Petitioner and Respondent in 1961, which ultimately were concluded by the adoption of new Articles of Agreement dated September 6, 1961, superseding the Articles of Agreement of April 10, 1959, Petitioner again sought unsuccessfully to extend the scope of the restrictions of Article 15 to include among other things contracting out of transportation work.

"8. That Article 22 of said Articles of Agreement dated April 10, 1959, which sets forth the procedure for processing grievances and the terms and conditions under which the parties have agreed to submit unresolved grievances to arbitration specifically provides that under no circumstances may an arbitration decision in any manner nullify, amend, modify, extend, reduce or otherwise change any of the terms or conditions of said Agreement.

"*CONCLUSIONS OF LAW*

"1. That the substantive rights of the parties are controlled by the Federal substantive law under Section 301 of the Labor-Management Relations Act.

"2. That interpreting the Articles of Agreement of April 10, 1959 in accordance with the intentions of the parties as therein expressed and in the light of all of the facts and circumstances surrounding the negotiations for and execution of prior and subsequent agreements, no agreement can be found between Respondent and Petitioner which requires the arbitration of grievances arising out of or based upon the contracting out of transportation work.

"3. An order compelling Respondent to proceed with the arbitration of the grievance dated December 27, 1960, would have the effect of modifying or extending the terms and conditions of said Articles of Agreement dated April 10, 1960 [sic], which is specifically prohibited by the terms of said Articles of Agreement."

> agreement so as to impose restrictions upon the Company's right to contract out only certain defined types of work and have knowingly rejected amendments which would have extended such restrictions to other types of work, may the Company be compelled to submit to arbitration its contracting out of such latter types of work, under an arbitration agreement which expressly excludes from arbitration, proposals to amend, modify or extend any of the terms or conditions of the agreement."

A more accurate statement of the issue to be resolved is as follows:

> Where the parties (Company and Union) have expressly and specifically agreed with reference to the subject matter of the Company contracting out work; and by the express terms of said agreement the restriction on contracting-out of work is limited solely to "contract labor to perform upkeep and repair work normally performed by employees"; and where the grievance does not relate to "contract labor to perform upkeep and repair work normally performed by employees" but relates to the use of contract labor relative to transporting products; and where the arbitration clause (Article 22) expressly provides that "Under no circumstances may an arbitration decision in any manner nullify, amend, modify, extend, reduce or otherwise change any of the terms or conditions of this Agreement," did the trial court err in refusing to order the parties to submit the controversy to arbitration?

As stated by the Supreme Court in United Steelworkers of America v. Warrior & Gulf Navigation Company, infra, 363 U.S. 574, 80 S.Ct. 1347, at page 1353, 4 L.Ed.2d 1409, at pages 1417–1419:

> "* * * An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.
>
> * * * * * *
>
> "* * * Contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators. A specific collective bargaining agreement may exclude contracting out from the grievance procedure. Or a written collateral agreement may make clear that contracting out was not a matter for arbitration. In such a case a grievance based solely on contracting out would not be arbitrable. * * * In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail * * *."

The case at bar differs radically from the factual situation in the Warrior case. The agreement in the Warrior case did not contain a provision which mentioned contracting-out of work. Footnote 8 of the majority opinion (80 S.Ct. p. 1354, 4 L.Ed.2d p. 1418) provides as follows:

> "8. See Celanese Corp. of America, 33 Lab.Arb.Rep. 925, 941 (1959), where the arbiter in a grievance growing out of contracting out work said:
>
> "'In my research I have located 64 published decisions which have been concerned with this issue covering a wide range of factual situations but all of them with the common characteristic —i. e., *the contracting-out of work involved occurred under an Agreement that contained no provision that specifically mentioned contracting-out of work.*'" (Emphasis added.)

The parties in the case at bar *did* specifically mention contracting-out of work in their agreement. The fact that the parties did specifically deal with the problem of contracting-out of work and specifically restricted the Company with reference to contracting-out of work only insofar as "contract labor to perform upkeep and repair work normally performed by employees" constitutes "forceful evidence of a purpose to exclude the claim [i. e. contracting-out of transportation work] from arbitration." (See: Local No. 725, Intern Union of Operating Engineers v. Standard Oil Co. of Ind., D.C., 186 F.Supp. 895.)

"Arbitration is the means of solving the unforeseeable"—here there was no question as the matter being unforeseeable, the Company and the Union had each foreseen the problem and had made a provision in the contract to provide for what could not be contracted-out. Pursuant to the law which is in effect under the circumstances, this court does not undertake to make any determination of the merits of the grievance. It seems perfectly clear however that the arbitration clause in this case is not susceptible to interpretation to have it cover the asserted dispute.

The judgment is affirmed.

WOOD, P. J., and LILLIE, J., concur.

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209 Cal.App.2d 157

⊥157⊥ **GLENS FALLS INSURANCE COMPANY, a corporation, Cross-Complainant and Respondent,**

v.

FOUNDERS' INSURANCE COMPANY, a corporation, Cross-Defendant and Appellant.

Civ. 20148.

District Court of Appeal, First District, Division 1, California.

Oct. 31, 1962.

Hearing Denied Dec. 26, 1962.

Action by contractor who repaired fire damage against insurer, which first issued fire policies, subsequent insurer and insured. The action went to trial ultimately only as between the two insurers. The Superior Court, County of San Francisco, Theresa Meikle, J., entered judgment in favor of prior insurer and subsequent insurer appealed. The District Court of Appeal, Molinari, J., held that evidence did not support finding that insured unequivocally and unconditionally requested of prior insurer a cancellation of policies it had issued.

Reversed.

1. Insurance 🔑232

Sole requirement to effect a cancellation of fire policy by insured is definite and unconditional request for cancellation actually communicated to insurer. West's Ann.Insurance Code, § 2071.

2. Insurance 🔑232

Although insured can cancel fire policy forthwith at any time by request, request must be unequivocal and absolute. West's Ann.Insurance Code, § 2071.

3. Insurance 🔑232

No formal or written notice of cancellation of fire policy is required on part of insured and neither surrender of policy or return of unearned premium is prerequisite to cancellation. West's Ann.Insurance Code, § 2071.

4. Insurance 🔑235

Evidence did not support finding that insured unequivocally and unconditionally requested insurer to cancel fire policies it had issued. West's Ann.Insurance Code, § 2071.

5. Insurance 🔑232

Intention to cancel policy does not expropio vigore cancel it and in order for insured to avail himself of privilege of cancellation, he must indicate present resort to it. West's Ann.Insurance Code, § 2071.

6. Insurance 🔑235

Although surrender or return of unearned premium was not essential to cancellation of fire policies, it was evidence tending to show that insurer did not deem policies to be cancelled, particularly in light of burden of insurer which contended that another insurer was liable for loss, to prove cancellation. West's Ann.Insurance Code, § 2071.

7. Insurance 🔑248

Specification in Insurance Code of manner in which policy may be cancelled does not restrict rights of rescission to methods therein provided and upon them are superimposed provisions of law governing contracts generally and other remedial rights recognized and implemented by other provisions of law. West's Ann.Insurance Code, § 2071; West's Ann.Civ.Code, §§ 1572, 1709, 1710.

8. Insurance 🔑246

Insurance contract may be rescinded because of fraud or it may be extinguished by its rescission if all parties consent thereto. West's Ann.Civ.Code, §§ 1688, 1689 and subd. (a).

9. Insurance 🔑226

Policy may be terminated by mutual agreement of parties independent of express terms of policy and such agreement may be expressed or may be implied from circumstances. West's Ann.Civ.Code, §§ 1688, 1689 and subd. (a).

10. Insurance 🔑233

Except for remedial rights of rescission afforded one of parties to contract such as in instances of fraud, deceit, or mistake, policy can only be cancelled pursuant to its terms or by mutual consent. West's Ann. Civ.Code, § 1689.

11. Insurance 🔑233

In order for cancellation of policy to take place by substitution of one policy for another, there must be mutual consent.

12. Insurance 🔑232

That insurer obtained new fire policy with another insurer through broker with intent that it should take place of existing policies and with no intent thereby to acquire additional insurance did not work effective cancellation of existing insurance in absence of mutual consent to cancellation of policies.

13. Insurance 🔑604

New insurer, which believed that it was only carrier on fire risk, which did not require cancellation of old policies as condition upon which it would issue the new policy and which honored insured's claim against it, had standing to assert that old policies were not cancelled and that prior insurer should share loss.

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Bolton & Groff, Los Angeles, for appellant.

Bert W. Levit, David C. Bogert, Long & Levit, San Francisco, for respondent.

⊥MOLINARI, Justice. ⊥159

This is an appeal from a judgment for $9,327.26 in favor of respondent, Glens Falls Insurance Company, a corporation, against appellant, Founders' Insurance Company, a corporation. The cause was tried by the court without a jury. Four witnesses were presented at the trial, to wit: Raffaela Dorothea Brucato, hereinafter referred to as Mrs. Brucato, Francis Freitas, Edgar Peterson, and Ernest Vedovi, all of whom testified by way of depositions taken before trial.

The Facts

Mrs. Brucato was the owner of an apartment house on Avila Street in San Francisco. The said building was covered by fire insurance with the respondent, Glens Falls, in the total sum of $38,000, represented by four different policies in varying amounts each of which was for a term of three years. Two of the policies bore expiration dates of January 9, 1953; one expired on September 19, 1953; and the other on May 17, 1954. One of these policies provided for additional coverage in the sum of $2,000 for fire insurance on furniture and contents. A Mr. Vedovi was the insurance broker on these policies. Mrs. Brucato also carried an insurance policy with the respondent company on another piece of property. In 1951 a claim was presented by Mrs. Brucato to the respondent under the latter policy. The adjustment of the claim was entrusted by the respondent to a Mr. Frost who was an independent adjuster. Several discussions were had between Frost and Mrs. Brucato concerning the claim.

Frost finally told Mrs. Brucato at her home that the respondent would not honor the claim, whereupon Mrs. Brucato told him "'* * * I shall call up and cancel all of these policies as of now.'" (On the day previous she had stated to him "'* * * I will cancel every policy with that company, if that is the way they take care of a small claim. * * *'") She then, in the presence ⊥160 of Frost telephoned the Glens Falls office and stated "to someone on the telephone" that "'[a]s of today I shall cancel all these policies if you will not take care of this claim.'" On examination Mrs. Brucato testified that in this conversation she did not state that the policies were then and there cancelled but only told them that she would cancel in the event the claim was not taken care of. This conversation occurred in the spring or early summer of 1951. Mrs. Brucato thereafter had no other personal contact with the respondent company nor was her claim ever honored or paid.

Several months after the aforesaid telephone conversation and, as Mrs. Brucato testified, "nothing was still done," she enlisted the aid of a Mr. Freitas, who was an insurance broker. (Freitas testified that he undertook to attempt to bring about a settlement of the claim early in 1952). She stated, on examination, that until she sought the aid of Freitas she allowed more time to see what Glens Falls was going to do, stating, "I still allowed more time to adjust it." Mrs. Brucato testified that when Freitas told her he was unsuccessful in settling the claim she told him that she "was going to cancel every policy with Glens Falls"; "I told him to cancel the policies and keep me covered." She testified further that she told him she wanted "the same amount that I had," stating that it was her intention to have the property insured for the said sum of $38,000, and not twice that amount, i. e., $76,000, and that it was her intention that the new policy which Freitas would place on the Avila Street property would be the only insurance she would have on said property. Upon re-examination by counsel for respondent the following questions were directed to Mrs. Brucato, and she gave the following answers: "Q. Anyway, you did tell Mr. Freitas that you wanted to cancel all of the policies with the Glens Falls Insurance Company on the building? A. If they didn't pay the claim. Q. And you told Freitas that you wanted them cancelled; isn't that correct? A. I was going to cancel them if they didn't pay the claim. Q. And you told Mr. Freitas that you wanted the Glens Falls Insurance to be replaced with another company? A. To cover the property with insurance. Q. For the $38,000? A. To keep me covered. Q. That was in the amount of $38,000? A. $38,000 was our intention."

Mrs. Brucato testified that she had no further dealings with Vedovi after she consulted Freitas. She further testified that she herself did not personally act or do anything toward the cancellation of the Glens Falls policies or about seeking any ⊥161 return premium from said company, but that she looked to Freitas "to take care of all this" for her.

Freitas testified that Mrs. Brucato first came to him in the early part of 1952; that after he had not been able to adjust the disputed claim, Mrs. Brucato "asked me to cancel all of her insurance out and to replace it"; that these instructions were oral and had reference to all the insurance that was carried with Mr. Vedovi and Glens Falls; that he attempted to dissuade her from so doing because she would recover only a "short rate premium" refund rather than a prorated one if she cancelled the policies, it being to her advantage to allow the policies to continue to their expiration period; and that she was adamant, telling him that if he "didn't want to write the business on her terms, she would get herself another broker." He testified further that there was no question in his mind that she wanted to cancel the policies and replace them. Freitas testified also that in March or April of 1952 he visited Mrs. Brucato at her beauty salon and told her that Glens Falls definitely would not entertain her claim, whereupon she then telephoned the Glens Falls office in his presence. He described the conversation as follows: "And she notified the Glens Falls that if the claim were not paid, as she understood it was not going to be, that she did not want anything more to do with Glens Falls and she wanted all of her contracts cancelled and she hung up." Freitas testified further that he himself had told "someone" at Glens Falls, in addition to telling Mr. Frost, that unless the claim was paid the policies would be cancelled. He stated on examination, however, that during his conversations with representatives of Glens Falls he did not tell them he was authorized to cancel the policies or that the policies were then and there cancelled because he was not so authorized. He testified, moreover, that they told him that they couldn't talk to him as a broker because Mr. Vedovi was the broker of record, and that at most all he told them was that Mrs. Brucato would likely cancel at some future date. Freitas did nothing further about cancelling the Glens Falls policies nor did he get in touch with said company again to tell them that Mrs. Brucato wanted the policies cancelled. His explanation was that "It was very definite that if we did not have the claim paid, she was going to cancel."

Freitas subsequently placed a $38,000 fire policy on the said property with Founders, the effective date being March 19, 1952. This policy was issued with a loss payable clause ⊥162 in favor of Aetna Life Insurance Company with whom Mrs. Brucato had in the meantime refinanced a loan on the property. The Glens Falls policies bore a similar endorsement, providing that the loss was payable to the previous mortgage holder. Glens Falls was not notified of this change in loan companies nor were its policies endorsed to indicate the change. Freitas did not speak to Vedovi until March 19, 1952, the same day on which he placed the coverage with Founders. He testified that he spoke to Vedovi about Mrs. Brucato's attitude towards Vedovi and Glens Falls and of her desire to cancel the Glens Falls policies, but that he told Vedovi that he would do all in his power to see that she left the policies in force, Vedovi replying that he was not interested in keeping Mrs. Brucato as a client. It was on the same day, after this conversation, that Freitas placed a "binder" for said coverage on Founders, the actual ordering of the policy taking place on the next day.

When Freitas delivered the Founders policy to Mrs. Brucato he advised her of the amount of the return premiums due on the Glens Falls policies and advised her to collect them from Mr. Vedovi. Mrs. Brucato made no effort to collect these return premiums from either Vedovi or Glens Falls, nor did she advise either of them that she was claiming them.

On August 4, 1952, the premises were damaged by a fire. Freitas advised Founders of the loss and the latter sent an adjuster to the scene. In the course of his investigation on the premises the adjuster came across copies of the Glens Falls policies. He queried Freitas about these. Freitas responded "'Well, those are only copies. The originals, I believe, were cancelled.'" (Freitas testified that from the time of the issuance of the Founders policy he had assumed that the latter coverage was the only one on the building.) Freitas, however, on the same day of the fire called Glens Falls and was informed "that these contracts were still in force." Freitas then made a formal report of the fire to Glens Falls and an adjuster was sent out by that company. The adjuster for Founders thereafter prepared proofs of loss against both Founders and Glens Falls. Mrs. Brucato signed these forms on the advice of Freitas who told her that both the Glens Falls and Founders policies were in effect. Accordingly she made a claim for one-half of the loss against each of the companies. Mrs. Brucato testified that she didn't know that she had policies in force with both companies until after the fire. Freitas testified that ⊥163 he had been told by a representative of Glens Falls that its policies were considered to be in force.

Vedovi testified: that Freitas came to him on March 19, 1952, and advised him that he (Freitas) was taking over as Mrs. Brucato's broker; that Freitas told him Mrs. Brucato was insisting that the Glens Falls policies be cancelled and rewritten; that he (Freitas) had attempted to discourage her from so doing because of the loss incurred in short rate cancellation, but that she was very definite on removing all of her insurance from Vedovi as well as Glens Falls; that Freitas told him that Mrs. Brucato was going to cancel the Glens Falls policies; that she had instructed him to do so; and that it was Vedovi's understanding that something was going to be done in the future by either Freitas or Mrs. Brucato in connection with the cancellation. Vedovi testified further that he had no other conversations with Freitas until the time of the fire; that he did nothing in connection with the cancellation of the policies because he "felt that Mr. Freitas had taken everything over and that he would see to it that those policies would be cancelled as he was replacing them"; that Freitas did not request him to do anything in connection with the cancellation of the policies; that he had not spoken to or seen Mrs. Brucato since December of 1951; and that she had never given him instructions directly, orally, or in writing, to cancel the policies.

The fire loss amounted to $37,309.05. After numerous meetings and negotiations the respondent, Glens Falls, finally declined to pay any portion of the loss, taking the position that its policies had been cancelled. Glens Falls thereupon tendered the return premiums to Mrs. Brucato who refused to accept them. The respondent, Glens Falls, did, however, honor the proof of loss as to the $2,000 coverage on the furniture and contents. The contractor, Fred J. Early, Jr., Co., Incorporated, who performed the work of repairing the fire damage instituted an action against the respondent, the appellant and Mrs. Brucato for the above amount. Although cross-complaints were filed by Glens Falls and Mrs. Brucato, and Vedovi and Freitas were brought in as parties, the action went to trial ultimately only as between Glens Falls and Founders. A stipulation was entered into whereby there was paid to Early and Brucato sums totaling $27,345.18 by Founders and $9,471.51 by Glens Falls, the trial court retaining jurisdiction for the purpose of determining whether Founders was liable to pay all or only one-half of the loss of $37,309.05. The 164 stipulation further provided that if the court should find that Glens Falls policies were in full force and effect on August 4, 1952, Glens Falls would pay to Founders the sum of $9,327.26, and in the event the Founders policy was the only insurance in full force and effect on said date Founders would repay to Glens Falls the amount of $9,327.26 which it advanced to Early and Mrs. Brucato.

The trial court found that the Glens Falls policies were voluntarily and orally cancelled by Mrs. Brucato on or about March 19, 1952; that after said date it was the Founders belief and understanding that it carried the only fire insurance on said premises; that the Founders policy was substituted for the Glens Falls policies; and that on the date of the fire the Founders policy was the only policy of fire insurance covering Mrs. Brucato on said property. The trial court accordingly awarded judgment for $9,327.26 in favor of Glens Falls against Founders.

Question Presented

The vital question presented is whether the Glens Falls policies were cancelled by Mrs. Brucato prior to the occurrence of the fire. Founders contends on appeal that Glens Falls has not met the burden of establishing that the Glens Falls policies were cancelled either under the policy provisions, or at the request of Mrs. Brucato, or by mutual consent. The respondent asserts, on the other hand, that there was substantial evidence to support the court's finding that Mrs. Brucato orally cancelled the said policies, and contends further, that the acquisition of the Founders policy with intent to replace the Glens Falls policies constituted an effective voluntary cancellation of the latter policies. It is conceded by the parties that the Glens Falls policies are California standard fire insurance policies in the form prescribed by section 2071 of the California Insurance Code. The respondent asserts that it is not required that the policies be cancelled by mutual consent as long as they are cancelled by the insured. In this respect respondent urges that they were orally cancelled by Mrs. Brucato pursuant to the terms of the policies, the question of such cancellation being one of fact which finds substantial support in the evidence.

The Law

[1–3] The California statutory standard form of fire insurance policy provided for in section 2071 of the Insurance Code contains the following language: "This policy ⊥165 shall be canceled at any time at the request of the insured, in which case this company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time." The sole requirement to effect a cancellation by the insured is a definite and unconditional request for cancellation actually communicated to the company. (3 Richards on Insurance (5th Ed.), § 532, pp. 1764, 1765; Boutwell v. Globe & Rutgers Fire Ins. Co., 193 N.Y. 323, 85 N.E. 1087.) While the insured can cancel forthwith at any time by request, the request for cancellation must be unequivocal and absolute. (Richards, supra; Atlantic Fire Ins. Co. of Raleigh, N.C. v. Smith, 183 Okl. 97, 80 P.2d 216; Adler v. Burnes, 288 Mass. 409, 192 N.E. 922, 923; and see American Glove Co. v. Pennsylvania Ins. Co., 15 Cal.App. 77, 80, 113 P. 688.) No formal or written notice of cancellation is required (Richards, supra; American Glove Co. v. Pennsylvania Ins. Co., supra, at p. 80, 113 P. at p. 689); the surrender of the policy is not a prerequisite to cancellation (Richards, supra; Stevenson v. Sun Insurance Office, 17 Cal.App. 280, 288, 119 P. 529; Firpo v. Slyter, 95 Cal.App. 500, 504, 272 P. 1111); nor is the return of the unearned premium a condition precedent to cancellation. (Richards, supra; Mangrum & Otter v. Law U. & R. Ins. Co., 172 Cal. 497, 157 P. 239, L.R.A.1916F, 440.)

[4, 5] The evidence in this case does not support the finding that the insured unequivocally and unconditionally requested of Glens Falls a cancellation of the policies issued by that company. The oral communications by Mrs. Brucato and Mr. Freitas to Glens Falls amount, at most, to an expression of an intention to cancel the policies at some time in the future. An intention to cancel a policy does not *ex proprio vigore* cancel it. (Agalianos v. American Central Ins. Co., 62 Cal.App. 349, 358–359, 217 P. 107.) In order for the insured to avail himself of the privilege of cancellation, he must indicate a *present* resort to it. (American Glove Co. v. Pennsylvania Ins. Co., supra, 15 Cal.App. 77, 81, 113 P. 688.) The conversations by Mrs. Brucato with the representative of the respondent indicate in each instance that she would thereafter avail herself of the cancellation privilege if the company did not meet the condition imposed by her, i. e., the settlement of her claim. When she phoned the company in the presence of Mr. Frost in 1951 her statement was: "'As of today I shall cancel all these policies *if you will not take care of this claim.*'" (Emphasis added.) She stated that in this conversation she did not state or intend that ⊥166 the policies be forthwith cancelled, her statement being "I still allowed more time to adjust it." When, as she stated, "nothing was still done," she enlisted the aid of Freitas early in 1952. Even then she told Freitas that she wanted the policies cancelled "if they didn't pay the claim." Again, when she phoned Glens Falls in the presence of Freitas in March of 1952 his version of the conversation was that Mrs. Brucato stated that "*if the claim were not paid,* as she understood it was not going to be, * * * she wanted all of her contracts cancelled * * *." (Emphasis added.) Respondent urges that this language indicates a present resort to the privilege of cancellation. It appears to us to be conditional and equivocal, but even if we concede that it is not, the evidence discloses that it was Mrs. Brucato's

intention and Freitas' understanding that the Glens Falls policies were not to be cancelled until she was covered by other insurance, and further discloses that even after this last communication with the respondent, Freitas was still hopeful of dissuading Mrs. Brucato from cancelling. He so stated to Vedovi when he thereafter called on the latter. In that conversation he told Vedovi "she was going to cancel" the Glens Falls policies. It was not until after this conversation with Vedovi that the Founders policy was ordered issued. Freitas did not advise Glens Falls of this fact, nor did he or Mrs. Brucato again communicate with Glens Falls. Freitas' explanation of the failure to do so is a further demonstration of the "in futuro" mental process, when he testified: "It was very definite that if we did not have the claim paid, *she was going to cancel.*" (Emphasis added.)

[6] The respondent stretches our credulity when it urges that a cancellation took place at Mrs. Brucato's request, particularly when it did not itself consider that such a request was made. This is evidenced by the fact that when respondent was informed of the fire it believed that it was on the loss because its records indicated that the policies were still in full force and effect. That Glens Falls did not consider its policies cancelled is further evidenced by the fact that it did not request a surrender of the policies or tender the return premium until after the fire. While such surrender or return of the unearned premium is not essential to the cancellation of a policy, it is nevertheless a piece of evidence tending to show that the respondent did not deem the policy to be cancelled, particularly in the light of the burden place upon the respondent to prove cancellation. (K. C. Working C. Co. v. Eureka ⊥167 Sec. Ins. Co., 82 Cal.App.2d 120, 130, 185 P.2d 832; see Stevenson v. Sun Insurance Office, supra, 17 Cal.App. 280, 288, 119 P. 529.) Another circumstance which militates against such cancellation is the payment of the insurance on the personal property and the acceptance of that payment by Mrs. Brucato. Such payment is inconsistent with Mrs. Brucato's assertion that she requested and effected a cancellation of *all* of her policies with Glens Falls, as well as it is inconsistent with Glens Falls' claim that the insurance on the real property which was contained in the same policy was not in force. Actual communication of the request to cancel presupposes that the request be made known to the insurer. The actions and conduct of the insurer in this case in response to the oral statements of Mrs. Brucato negate the inference that the idea of present cancellation was imparted to the mind of the insurer. We are, therefore, of the opinion that there is no evidence to support the finding that Mrs. Brucato orally requested a cancellation. In reaching this conclusion we have accepted as true all of the evidence tending to support the findings with respect to such cancellation and have drawn all of the reasonable inferences that may be drawn from the evidence.

The trial court did not find that the subject policies were cancelled by mutual consent, and the respondent concedes that they were not. The appellant contends, however, that this is fatal to the respondent's assertion that the policies were, in any event, cancelled by the procurement of the new insurance. This is so, urges the appellant, because cancellation by substitution of insurance is part of the legal theory of cancellation by mutual consent. Respondent, on the other hand, argues that mutual consent is not required for effective cancellation under the rule of insurance cancellation by substitution.

The rule relied upon by respondent is stated in 27 California Jurisprudence 2d, Insurance, section 293, as follows: "Generally, the procurement of new insurance with intent that it shall take the place of existing insurance, and with no intent to thereby acquire additional insurance, constitutes an effective voluntary cancellation of the existing insurance, in which case the insured may not recover under both policies, despite physical possession, by the insured or his agent, of the original policy, and though the premium return, due on cancellation of the original policy, has not been made at the time the loss occurs." (Citing cases.) Respondent relies on similar statements in 45 C.J.S. Insurance § 458, and 6 Appleman, Insurance Law and Practice, sections 4196 168 and 4225, and upon the following cases: Strauss v. Dubuque Fire & Marine Insurance Co., 132 Cal.App. 283, 22 P.2d 582; Stevenson v. Sun Insurance Office, supra, 17 Cal.App. 280, 119 P. 529; Bache v. Great Lakes Ins. Co., 151 Wash. 494, 276 P. 549; White v. Insurance Co. of New York, 1 Cir., 93 F. 161; Pagliero v. Merchants Fire Assurance Corporation, 9 Cir., 169 F.2d 373; Wells Petroleum Co. v. Fidelity-Phoenix Fire Ins. Co., 7 Cir., 121 F.Supp. 739.

There is no question, in the instant case, that Mrs. Brucato procured new insurance with Founders through her broker, Mr. Freitas, with the intent that it should take the place of the existing insurance with Glens Falls and with no intent thereby to acquire additional insurance. The question posed is whether such act with such intention worked *ex proprio vigore* an effective cancellation of the Glens Falls policies.

[7–9] Under the terms of the Glens Falls policies they could be terminated either by the insured upon request or by the company upon notice. (Ins.Code, § 2071.) As we have hereinabove indicated no such formal cancellation was effected by the insured in the present case. It is conceded by the parties that no such formal cancellation was attempted by the company. These specifications in the Insurance Code of the manner in which a policy may be cancelled do not restrict the rights of rescission to the methods therein provided. Upon these are superimposed those provisions of law which govern contracts generally and the other remedial rights which are recognized and implemented by other provisions of law. (De Campos v. State Comp. Ins. Fund, 122 Cal.App.2d 519, 529, 265 P.2d 617.) Accordingly an insurance contract may be rescinded because of fraud (Civ.Code, §§ 1572, 1709, 1710; De Campos v. State Comp. Ins. Fund, supra), or it may be extinguished by its rescission as provided in Civil Code sections 1688 and 1689. Section 1689, subdivision (a) of the Civil Code provides that *"A contract may be rescinded if all the parties thereto consent."* A policy of insurance may, therefore, be terminated by mutual agreement of the parties independent of the express terms of the policy; and such an agreement may be express or it may be implied from the circumstances of the particular case. (Apparel Mfrs. Supply Co. v. National Auto. & Cas. Ins. Co., 189 Cal.App. 2d 443, 459, 11 Cal.Rptr. 380; Stevenson v. Sun Insurance Office, supra, 17 Cal.App. 280, 288, 119 P. 529.)

In Apparel Mfrs. Supply Co. the court stated that "[c]ancellation by mutual consent may occur where one policy is substituted for another." (189 Cal.App.2d p. 459, 11 Cal.Rptr. p. 389, citing Strauss v. Dubuque F. & M. Ins. Co., supra, 132 Cal. 169 App. 283, 22 P.2d 582, and 27 Cal.Jur.2d, Insurance, § 293.) There the company (National) which carried existing insurance had advised the broker for the insured that it desired to be relieved of the risk. The broker thereafter on several occasions advised National that he was in the process of seeking replacement coverage. On the day of the fire loss in question, and prior to its occurrence, the broker advised National that he had procured insurance with another company by way of a binder as of that date, and that it (National) was off the risk. There was a conflict in the testimony as to whether the broker then advised the company to cancel the policy, the broker testifying that he told the company's representative that he did not want the old policy cancelled until the new policies were actually received. There was ample evidence adduced that the insured intended to substitute the new policies for the old and that it did not desire additional coverage. The trial court held that both insurance companies were liable for the loss. The essence of the holding in Apparel Mfrs. Supply Co. is that it was a question of fact for the trial court to determine whether there was a cancellation of the existing policy by mutual agreement, and that, accordingly, the trial court's finding that the cancellation of National's policy was not to take place until the new policies were received should not be disturbed.

It would appear, therefore, that unless another method of cancellation has been evolved by decisional law as contended by respondent, i. e., cancellation by substituted insurance arising out of the unilateral intent of the insured uncommunicated to the company, an insurance contract cannot be terminated or extinguished except as provided by its terms or pursuant to the provisions of law which govern contracts generally and as implemented by other provisions of law.

[10–12] In our opinion, except for the remedial rights of rescission afforded one of the parties to a contract such as in the instances of fraud, deceit, mistake, etc. (see Civ.Code, § 1689), an insurance contract can only be cancelled pursuant to its terms or by mutual consent. Implicit in the Apparel Mfrs. Supply Co. case is the holding that the mere procuring of substituted insurance with the intent to replace existing insurance and without the intent to thereby acquire additional insurance does not per se work a cancelling of the existing insurance. (See Scheel v. German-American Ins. Co., 228 Pa. 44, 76 A. 507, and Ciokewicz v. Lynn Mut. Fire Ins. Co., 212 Wis. 44, 248 N.W. 778, 779.) The distilled rule of Ap⊥170parel Mfrs. Supply Co. is that in order for cancellation to take place by the substitution of one policy for another it must be done by mutual consent or agreement. (See Scheel v. German-American Ins. Co., supra; Home Insurance Co. v. Campbell, 4 Cir., 79 F.2d 588, 590–591.) It should be noted here that the authors of the article on Insurance which contains the rule relied upon by the respondent (i. e., 27 Cal.Jur.2d, § 293) have included the rule under the subtitle of "Rescission and Cancellation—By Agreement." (§§ 291, 293.)

We are fortified in our conclusion by the cases cited by respondent. The Strauss case states that "an insurance policy is in effect canceled when another policy is substituted for it," (132 Cal.App. page 292, 22 P.2d page 586) citing the Stevenson case as authority for the statement. The Stevenson case did not concern itself with the effect of the substituted insurance. There the company was advised prior to the loss that its policy "was cancelled" and the company indicated its assent to the cancellation. The court concluded that the rescission had been established by the *mutual agreement* of the parties and that it was complete and effectual notwithstanding that the policy was not formally and physically surrendered to the company prior to the loss. The Strauss case does not contain a narrative of the facts except such as appear in the quoted findings of the trial court. It appears, however, that the issue of policy substitution was resolved upon a conflict in the evidence which resulted in the specific finding " 'that the policy of the defendants * * * was canceled *by consent* of the parties prior to the time of the fire.' " (Finding No. XII, p. 290; emphasis added.)

In Bache the issue of mutual consent was not before the court because the cause proceeded on a stipulation that the procuring of new insurance by the assured or its agent would effect a cancellation. The specific issue there was whether the loss payee had authority to cancel the original policy on behalf of the insured after the insurance company had given notice of cancellation. White and Pagliero both involved a situation where the company had given notice of its intention to cancel the policy. In each the insured's broker thereafter and prior to the loss advised the company that he had contracted for new insurance to replace the old. The main question before the respective courts was whether the broker was authorized to substitute the insurance, and having concluded that he was, the court held that there was a complete substitution. A reading of these cases compels the conclusion that the court thereupon found that there was a mutual consent to the termination⊥171 of the contractual relationship. In Wells Petroleum Co. the broker in the first instance advised the company that he *had* replaced its policies with insurance in another company and actually did so. The broker and the company were unable to agree as to whether the return premiums should be on a pro-rata or a short rate basis. While this dispute was going on and while the insured still had possession of the old policies a loss occurred. In Wells Petroleum Co. the inquiry was also directed primarily to the authority of the broker. In holding that there was a cancellation by virtue of replacement and substitution the appellate tribunal pointed out that the insured had ratified the replacement and substitution of the policies long prior to the occurrence of the fire and that this early ratification was confirmed by virtue of the election of the insured to present claims under the substituted policies and to collect payment of the proceeds thereof. A close scrutiny of the Wells Petroleum Co. case, which cites the Strauss case among its authorities, indicates that its decision was based upon the substitution of the new policies pursuant to mutual consent by ratification.

[13] It is also contended by respondent in its brief that Founders has no standing to urge that the Glens Falls policies had not been cancelled because it "knew all along that its policy in the amount of $38,000 was *supposed* to be the only insurance on the Brucato building." (Emphasis added.) This is a specious argument particularly in view of the stipulation entered into between Glens Falls and Founders, the remaining parties to this litigation, reserving to the trial court the jurisdiction to determine the liability of Glens Falls and Founders in connection with the insurance policies and the loss suffered by Mrs. Brucato. The case cited by respondent in support of its contention, i. e., Schoenherr v. Continental Ins. Co., 282 App.Div. 817, 122 N.Y.S.2d 458, discloses a situation where the new insurance carrier had issued its policy upon the understanding that it would be the only carrier and that the old policy with Mutual would be cancelled. The insured mailed the policy to Mutual requesting cancellation but it was not received by the latter. A fire thereafter occurred resulting in a loss. Mutual, upon being apprised of the insured's action in mailing the policy and requesting cancellation agreed to the cancellation. The court held that there was, therefore, an effective cancellation, and that, accordingly, the new insurance carrier could not complain as against the insured of any informality in the manner of cancellation because the insured had taken all of the steps to carry out this understanding. In the present case, while Founders understood and believed that it was the only insurance carrier on the risk, it did not require cancellation of the old policies as a condition upon which it would issue the new. We do not have a situation here where Founders is claiming as against Mrs. Brucato that its policies were issued on condition that those with Glens Falls would be cancelled. Founders is honoring Mrs. Brucato's claim against it, but asserts that because the Glens Falls policies were not cancelled, that Glens Falls should share the loss. This is the position taken by the insured who filed proofs of loss against both. It appears to us that Founders has as much standing to assert that the Glens Falls policies were not cancelled (as we have concluded that they were not), as Glens Falls has to contend that they were cancelled by Mrs. Brucato when all along and up to the time of the loss they themselves had understood and supposed that their policies were still in effect. It should be further noted that the trial court's judgment is predicated upon findings that Mrs. Brucato requested cancellation and upon cancellation by substitution. The only issue presented to the trial court was the issue of cancellation. The question of estoppel as against Founders was not pleaded or urged at the trial court level; nor does the pretrial order include it as an issue. It appears for the first time in respondent's brief on appeal.

In view of the conclusions herein reached that the Glens Falls policies were not cancelled we need not consider respondent's remaining contention that the $2,000 personal property coverage and the insurance on the real property were severable contracts.

The judgment is reversed. Accordingly and as provided in the stipulation of the parties, the appellant, Founders, shall have judgment against respondent, Glens Falls, for the sum of $9,327.26 together with all taxable costs incurred in this action, other than costs paid to Early and Brucato pursuant to said stipulation.

BRAY, P. J., and SULLIVAN, J., concur.

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209 Cal.App.2d 48

⌊48 **In the Matter of the ESTATE of Della F. BISHOP, Deceased.**

Gordon Holmes BISHOP, as Executor of the Estate of U. Holmes Bishop, deceased, Clyde M. Bishop, DeWitt Bishop, Clara B. Hebard, Harold S. Bishop and William C. Bishop, Petitioners, Claimants, Respondents and Appellants,

v.

Margaret DONOVAN, Frances Thompson, and Mary Shipp Ackerman, Claimants, Appellants and Respondents.

Civ. 6841.

District Court of Appeal, Fourth District, California.

Oct. 26, 1962.

Hearing Denied Dec. 19, 1962.

Proceeding wherein the Superior Court of Orange County, Warren J. Ferguson, J., rendered a judgment determining heirship under claim of succession based on the statute providing that if decedent leaves neither spouse nor issue and the estate or any portion thereof was separate property of the previously deceased spouse and came to the decedent by gift, descent, devise or bequest, such property goes in equal shares to children of deceased spouse and to their descendants by right of representation. An appeal was taken. The District Court of Appeal, Coughlin, J., held, inter alia, that the evidence would not sustain finding that wife received as gift portion of ranch deeded her by husband or implied finding that she had had no separate property at the time of conveyance.

Reversed and new trial ordered.

Opinion 23 Cal.Rptr. 860 vacated.

1. Appeal and Error 🔑1010(1), 1011(1)

If there is any substantial evidence, contradicted or uncontradicted, including any inferences reasonably deducible therefrom, which supports findings, they will be sustained on appeal.

2. Appeal and Error 🔑931(1)

It is presumed on appeal that all conflicts in the evidence, and between all reasonable inferences equally deducible therefrom, were decided by trial court in favor of prevailing party.

3. Evidence 🔑597

Only "substantial evidence" will suffice to support a finding, and, to be so substantial, evidence must be of ponderable legal significance, reasonable in nature, credible, and of solid value.

See publication Words and Phrases for other judicial constructions and definitions.

4. Evidence 🔑595

Inferences based only on mere possibility, suspicion, speculation, imagination, guesswork, supposition, conjecture or surmise must be rejected.

5. Appeal and Error 🔑1010(1)

Finding will be set aside if evidence in support thereof is so slight and tenuous that it does not create a real and substantial conflict.

6. Descent and Distribution 🔑71(4)

Where right as heir depends not only upon fact of designated relationship but also status of property, claimant has burden of proving that status. West's Ann.Prob. Code, § 229.

7. Husband and Wife 🔑49½(8)

Evidence would not sustain finding that wife received as gift portion of ranch deeded her by husband or implied finding that she had had no separate property at the time of conveyance. West's Ann.Prob. Code, § 229.

8. Husband and Wife ⚷43

Advancement of separate funds by wife to husband for investment in his separate property is presumed to be loan and imposes upon him legal duty of returning it to her. West's Ann.Prob.Code, § 229.

9. Gifts ⚷1

"Valuable consideration" is not limited to payment of money or other material exchange, but may be based on promise, consist of cancellation of debt, or arise out of waiver of rights, and transfer for such consideration is not a "gift."

See publication Words and Phrases for other judicial constructions and definitions.

10. Gifts ⚷1

Extent of valuable consideration is not important, even though recital of mere nominal consideration in an instrument of transfer does not foreclose finding that transaction was gift.

11. Husband and Wife ⚷47(3)

Absence of separate property of wife at time of conveyance to her by husband is not sufficient to support inference that there was no consideration therefor. West's Ann.Prob.Code, § 229.

12. Deeds ⚷195

Deed carried with it statutory declaration that transfer effected thereby was presumed to have been for consideration and not as gift.

13. Evidence ⚷54

Presumption may be invoked only when evidence sufficiently establishes sphere within which it can operate.

14. Evidence ⚷419(5)

Ordinarily whether deed is one of gift or for consideration has no effect on kind of estate transferred, and, as consequence, recital respecting receipt of consideration is not related to quality of estate and is not subject to rule precluding contradiction by parol evidence.

15. Evidence ⚷419(2)

Where nature of title is relied on to affect fact that it was conveyed as gift or for consideration, recital as respecting such fact may not be contradicted.

16. Trial ⚷105(2)

Hearsay not objected to became competent evidence of facts recited.

17. Deeds ⚷17(1)

There is a distinction between "valuable consideration" and "sufficient consideration" and the former may exist though the latter does not.

See publication Words and Phrases for other judicial constructions and definitions.

18. Husband and Wife ⚷49½(7)

Statutory presumption that transactions to one in fiduciary relationship were entered into without sufficient consideration would not support finding that transfer to wife was gift. West's Ann.Civ.Code, § 2235.

19. Husband and Wife ⚷49½(7)

Statutory presumption that transfer to trustee was without consideration is intended to protect parties in fiduciary relationship and is not applicable, with respect to transfer between husband and wife, in controversy between their claimed heirs. West's Ann.Civ.Code, § 2235.

20. Descent and Distribution ⚷16

Under statute, where predeceased spouse was source of title held by surviving spouse at time of latter's death, distribution is made to relatives of predeceased spouse, but, even though property may originally have been owned by predeceased spouse from whom it was obtained by surviving spouse by gift, descent, devise, etc., if the latter at time of death owned property by virtue of intervening source, distribution is made to relatives of surviving spouse. West's Ann.Prob.Code, § 229.

21. Descent and Distribution ⚷16

Where separate property of predeceased spouse comes to surviving spouse under conditions making it subject to statute whereby property goes in equal shares to children of deceased spouse and their descendants by right of representation, any increase in value thereof which is due to personal activity, ability or capacity of the latter, through services rendered after death of former, is not subject to such succession. West's Ann.Prob.Code, § 229.

◆

Bradley & Bowman, Santa Ana, for petitioners, claimants, respondents and appellants.

McCabe & Schumacher, Fullerton, for claimant, appellant and respondent Donovan.

Rudolph Pacht, Los Angeles, for claimants, appellants and respondents Thompson and Ackerman.

⌊51 ⌊COUGHLIN, Justice.

This is an appeal from a judgment determining heirship under a claim to succession based on the⌊provisions of Section ⌊52 229 of the Probate Code, the pertinent parts of which provide:

> "If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise, or bequest, * * * such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, * * *." (Prob.Code, sec. 229.)

A. D. Bishop and Della Bishop were married on October 12, 1908. At the time of marriage Mr. Bishop owned a 25 acre ranch which was his separate property, and is the subject of this proceeding. The trial court found, in substance, that at this time Mrs. Bishop owned some improved real property, which was her separate estate; that she sold the same; and that the proceeds of this sale were put into a home built on the ranch. A few years later, i. e., on July 11, 1914, Mr. Bishop, by grant deed, conveyed 22½ acres of the 25 acre ranch to Mrs. Bishop, including that part thereof upon which the home was situated, and retained 2½ acres. The deed in question was a form; as executed, was printed in part and handwritten in part; and recited that the grant was made in consideration of the sum of "Ten Dollars and other valuable considerations," the quoted portion being handwritten. Thereafter, a homestead was placed on that part of the ranch occupied by the home, which covered a plot of ground 250 feet by 200 feet in dimension.

Mr. Bishop also owned other separate property; sold a part thereof to one of his sons; caused some of it to be placed in the name of his wife and himself as joint tenants; conveyed other parts to other persons; transferred an interest in one parcel to his wife by deed which recited a consideration of $1.00; and conveyed another parcel to her by a deed which recited a consideration of love and affection.

In 1928 Mr. Bishop died. The 2½ acres which he retained from the 25 acre ranch became a part of his estate and was distributed to Mrs. Bishop and Mr. Bishop's sons by probate decree awarding the former a one-third interest therein and the latter a two-thirds interest. Subsequently Mrs. Bishop purchased the interest awarded to the sons and received from them a grant deed conveying the 2½ acres in question without any reference to their two-thirds interest therein. Thereafter, until her death, Mrs. Bishop managed the whole ranch, which was planted to citrus trees; supervised the workmen; arranged for cultivation of the grove; ordered fertilizer and spraying;⌊replaced some of the trees; ⌊53 planted eucalyptus trees; kept the records; and generally "ran it just like if she had been a man."

Mrs. Bishop did not remarry; died in 1958; left no issue; and did not dispose of the subject property by will. The executor of the estate of one of Mr. Bishop's sons filed the instant proceeding, and he, together with the children of other sons, filed statements of claim to a part of Mrs. Bishop's estate contending that they were entitled to succeed thereto by virtue of the provisions of Section 229 of the Probate Code.

The trial court found and concluded that: (1) the 25 acre ranch was the separate property of Mr. Bishop; (2) the conveyance of 22½ acres therefrom to Mrs. Bishop was a gift; (3) one-half of that portion of the parcel so conveyed which had been homesteaded, i. e., the 250 foot by 200 foot home place site, was the separate property of Mr. Bishop, and one-half thereof was the separate property of Mrs. Bishop; (4) the remaining 2½ acres of the ranch were acquired by Mrs. Bishop from Mr. Bishop's sons; (5) that Mrs. Bishop's relatives were entitled to succeed to the 2½ acre parcel and a one-half interest in the home site; and (6) that Mr. Bishop's relatives were entitled to succeed to the 22½ acre parcel, less a one-half interest in the home site. Judgment was entered accordingly. Mrs. Bishop's relatives appealed from that part of the judgment in favor of Mr. Bishop's relatives, and the latter appealed from that part of the judgment in favor of the former.

[1–5] Each side contends, in substance, that the evidence is insufficient to sustain the findings in favor of the other side. When such a contention is raised on appeal, if there is any substantial evidence, contradicted or uncontradicted, including any inferences reasonably deducible therefrom, which supports the findings, they will be sustained (Primm v. Primm, 46 Cal.2d 690, 693, 299 P.2d 231; Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689); it is presumed that all conflicts in the evidence, and between all reasonable inferences equally deducible therefrom, were decided by the trial court in favor of the prevailing party (Estate of Schultz, 54 Cal.2d 513, 518, 6 Cal.Rptr. 281, 353 P.2d 921, 81 A.L.R. 2d 1106; Thomas v. Hunt Mfg. Corp., 42 Cal.2d 734, 736, 269 P.2d 12); only substantial evidence will suffice to support a finding (Dyer v. Knue, 186 Cal.App.2d 348, 351, 8 Cal.Rptr. 753); to be substantial, evidence "must be of ponderable legal significance * * * reasonable in nature, credible, and of solid value" (Estate of Teed, 112 Cal.App.2d 638, 644, 247 P.2d 54; Dyer v. Knue, supra, |54 186 Cal.App.2d 348, 351, 8 Cal.Rptr. 753, 755); inferences based only on mere possibility, suspicion, speculation, imagination, guesswork, supposition, conjecture or surmise must be rejected (DiSandro v. Griffith, 188 Cal.App.2d 428, 435, 10 Cal.Rptr. 595; Krause v. Apodaca, 186 Cal.App.2d 413, 418, 9 Cal.Rptr. 10; Estate of Kuttler, 185 Cal.App.2d 189, 205, 8 Cal. Rptr. 160; Eramdjian v. Interstate Bakery Corp., 153 Cal.App.2d 590, 602, 315 P.2d 19); and a finding will be set aside if the evidence in support thereof "is so slight and tenuous that it does not create a real and substantial conflict." (Fewel & Dawes, Inc. v. Pratt, 17 Cal.2d 85, 89, 109 P.2d 650, 653.)

[6] Where the right of a person as an heir depends not only upon the fact of a designated relationship but also upon the status of property which he claims as heir, he has the burden of proving that status. (Estate of Abdale, 28 Cal.2d 587, 593, 170 P.2d 918; Estate of Rattray, 13 Cal.2d 702, 705–706, 91 P.2d 1042; Estate of Anderson, 142 Cal.App.2d 391, 392, 298 P.2d 105; Estate of Adams, 132 Cal.App.2d 190, 196, 282 P.2d 190.) Section 229 of the Probate Code applies only to separate property of a predeceased spouse which came to a surviving spouse in the manner specified by the statute. As a consequence, in the instant proceedings, among other things, Mr. Bishop's relatives have the burden of proving that his separate property, which they claim as heirs, came to Mrs. Bishop by gift, descent or devise.

In essence, two parcels of property are involved; one being that described in the deed from Mr. Bishop to Mrs. Bishop, dated July 11, 1914, consisting of 22½ acres; and the other is the remaining 2½ acres which became a part of his estate upon death.

[7] As to the first parcel, Mr. Bishop's relatives contend, and the court found, that Mrs. Bishop received the same as a gift.

The evidence relied upon to establish this fact is the testimony of witnesses that they had no knowledge that Mrs. Bishop had been employed prior to or after marriage, or that she owned any separate property at the time of marriage; the testimony of one of Mr. Bishop's grandsons that, as he interpreted his father's statements to him, who in turn obtained the information from "family gossip," his grandfather had said, apparently referring to Mrs. Bishop and the property in question, "She got it away from him," and his further testimony that he was told that "in the 1920's sometime" his grandfather said to his father, referring to property thereafter transferred to the latter, "Come on, let's go down town ⌊55 and get this deed transacted before I lose that too"; and the testimony of Mrs. Bishop's niece which, in substance, constituted a statement that she did not remember why Mr. Bishop conveyed the subject property to her aunt.

Under the record before us, this evidence is not sufficient to support the questioned finding.

[8] The court rejected the testimony that Mrs. Bishop did not own any separate property at the time of her marriage, because it found that she did own such property at that time and that she invested the proceeds thereof in the home located on the 22½ acre parcel. This home was built after marriage but prior to execution of the deed in question. If, as contended by Mr. Bishop's relatives, the finding of a gift is based upon a further and implied finding that Mrs. Bishop had no separate property with which to make a purchase, the latter determination necessarily related to her separate property status as of the date of execution of the deed. The advancement of separate funds by a wife to her husband for investment in his separate property is presumed to be a loan, "and imposes upon him the legal duty of returning it to her." (McKay v. McKay, 184 Cal. 742, 746, 195 P. 385; Estate of Abdale, supra, 28 Cal. 2d 587, 593, 170 P.2d 918.) Therefore, it must be presumed that Mrs. Bishop loaned her separate funds to Mr. Bishop, and as there is no showing that this loan had been paid, or which accounts for its proceeds, the implied finding that she had no separate property at the time of the conveyance in question is not supported by the evidence.

[9–11] Furthermore, a valuable consideration is not limited to the payment of money or other material exchange; may be based on a promise; consist of the cancellation of a debt; or arise out of a waiver of rights; and a transfer for such a consideration is not a gift. (Allied Architects' Assn. v. Payne, 192 Cal. 431, 438, 221 P. 209, 30 A.L.R. 1029.) The extent thereof is not important (Driscoll v. Driscoll, 143 Cal. 528, 533, 77 P. 471; Estate of Breschini, 120 Cal.App.2d 154, 156, 260 P.2d 804), even though the recital of a mere nominal consideration in an instrument of transfer does not foreclose a finding that the transaction was a gift. (Salmon v. Wilson, 41 Cal. 595, 604; Bertelsen v. Bertelson, 49 Cal.App.2d 479, 484, 122 P.2d 130; Pomper v. Behnke, 97 Cal.App. 628, 636, 276 P. 122.) As a consequence, even assuming that Mrs. Bishop had no separate property at the time of the conveyance to her, this fact is not sufficient to support an inference that there was no consideration therefor. ⌊56 (Estate of Woolman, 187 Cal. App.2d 573, 577, 9 Cal.Rptr. 648.)

The contention of Mr. Bishop's relatives that the testimony of his grandson respecting family gossip and what his father told him, and the testimony of Mrs. Bishop's niece regarding her knowledge of the reason for the conveyance, support an inference that Mrs. Bishop received the 22½ acre parcel from Mr. Bishop as a gift, is without merit. To draw such an inference from the testimony in question, under the circumstances of this case, would require indulgence in conjecture, surmise, speculation, imagination and guesswork. This type of evidence is not of that substantial character required by the rules heretofore stated.

[12] Opposed to such tenuous testimony is the fact that by virtue of the provisions of Section 1614 of the Civil Code declaring a written instrument to be presumptive evidence of a consideration (Civ.Code, sec. 1614), execution of the subject deed carried with it the statutory declaration that the transfer effected thereby was presumed to have been for a consideration and not as a gift. (Driscoll v. Driscoll, supra, 143 Cal. 528, 533, 77 P. 471; Estate of Hobart, 82 Cal.App.2d 502, 509, 187 P.2d 105; Belletich v. Belletich, 40 Cal.App.2d 732, 735, 105 P.2d 954.)

[13] Mr. Bishop's relatives contend that, in any event, the questioned finding is supported by a presumption that every transfer of property from a husband to a wife is deemed to be a gift. The opinions in Dunn v. Mullan, 211 Cal. 583, 589, 296 P. 604, 77 A.L.R. 1015; Rice v. Ransom, 186 Cal.App.2d 191, 194, 8 Cal.Rptr. 840; Estate of Riley, 157 Cal.App.2d 323, 326, 320 P.2d 932; Estate of Horn, 102 Cal.App.2d 635, 641, 228 P.2d 99; Estate of Nelson, 104 Cal.App. 613, 620, 286 P. 439; Donze v. Donze, 88 Cal.App. 769, 772, 264 P. 294, contain statements indicating the existence of such a presumption. However, in those cases, the issue at hand was whether particular property was the separate property of the wife, and the statements therein that the transfer of property by or on behalf of a husband to his wife is presumed to be a gift were dicta. On the other hand, in Ayoob v. Ayoob, 74 Cal.App.2d 236, 254, 168 P.2d 462, the court held that any transfer of a husband's property resulting from his naming her beneficiary in a policy of insurance was presumed to be made as a gift rather than in payment of his debt to her. In all of these cases, however, the presumption was invoked in favor of the wife, or those claiming under her, in a controversy ⊥57 with her husband, or those claiming under him, so as to place upon the latter the burden of producing proof that the transfer in question did not, in fact, vest in her his total interest in the property transferred, or that the transaction resulting in such transfer diminished her rights against him in any way, or imposed upon her any obligation in his favor. These circumstances do not exist in the instant case. A presumption may be invoked only when "the evidence sufficiently establishes a sphere or field within which [it] * * * can operate." (Smellie v. Southern Pacific Co., 212 Cal. 540, 555, 299 P. 529, 535; Estate of Roberts, 49 Cal. App.2d 71, 80, 120 P.2d 933.) As the sphere of operation for the presumption in question is not presented by the facts in this case, it is inapplicable.

[14–16] Furthermore, assuming that such presumption would apply to the case at bar, it may not be relied upon by Mr. Bishop's relatives because it is inconsistent with uncontradicted evidence introduced by them in proof of their case. They offered in evidence the deed from Mr. Bishop to Mrs. Bishop which contained a recital that the transfer effected thereby was for "Ten Dollars and other valuable considerations." An inquiry into the effect of this recital presents a number of questions not argued by the parties and not decided herewith. For example, they have assumed that it is subject to contradiction and for the purpose of this decision we have accepted this assumption, although its correctness may be seriously questioned in view of the particular circumstance of this case.[1] In any event, the recital constituted a declaration by the grantor respecting the nature of the transaction under review. (Long v. Dollarhide, 24 Cal. 218, 224; Galland v. 58 Jackman, 26 Cal. 79, 86; Black Eagle Oil Co. v. Belcher, 22 Cal.App. 258, 263, 133 P. 1153.) Even assuming that the admission into evidence of such a declaration was subject to objection as hearsay, nevertheless, being admitted without objection, it became competent evidence of the facts recited. (McVey v. McVey, 132 Cal.App.2d 120, 123, 281 P.2d 898; Vartanian v. Croll, 117 Cal. App.2d 639, 647–648, 256 P.2d 1022; Murray v. San Leandro Rock Co., 111 Cal. App.2d 641, 647, 245 P.2d 347; Fallon v. Fallon, 86 Cal.App.2d 872, 873, 195 P.2d 878; Falk v. Falk, 48 Cal.App.2d 780, 789, 120 P.2d 724.) This evidence is inconsistent with the presumption relied upon; as heretofore noted, is not contradicted by any substantial evidence; and, under established rules, as a matter of law, dissipates any presumption that the transfer was a gift. (Chakmakjian v. Lowe, 33 Cal.2d 308, 313, 201 P.2d 801; Estate of McConnell, 6 Cal.2d 493, 499, 58 P.2d 639; Smellie v. Southern Pacific Co., supra, 212 Cal. 540, 552, 553, 299 P. 529; Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 8–9, 210 P. 269.)

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[1] Ordinarily whether a deed is one of gift or for a consideration has no effect upon the kind of estate transferred. (See 15 Cal.Jur.2d 443; 4 Tiffany Real Property (3rd ed.) p. 67.) As a consequence, a recital therein respecting the receipt of a consideration is not related to the quality of that estate. For this reason, such a recital is not subject to the rule precluding its contradiction by parol evidence. (Winchester v. Winchester, 175 Cal. 391, 393–394, 165 P. 965; Treat v. Treat, 170 Cal. 329, 336, 150 P. 53, 57; Carty v. Connolly, 91 Cal. 15, 19, 27 P. 599; cf. 15 Cal.Jur.2d 448; 4 Tiffany Real Property (3rd ed.) pp. 70, 73.) On the other hand, where the nature of the title relied upon is affected by the fact that it was conveyed as a gift or for a consideration, the recitals respecting this fact in the deed conveying it are related to the quality of the property transferred

[17–19] Mr. Bishop's relatives also claim that the deed in question is presumed to have been made for an insufficient consideration because of the fiduciary relationship between husband and wife; that this presumption supports the finding 59 of a gift; and cite Section 2235 of the Civil Code in support of this contention. There is a distinction between a valuable consideration and a sufficient consideration; the former may exist even though the latter does not (Golson v. Dunlap, 73 Cal. 157, 14 P. 576); and, as the presumption arising from Section 2235 would tend to prove only the lack of a sufficient consideration, rather than the lack of any consideration, it would not support a finding that the subject transfer was a gift. (Metropolis Trust & Sav. Bank v. Monnier, 169 Cal. 592, 147 P. 265.) In addition, the presumption in question is intended for the protection of the parties to the fiduciary relationship (Papineau v. Security-First Nat. Bank, 6 Cal.2d 668, 670,

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thereby and may not be contradicted. (Winchester v. Winchester, supra, 175 Cal. 391, 394, 27 P. 599; Treat v. Treat, supra, 170 Cal. 329, 336, 150 P. 53, 57; Arnold v. Arnold, 137 Cal. 291, 296–297, 70 P. 23; Feeney v. Howard, 79 Cal. 525, 530, 21 P. 984, 4 L.R.A. 862; Brison v. Brison, 75 Cal. 525, 532, 17 P. 689; Russ v. Mebius, 16 Cal. 350, 356; Yates v. Burt, 161 Mo.App. 267, 143 S.W. 73; Kern v. Gardner, 26 Ohio App. 48, 159 N.E. 840, 841.) In Winchester v. Winchester, supra, 175 Cal. 391, 394, 165 P. 965, 966, the court considered the admission of evidence to contradict the recital in a deed as to the consideration therefor, and said that "evidence of this character cannot be allowed, in the case of a deed, 'when thereby the legal operation of the instrument to pass the entire interest *according to the purpose therein designated would be defeated.*'" (Italics ours.)

In Ohio the rule "is well settled that for the purpose of descent and distribution when a deed contains a recital of a valuable consideration received from the grantee, it is to be construed as a deed of purchase, and it is not competent to show by parole evidence that it was in fact a deed of gift in order to change the line of descent." (National Bank of Lima v. Allen, Ohio Prob., 104 N.E.2d 469, 472.) This conclusion results from a determination that the character of a deed, such as the one at bar, as to whether it was one of gift or for a consideration, is related to the quality of the property transferred as ancestral, i. e., subject to inheritance under the provisions such as those contained in Section 229 of the Probate Code; the recital therein acknowledging receipt of valuable considerations identify its character and, in turn, relates to the quality of the property conveyed thereby; as a consequence, under the aforestated rules, this recital is not subject to contradiction. (Patterson v. Lamson, 45 Ohio St. 77, 12 N.E. 531, 534; Thiessen v. Moore, 105 Ohio St. 401, 137 N.E. 906, 910.) The rule in Missouri is in accord. (Yates v. Burt, 161 Mo.App. 267, 143 S.W. 73, 74–75.)

We do not wish our opinion to inferentially indicate a belief that the recital in question is subject to contradiction under the facts of this case, and make the foregoing observations for this reason.

59 P.2d 131), and, for this reason, is not applicable to the instant case because the controversy here is not between Mr. Bishop and Mrs. Bishop, or their successors, but between persons who claim to be heirs of Mrs. Bishop.

[20] As to the 2½ acre parcel, Mrs. Bishop's relatives contend, and the court found, that she acquired the same from Mr. Bishop's sons and, for this reason, it was not subject to disposition under Section 229. In applying the provisions of that section the courts have endeavored to effect disposition of property on the basis of its source. (Estate of Abdale, supra, 28 Cal.2d 587, 590-591, 170 P.2d 918.) If the predeceased spouse was the source of title held by the surviving spouse at the time of the latter's death, distribution is made to the relatives of the predeceased spouse. On the other hand, even though the property originally may have been owned by the predeceased spouse, from whom it was obtained by the surviving spouse in the manner designated by the statute, i. e., gift, descent, devise, etc., if the latter at the time of death owned the property by virtue of an intervening source, i. e., "a new title," distribution is made to the relatives of the surviving spouse. (Estate of Abdale, supra, 28 Cal.2d 587, 591, 170 P.2d 918; Estate of Putnam, 219 Cal. 608, 28 P.2d 27; Estate of Flood, 55 Cal.App.2d 410, 130 P.2d 811.) Mrs. Bishop's heirs claim that the source of her title to the 2½ acres, at the time of her death, was the deed which she received from Mr. Bishop's sons in culmination of her purchase from them. However, the evidence shows without dispute that at the time of execution of this deed Mrs. Bishop was the owner of a one-third interest in this parcel by virtue of a decree of distribution in Mr. Bishop's estate. This one-third interest was received by "descent," and was subject to the provisions of Section 229. The remaining two-thirds interest was distributed 60 to his sons who, by their deed, transferred it to Mrs. Bishop, thereby creating a new source of title as to that interest, which was not subject to succession under the provisions of Section 229. Obviously, the finding that the deed from the sons created a new source of title in Mrs. Bishop as to both the one-third and the two-thirds interest is not sustained by the evidence.

In support of the finding as made, Mrs. Bishop's relatives further contend that, by executing the deed in question, Mr. Bishop's sons transferred not only their two-thirds interest in the 2½ acre parcel but also the right which they or their sons might have under Section 229 to inherit the one-third interest therein, and cite the decisions in Estate of Anderson, 160 Cal.App.2d 552, 325 P.2d 670 and Estate of Wilson, 40 Cal.App.2d 229, 104 P.2d 716, as authority for this position, but these cases clearly are inapplicable to the facts at hand. Two of the three sons predeceased Mrs. Bishop; the deed merely described the 2½ acre parcel; she already owned a one-third interest therein and the sons' ownership was limited to a two-thirds interest; no mention is made of any right of inheritance; and there is no evidence from which the court could have concluded that the grantors intended that the deed should affect any right to inherit from the grantee's estate. The contention to the contrary is without merit. (See Sears v. Rule, 27 Cal.2d 131, 143, 145, 163 P.2d 443.)

Mr. Bishop's relatives claim that the purchase of the two-thirds interest by Mrs. Bishop did not constitute a new source of title thereto; that the only property she owned was the separate property of her husband which she had acquired by gift, descent or joint tenancy termination; that she had inherited no estate except from him; that she had no income except from that property; that, therefore, the purchase in question must have been made with funds consisting of the rents, issues, profits or proceeds from such property; that property purchased by such funds retained the character of the property from which they came; that, through these funds a part of the property which she had acquired from her husband was transmitted into a two-thirds interest in the 2½ acre parcel which is part of her estate; and cite the decisions in Estate of Rattray, 13 Cal.2d 702, 707, 91 P.2d 1042, Estate of Jolly, 196 Cal. 547, 556, 238 P. 353, Estate of Brady, 171 Cal. 1, 4–7, 151 P. 275, and Estate of Adams, supra, 132 Cal.App.2d 190, 202, 282 P.2d 190, in support of the legal premise upon which they rely. The fallacy of their contention lies in the factual assumptions that 161 all of Mrs. Bishop's property came to her from Mr. Bishop by gift, descent or joint tenancy termination, and that none of the rents, issues and profits which she received from the property were due to her personal activity, ability or capacity. As to the former, the evidence does not establish that the 22½ acre conveyance was a gift. With respect to the latter, the court made no finding.

[21] Where the separate property of a predeceased spouse came to a surviving spouse under conditions making it subject to the provisions of Section 229, any increase in the value thereof which is due to the personal activity, ability or capacity of the latter, through services rendered after death of the former, is not subject to succession under those provisions. (Estate of Adams, supra, 132 Cal.App.2d 190, 202, 282 P.2d 190; See Estate of Brady, supra, 171 Cal. 1, 3, 151 P. 275.) The application of this rule to services allegedly rendered by Mrs. Bishop in the operation and management of the ranch, assuming that any part thereof is determined to be subject to succession under Section 229, involves a variety of issues which need not be anticipated and ruled upon in this decision.

The trial judge orally indicated his intention to find that the homestead parcel, viz., the 250 foot by 200 foot plot upon which the home was built, was community property of the parties. With respect to this determination he said: "I will be frank in stating that I may be making an error in this regard * * *." In his written findings he found this parcel to be the separate property of the parties, and that each owned a one-half interest therein. In either event, he made an error. The fact that Mrs. Bishop advanced money to her husband which he put into a home on his property, under the circumstances of this case, does not justify the conclusion reached.

There are other contentions raised by the parties respecting other issues in this case but, as they are related to findings made by the court and the status of the evidence upon which those finding are based, in view of the fact that a new trial must be had herein no purpose would be served in reviewing them.

The judgment is reversed and a new trial ordered as to all issues. Neither party to recover costs on appeal.

GRIFFIN, P. J., and SHEPARD, J., concur.

Hearing denied; SCHAUER, J., dissenting.

209 Cal.App.2d 376

376 **Charles W. TURNER and Kathleen D. Turner, Plaintiffs, Cross-Defendants and Appellants,**

v.

WALDRON REALTY, W. W. Gaspard, et al., Defendants, Cross-Complainants and Respondents.

Civ. 6873.

District Court of Appeal, Fourth District, California.

Nov. 8, 1962.

Action by landowners against brokers for damages because of an allegedly unauthorized action by brokers who cross-complained for commission. The Superior Court of Orange County, Robert P. Kneeland, J., entered a judgment for the brokers and the landowners appealed. The District Court of Appeal, Coughlin, J., held that the brokers were entitled to commission on uncompleted sale of listed 7½ acre tract where owners had entered into agreement with prospective purchaser procured by brokers, but brokers were not entitled to recover commission for proposed sale of 2 additional acres where neither terms of listing agreement nor agreement after sale referred to brokers' services in connection with such additional acreage.

Judgment modified and as modified affirmed.

1. Appeal and Error 🔑934(1)

When sufficiency of evidence to support judgment is attacked on appeal, court must accept that version of evidence most favorable to judgment.

2. Brokers 🔑86(1)

Evidence sustained findings, in brokers' cross-complaint for commission, that listing agreement covered designated 7½ acre parcel, that brokers procured buyer for purchase thereof upon terms acceptable to the owner and that a written contract between the parties was executed on these terms.

3. Brokers 🔑60

Where brokers procured a buyer for purchase of listed property on terms acceptable to owner and a written contract was entered into between the parties on these terms, brokers were entitled to commission based on purchase price for parcel although deal was never consummated.

4. Brokers 🔑49(3)

Broker is entitled to commission under listing agreement for sale of real property which does not completely specify exact terms of sale when he has procured a purchaser pursuant to listing who is ready, willing and able to buy on terms acceptable to owner, even though terms differ from those specified, provided broker's services are the procuring cause which affected proposed sale on terms actually agreed on.

5. Brokers 🔑53, 58, 60

Broker has procured purchase pursuant to property listing agreement when, through his efforts, there is a meeting of minds upon terms of proposed sale between owner, as prospective seller, and person procured by broker, as prospective buyer and fact that agreement so reached is not evidenced by binding contract or that proposed sale is not completed does not foreclose recovery of broker's commission unless listing agreement expressly or by established implication provides otherwise

6. Brokers 🔑54

Execution of contract of sale with prospective purchaser is conclusive proof that owner was satisfied as to qualifications of purchaser and his ability to perform.

7. Brokers 🔑58

Fact that oral agreement between landowner and proposed purchaser to sell two acres in addition to the 7½ acres covered by written contract was unenforceable, would not be a defense to owner's obligation to pay brokers under listing contract commission on 7½ acre parcel after broker had procured a ready, willing and able purchaser on terms acceptable to the owner.

8. Brokers 🔑86(1)

Landowners' execution, simultaneous with contract to sell real estate, of an agreement wherein owners promised to pay commission to brokers upon successful completion of escrow between parties, showed that brokers had performed duties and earned commission by procuring a ready, willing and able purchaser on terms satisfactory to owner.

9. Vendor and Purchaser 🔑145

Law requires that vendor exercise good faith and do no intentional act to discourage, embarrass, or prevent completion of purchase.

10. Brokers 🔑63(1)

Vendors could not urge noncompletion of escrow provided for in written contract to purchase and sell as defense to broker's action for commission, where vendors brought about noncompletion of escrow by their refusal to proceed.

11. Brokers 🔑39

Where agreement to pay brokers commission upon successful completion of escrow referred only to escrow covering the

7½ acre parcel and neither listing agreement nor agreement after sale authorized brokers' recovery for services rendered in connection with proposed sale of an additional 2 acres, brokers were not entitled to recover commission based on proposed sale of additional 2 acres.

Murphy & Donahue and M. S. Bernard, Santa Ana, for plaintiffs, cross-defendants and appellants.

H. Walter Steiner, Santa Ana, for defendants, cross-complainants and respondents.

⊥378 ⊥COUGHLIN, Justice.

The issues in this matter arise out of a real estate broker's listing agreement; the rendition of services in response thereto; and his claim for a commission.

On April 4, 1959, Mr. and Mrs. Turner, who are the plaintiffs, cross-defendants and appellants herein, listed the subject property for sale with F. P. Waldron, a real estate broker doing business as Waldron Realty, and employing W. W. Gaspard, a real estate salesman, both of whom are the defendants, cross-complainants and respondents herein. Waldron's only participation in the transaction is through Gaspard. On the aforesaid date, the Turners owned three adjoining parcels of property totaling approximately 47 acres; listed with Waldron the subject property which is a parcel approximating 7½ acres; and, by separate agreement, also listed with him the whole 47 acres. The listing involved in this case was in writing; covered the period from April 4th to April 15th; related to the 7½ acre parcel; authorized the broker to sell the same for $88,000 on "Terms: Submit"; and provided for a commission of 5% "of the selling price."

Thereupon the broker obtained a prospective buyer named Fether who, on April 14th, submitted an offer in writing to purchase the property for $9800 per acre, payment to be made in cash on close of escrow; described the parcel as having a frontage of "320′ on Hobart Street"; related that he intended to develop "the property into approximately 25 lots and a variance for triplex usage"; agreed to pay for all expenses incurred in obtaining such a variance; provided that "Upon securing the variance the buyer and seller will enter * * * a 60 day escrow"; and declared that a $1000 check securing the offer, to be placed in escrow, was held by the Tustin Land and Cattle Co., a real estate brokerage firm, in its trust account.

[1] The Turners did not accept the offer as presented; revised it by causing insertions and deletions to be made in the writing submitted to them; in this manner added to the description of the property by referring to it as "the 7+ acres purchased from Ed Hall"; increased the price to $10,300 per acre with a 30 day escrow; and attached their signature, indicating acceptance of the offer as revised. Fether approved the revision. In addition, both parties, by a separate instrument in⊥writing ⊥379 "agreed that upon successful completion of the escrow" in question "a real estate commission based on 5% of the selling price will be paid to Waldron Realty Co." and an assisting broker. The latter thereafter assigned his rights in this agreement to Waldron.

On June 9, 1959 proceedings were instituted to effect the triplex zoning variance referred to in the purchase agreement. The extent of these proceedings, the various steps taken, what transpired in the course thereof, and the sequence of events, do not clearly appear from the record before us, which is presented by an engrossed statement on appeal augmented by the exhibits introduced at the trial. However, the following facts are supported by substantial evidence, and are stated in accord with the rule requiring acceptance of that version thereof most favorable to the judgment when the sufficiency of the evidence to support the same is attacked on appeal. (Thomas v. Hunt Mfg. Corp., 42 Cal.2d 734, 736, 269 P.2d 12.) Fether was informed that a variance for triplex purposes would require a 380 foot frontage on Hobart Street, which would necessitate the acquisition of an additional two acres from the adjoining property. He requested the broker to arrange for the purchase of this additional acreage. The Turners orally agreed to such a purchase, the price per acre remaining the same. Thereupon a variance application was filed with the planning commission covering the seven acre parcel described in the original written agreement, and the additional two acre parcel orally agreed upon; contained a legal description of these two parcels; and was verified by Mr. Turner, under oath, on behalf of the owners of the property. A dispute arose as to whether the application sponsored by the Turners was one to obtain a duplex variance for seven acres or a triplex variance for nine acres. The Turners, by letter to the planning commission, at first revoked all variance applications made by them but subsequently indicated their objection thereto was directed only to the use thereof to obtain a duplex variance. On July 8, Mr. Turner directed a letter to Fether which reflects this dispute, and in which it was stated:

> "I hereby rescind the said agreement dated April 14, 1959 and any and all agreements or escrow instructions heretofore signed by me with respect to said property. In addition, I am notifying the Santa Ana Planning Commission that I am revoking the application for variance which was heretofore signed by me and which is presently pending * * *.
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> * * * * * *
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> 380 "It is also interesting to note that our agreement as aforesaid concerned property consisting of seven acres while the escrow instructions as prepared and dated June 11, 1959, and the variance application concerned property consisting of nine acres which was not in our agreement."

Six days later Fether caused a letter to be sent to the Turners in which he asserted his reliance upon the written agreement to support his right to purchase the 7½ acres and upon the oral negotiations between them to support his right to purchase the additional two acres, and also asserted his intention to enforce the former even though he was unable to enforce the latter. In the meantime a man named Griffith negotiated with the Turners for the purchase of that part of their property not sold to Fether, and these negotiations also included the probability of purchasing the whole property. On August 20th, the Turners and Fether directed a communication to the planning commission which, in substance, advised that the application theretofore filed, should be considered as the application of both of them; and requested a favorable consideration thereof; but declared that the Turners would not consent to any amendment thereof so as to permit the construction of duplex units. As heretofore noted, both the 7½ acre and the two acre parcels were included in this application. On the same day, i. e., August 20th, the Turners advised Fether, by two letters, that they in no way intended to violate or breach their agreement of April 14th and would "cooperate fully and perform" that agreement. On August 24th the planning commission voted approval of the triplex variance and on September 8th the city council granted the same. Thereafter, Fether agreed to go into escrow to consummate his purchase of the two parcels covered by the variance, but the Turners refused to do so stating that they would abide by the agreement of April 14th for the purchase of the 7½ acre parcel and also stating that they had sold the balance of the property to Griffith. By escrow instructions dated August 25th, which was the day after the planning commission had approved the triplex application, the Turners and Griffith had agreed to a sale and purchase of the whole 47 acres at $11,000 per acre; amendments thereto were made from time to time, but eventually the sale therein agreed upon was consummated; and on October 30th Griffith became owner of the entire parcel. Before consummation of this sale Fether had brought an action against the Turners to enforce the agreement to sell him the nine acres which he wished to purchase; prayed for specific performance, or in the alternative, for damages; subsequently ⊥381 compromised his claim for $7000; and thereupon dismissed the action. The triplex variance was scheduled to expire on March 8, 1960 because construction had not been commenced. The Turners requested a 90 day extension thereof; and this request was granted.

The instant action was commenced by the Turners, who alleged they had been injured by the unauthorized action of Waldron and Gaspard in negotiating the sale of the two acre parcel, and sought recovery of damages on account thereof. The latter cross-complained for their commission. The trial court found in favor of Waldron and Gaspard on all issues; that they should recover $4892.50 as a commission based on a prospective 9½ acre sale; and that the Turners should recover nothing on their complaint. Judgment was entered accordingly. The plaintiffs appeal from the judgment; make no contention respecting that part thereof decreeing that they should take nothing on their complaint; contend that the award of a commission should be reversed; and list the following issues on appeal, i. e.:

> "1. Is the instrument of April 14, 1959, sufficiently definite so that both the buyer and seller had a valid and enforceable agreement?
>
> "2. Are the respondents entitled to a commission on the entire nine acre parcel?
>
> "3. Are the respondents entitled to a commission on the seven acre parcel?"

Both sides devote extensive consideration to the issues as to whether the written agreement of April 14, 1959 bound the Turners to sell Fether 9½ acres; whether the statute of frauds rendered the same unenforceable; and whether the Turners were estopped to assert that statute. As will be noted hereinafter, these issues are immaterial to the case at hand. At this juncture, however, it should be noted that the instant action is not one between the buyer and the sellers where such issues properly might be advanced.

[2, 3] The cross-complaint for a commission alleges, among other things, the execution of the listing agreement covering the 7½ acre parcel; the procurement of a buyer for the purchase thereof upon terms acceptable to the owner; and the execution of a written contract between the parties upon these terms. The court found these allegations to be true. They are supported by the evidence and, under the law, entitle the broker to a commission based on the agreed purchase price for the 7½ acre parcel.

⊥382 [4–6] A broker is entitled to a commission under a listing agreement for the sale of real property which, as in the instant case, does not completely specify the exact terms of sale, when he has procured a purchaser pursuant thereto ready, willing and able to buy on terms acceptable to his employer (Collins v. Vickter Manor, Inc., 47 Cal.2d 875, 880, 306 P.2d 783; W. Ross Campbell Co. v. Peskin, 162 Cal.App.2d 225, 231, 328 P.2d 27; Cochran v. Ellsworth, 126 Cal.App.2d 429, 438, 272 P.2d 904; Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 305, 266 P.2d 856), even though such terms differ from those specified, providing his services are the procuring cause which effected the proposed sale on the terms actually agreed upon. (Palmtag v. Danielson, 30 Cal.2d 517, 520, 183 P.2d 265—Difference in price; Twogood v. Monnette, 191 Cal. 103, 108, 215 P. 542; Cochran v. Ellsworth, supra, 126 Cal.App.2d 429, 439, 272 P.2d 904; Baker v. Curtis, 105 Cal.App.2d 663, 670, 234 P.2d 153; Pray v. Anthony, 96 Cal.App. 772, 779, 274 P. 1024; Bail v. Glantz, 78 Cal.App. 49, 56, 248 P. 258; Merzoian v. Papazian, 53 Cal.App. 112, 115, 199 P. 826; Arnold v. La Belle Oil Co., 47 Cal.App. 290, 298, 190 P. 815—Subsequent modification; Wood & Tatum Co. v. Basler, 37 Cal.App. 381, 384, 173 P. 1109.) The broker has procured a purchaser pursuant to such a listing agreement when, through his efforts, there is a meeting of the minds upon the terms of a proposed sale between the employer, as the prospective seller, and the person procured by the broker, as the prospective buyer. (Keeler v. Glendon, 124 Cal.App.2d 634, 638, 268 P.2d 1089; Lawrence Block Co. v. Palston, supra, 123 Cal.App.2d 300, 308, 266 P.2d 856; Love v. Gulyas, 87 Cal.App.2d 608, 618, 197 P.2d 405.) The mere fact that the agreement so reached is not evidenced by a binding contract, providing the buyer is willing to enter into such, or that the proposed sale is not completed, does not foreclose recovery of the broker's commission, unless the listing agreement expressly or by established implication provides otherwise. (Collins v. Vickter Manor, Inc., supra, 47 Cal.2d 875, 880–882, 306 P.2d 783; Jauman v. McGusick, 166 Cal. 517, 522, 137 P. 254; Cochran v. Ellsworth, supra, 126 Cal.App.2d 429, 438, 272 P.2d 904.) In this regard the Supreme Court, in Twogood v. Monnette, supra, 191 Cal. 103, 107, 215 P. 542, 543, stated:

> "It is also established law in this state that a written contract between the seller and the purchaser is not essential to the recovery of the broker's commission if he has produced to the seller a purchaser who is ready, willing, and able to ⊥383 purchase upon the terms proposed by the seller and who has agreed to those terms and is willing and offers to enter into a binding written contract. The broker has performed his duty and has earned his commission regardless of whether a written contract is actually entered into or whether the sale is ever consummated by the delivery of the property and the payment of the purchase price."

On the other hand, the execution of such a contract is conclusive proof that the owner was satisfied as to the qualifications of the purchaser and his ability to perform. (McNamara v. Steckman, 202 Cal. 569, 572, 262 P. 297; Jauman v. McCusick, 166 Cal. 517, 522, 137 P. 254; Deeble v. Stearns, 82 Cal.App.2d 296, 299, 186 P.2d 173.)

In the instant case there was a listing agreement employing the broker to obtain a purchaser for the 7½ acre parcel at $88,000 on terms to be agreed upon. The broker procured a prospective buyer. Thereupon he and the owner agreed upon a purchase price of $10,300 per acre payable in cash through a 30 day escrow to be commenced after a designated variance had been obtained. A written agreement to that effect was executed by the parties. The provision therein indicating the purchaser's intention to apply for a 25 lot triplex variance is not a term of the agreement, but an expression of the purchaser's intended use of the property and a measure of the time element preceeding the consummation of the escrow. Thereafter, the owners participated in an effort to obtain the triplex variance and to this end orally promised to sell the purchaser an additional two acres of land. Subsequently, the owners attempted to rescind their agreement; indicated that they had agreed to sell only the 7½ acre parcel; voiced their objection to a duplex variance which apparently could have been obtained for that parcel; but thereafter, in substance, withdrew their attempted rescission; expressed their intention to cooperate in obtaining a triplex variance; and requested the planning commission to grant the previously filed application which covered both the 7½ acre and the 2 acre parcels. In the meantime, the buyer had advised the owner that he intended to proceed with the sale as to the 7½ acre parcel even though he was unable to acquire the additional two acres. The variance was granted. The buyer offered to proceed to escrow, causing the preparation of escrow instructions to effect compliance with both the written and the oral agreements. The owners refused to proceed, contending that they were not bound to sell the additional two acres, ⊥384 although indicating their intention to proceed with the 7½ acre sale, but the evidence indicates that they previously had agreed to sell the whole of their property to another party. Thereupon the buyer brought an action to enforce performance of both agreements which resulted in a compromise, the payment of damages to him, and dismissal of the action. Under the principles heretofore considered, these facts fully support the determination of the trial court that the broker procured a prospective purchaser, ready, willing, and able to buy the 7½ acre parcel upon terms proposed by the owner and agreed to by the parties.

[7] Even though it be assumed that the terms of sale agreed upon by the parties included not only a sale of 7½ acres at $10,300 per acre, payable in cash, but also the procurement of a zoning variance which required performance of an oral agreement to sell an additional 2 acres, the evidence supports a finding that the parties had entered into such an oral agreement, and a conclusion that there was a meeting of the minds between the prospective buyer and the prospective sellers respecting the terms of sale was proper. The fact that the oral agreement was unenforceable, as contended by the owner and which is assumed only for the purpose of this decision, is not a defense to their obligation under the listing contract. (Collins v. Vickter Manor, Inc., supra, 47 Cal.2d 875, 882, 306 P.2d 783; W. Ross Campbell Co. v. Peskin, supra, 162 Cal.App. 2d 225, 228–229, 328 P.2d 27.) It was a term of sale agreed upon by the owners as well as by the buyer; and there was a meeting of their minds on this and all other terms of the sale; thus, the prospective buyer procured by the broker was one ready, able, and willing to purchase on terms acceptable to the owners; and the broker had complied with the requirements of his contract and the law in the premises.

This conclusion renders unnecessary any consideration of the contentions respecting the enforceability of the oral contract; its susceptibility to avoidance under the statute of frauds; or the claim of estoppel upon the owners to assert that statute.

[8–10] Furthermore, affirmance of the judgment herein may be predicated upon the agreement executed simultaneously with the contract to purchase and sell wherein the Turners promised to pay a commission "upon successful completion of the escrow" between the parties. The trial court was entitled to conclude therefrom that Waldron had performed the duties of his employment and earned his commission by ⊥385 procuring a purchaser ready, willing and able to purchase on the terms specified in the written contract executed by the Turners and Fether. (Collins v. Vickter Manor, Inc., supra, 47 Cal.2d 875, 881, 306 P.2d 783.) This contract provided for the sale and purchase of 7½ acres. Fether wanted to subdivide the property into 25 lots zoned for triplex dwelling units. Because of its size, a zoning variance to permit such use could not be obtained. However, a duplex variance could have been obtained. Fether would have completed his purchase on this basis. The contract between him and the Turners did not require the obtaining of a triplex variance as a condition precedent to purchase. Nevertheless, the Turners were desirous of having the property zoned for triplex unit use. To accomplish this purpose they agreed to sell Fether an additional two acres to meet the zoning requirements; applied for a triplex variance for the two parcels, i. e., the 7½ acres covered by the written contract and the 2 acres covered by the oral agreement; objected to the granting of a duplex variance; wrongfully attempted to rescind their contract when they learned that Fether might subdivide the property for duplex unit purposes; and thereafter, along with Fether, reinstated their application for a triplex variance.

> "The law requires of the vendor good faith and the doing of no intentional act to discourage, embarrass, or prevent the completion of the purchase." (Coulter v. Howard, 203 Cal. 17, 23, 262 P. 751, 753.)

In due course a triplex variance was granted. The next day the Turners sold the property to another person. Fether offered to commence an escrow as agreed, but his offer was rejected. Both he and the broker had done everything required of them under the written contract. When Fether attempted to enforce the Turners' promise to sell, they compromised his claims against them; thus prevented consummation of the sales; and, in substance, effected a cancellation of both agreements. Under these circumstances, although the promise to pay a commission contained in the writing of April 14th, appeared to be conditioned upon "successful completion" of the escrow provided for in the written contract to purchase and sell, the Turners may not urge noncompletion thereof to defeat recovery of the agreed commission, because such noncompletion was brought about by their refusal to proceed. (Collins v. Vickter Manor, Inc., supra, 47 Cal.2d 875, 881, 306 P.2d 783; Coulter v. Howard, supra, 203 Cal. 17, 23, 26, 262 P. 751; W. Ross Campbell ⊥386 Co. v. Peskin, supra, 162 Cal.⊥App.2d 225, 231, 328 P.2d 27; Swanson v. Thurber, 132 Cal.App.2d 171, 177, 281 P.2d 642; Woodbridge Realty v. Plymouth Dev. Corp., 130 Cal.App.2d 270, 280, 278 P.2d 713; Cochran v. Ellsworth, supra, 126 Cal.App.2d 429, 438, 272 P.2d 904.)

The plaintiffs also contend that the defendant is not entitled to a commission because the transaction as defined by the written contract relates to a parcel extending 320 feet along Hobart Street instead of 270 feet, which appears to be the street frontage of the "Ed Hall" property, and as finally agreed upon by the parties involved the sale of 9½ acres instead of 7½ acres. If the purchase of the additional property was a part of the transaction involved in the written contract to purchase the 7½ acres, it became such by virtue of the agreement made by the plaintiffs and they may not complain of this fact. In support of their position the plaintiffs cite Cone v. Keil, 18 Cal.App. 675, 124 P. 548, and Boyd v. Big Three Ranch Co., 22 Cal.App. 108, 133 P. 623. These cases support denial of a commission where the broker sold only a part of the property listed; obviously differ from the case at bar where the broker procured a purchaser for all of the property listed and, in addition, two acres of other property; and are not controlling here.

[11] On the other hand, there is no showing that the broker was employed to sell the additional 2 acre parcel. His listing agreement was confined to the 7½ acres later described in the contract between the owners and the buyer as the "Ed Hall" property, having a 320 foot frontage on Hobart Street. The simultaneously executed agreement to pay the two brokers a commission "upon successful completion of the escrow" by the Turners and Fether obviously referred to the escrow then under consideration which was concerned only with the 7½ acre parcel. Neither the listing agreement nor the agreement after sale authorized recovery by the broker for services rendered in connection with the proposed 2 acre sale; the terms thereof did not cover such services; he had no written contract authorizing the same; and he may not recover therefor. (Frederick v. Curtright, 137 Cal.App.2d 610, 614, 290 P.2d 875; Augustine v. Trucco, 124 Cal.App.2d 229, 237, 268 P.2d 780; Herzog v. Blatt, 80 Cal. App.2d 340, 343, 180 P.2d 30.)

The 7½ acre parcel sale price, at $10,300 per acre, was $77,250; the 5% commission there on was $3862.50; and the judgment should be modified by reducing the principal payable thereunder from $4892.50 to $3862.-50.

⊥The judgment is modified by reducing the ⊥387 principal sum thereof from $4892.50 to $3862.50, and by allowing interest as therein prescribed on the latter amount only. As so modified, the judgment is affirmed. Appellants will recover costs on appeal.

GRIFFIN, P. J., and SHEPARD, J., concur.

209 Cal.App.2d 306

⊥306 ⊥**David A. PELLISSIER, Plaintiff, Cross-Defendant and Appellant,**

v.

Roy HUNTER and Juanita Hunter, Defendants, Cross-Complainants and Respondents.

Civ. 6875.

District Court of Appeal, Fourth District, California.

Nov. 7, 1962.

Rehearing Denied Dec. 4, 1962.

Hearing Denied Jan. 3, 1963.

Vendor's action against purchasers to recover on account of baled hay left on premises. The Superior Court, Inyo County, John P. McMurray, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Griffin, P. J., held that evidence to effect that vendor and purchasers had agreed that hay, which was growing at time of negotiations, should, upon its harvest by vendor, pass to purchasers who would pay cost of harvesting was admissible as evidence of separate executed oral agreement, supported by consideration and not in conflict with writing, although escrow instructions, bill of sale and deed did not mention hay.

Affirmed.

1. Vendor and Purchaser 🔑80

Evidence in vendor's action against purchasers to recover on account of baled hay on premises sold supported finding that parties had agreed that vendor should turn over hay as part of consideration if purchasers would pay cost of its harvesting.

2. Crops 🔑7

When crops, either fructus industriales or fructus naturales, are actually severed from land by proprietor, they become personal property.

3. Crops 🔑5

As between vendor and purchaser, crop unsevered at time of transfer is part of realty and passes to purchaser, unless it is specially reserved in writing. West's Ann. Civ.Code, §§ 658, 660.

4. Evidence 🔑441(1)

Prior contemporaneous collateral oral agreement may sometimes be shown where it is not inconsistent with terms of written agreement, even though it relates to same subject matter.

5. Evidence 🔑441(8)

Evidence to effect that vendor and purchasers had agreed that hay, which was growing at time of negotiations, should, upon its harvest by vendor, pass to purchasers who would pay cost of harvesting was admissible in vendor's action to recover hay, as evidence of a separate executed oral agreement, supported by consideration and not in conflict with writing, although escrow instructions, bill of sale and deed did not mention hay. West's Ann.Civ. Code, §§ 658, 660, 1723.

◆

Jess G. Sutliff, Independence, and Harry R. Roberts, Pomona, for appellant.

Verne Summers, Bishop, for defendants, cross-complainants and respondents.

⊥GRIFFIN, Presiding Justice. ⊥307

This is an appeal by plaintiff, cross-defendant and appellant David A. Pellissier (hereinafter referred to as plaintiff) from a judgment in favor of defendants, cross-complainants and respondents Roy and Juanita Hunter (hereinafter referred to as defendants). The defendants have not appealed from the judgment in favor of the plaintiff and against the defendants upon the counter-claim and cross-complaint filed by defendants.

This action arises out of a sale of plaintiff's ranch to defendants in 1959. The defendants paid the plaintiffs $70,000 for this ranch and certain equipment. Thereafter, plaintiff filed an action seeking to recover $2,240 on account of 80 tons of baled hay valued at $28 per ton. Defendants' answer alleged that this hay was included in the price of the ranch and the payment of the $70,000 also included a payment for the hay. In their counter-claim, defendants claimed that plaintiff had not delivered a certain hay baler, valued at $3,600, and that plaintiff had agreed to deliver this equipment to defendants as a part of the equipment included in the sale. The trial court found for the plaintiff on the counter-claim ⊥308 and cross-complaint. It also found that the hay was part of the property which plaintiff agreed to sell to defendants along with the ranch, and found for the defendants on the complaint.

During 1957 and 1958, plaintiff had harvested five crops of alfalfa from the ranch. In August 1959, plaintiff commenced the fourth harvest of hay, which was finished early in September 1959. In July 1959, plaintiff and defendants first discussed the sale of the ranch to defendants. The sale was placed in escrow on November 12, 1959 and escrow closed on December 4, 1959. Defendants testified that the last cutting of alfalfa was included in the sale and that defendants agreed to pay plaintiff his costs in connection with irrigating the last cutting of hay. Defendants also testified that on January 5, 1960 and February 1, 1960, they sent plaintiff checks totaling $502.70 in payment of plaintiff's irrigating costs and power bills. The 80 tons of hay were left on the ranch when defendants took possession. On December 9, 1959, five days after the close of the escrow, a banker loaned defendants money, and the 80 tons of hay became part of the security for the loan. Before making the loan, the banker talked to the plaintiff. The banker testified that he did not remember the gist of this conversation, but said that he was of the opinion that defendants owned the hay at the time he made the loan. Plaintiff did not move off the ranch until January 5, 1960.

Plaintiff contends (1) that the trial court violated the parol evidence rule when it permitted the defendants to testify that the 80 tons of hay were included in the purchase price of the ranch; that the effect of this testimony was to modify the clear and unambiguous terms of the escrow instructions, deed and bill of sale, none of which instruments referred to or mentioned any hay whatsoever; and (2) that when a crop is severed from the soil or harvested, it ceases to be realty and becomes personal property.

It is defendants' contention that this was a collateral oral agreement such as falls within the exceptions to the parol evidence rule under the provisions of Restatement of Contracts, section 240, which provides that a collateral agreement may sometimes be proven where it is not inconsistent with the terms of the written agreement, even though it relates to the same subject matter and where the oral agreement is such as might naturally be made the subject of a separate agreement by the parties.

Defendants contend that the hay was harvested during the period the parties were negotiating the sale and they could not have known the exact status of the hay at the time of the ⊥309 close of escrow; that therefore this was a type of situation where the parties might naturally enter into a collateral verbal agreement; that the hay was a consumable item and therefore would not have been included within the list of objects used as security for the chattel mortgage which plaintiff was giving as security for the unpaid portion of the purchase price, and that this is why the hay was not listed with the other items of personalty described in the escrow instructions.

The trial court specifically found that it was not true that defendants became indebted to plaintiff in the sum of $2,240 on account of 80 tons of hay sold and delivered to defendants, and that the 80 tons of hay in question were delivered to and used by defendants. Apparently the court believed defendants' testimony that the fourth crop was to be retained by defendants and was included in the consideration for the sale of the ranch property. There is some evidence that a part of that consideration was the payment by defendants of $552.70 for power bill and irrigation costs made in the form of two checks received in evidence. The 80 tons of hay were left on the ranch when plaintiff left it, indicating that possession was delivered to defendants. The stock of hay was fenced by defendants while plaintiff was still living on the premises. Defendants did this to prevent cattle they had turned in on the unharvested alfalfa crop from eating it. This was done without objection on the part of plaintiff and apparently with his consent.

[1] As corroboration, the trial court laid stress on the testimony of the banker and defendants that the banker did call plaintiff about the hay when defendants listed it as part of the security for obtaining a bank loan after the sale of the ranch, and no protest was made by plaintiff. It was defendants' story that plaintiff agreed to turn over to defendants the 80 tons of hay harvested while negotiations were pending as part of the consideration if defendants would pay the power bill and irrigation costs which included the personal services of the plaintiff, and that if the sale was not effected defendant would pay $28 per ton for it. There is sufficient evidence to support this finding. The only question is whether this testimony was admissible, over strenuous objections, to show this transaction, in view of the escrow instructions, bill of sale and deed which made no mention of it.

Civil Code, section 1723, recites:

> "Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or⊥by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties." ⊥310

Civil Code, section 658, describes real property as:

> "1. Land;
>
> * * * * * *
>
> "4. That which is immovable by law; except that for the purposes of sale * * * industrial growing crops * * * which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods."

Civil Code, section 660, states that a thing affixed to land is a fixture, under certain conditions and exceptions noted; that for the purpose of sale, growing crops attached to the land, which are agreed to be severed before sale, shall be treated as goods and be governed by the law regulating sales of goods.

[2, 3] It appears to be the rule that when crops of either species, *fructus industriales* or *fructus naturales*, are actually severed from the land by their proprietor, they become personal property (15 Am.Jur. sec. 6, p. 199), and as between vendor and purchaser of real property upon which there is growing at the time of transfer an unsevered crop, the crop constitutes a part of the realty and passes to the grantee by the conveyance of the land, unless the ownership of the growing crop is specially reserved in writing. (Fiske v. Soule, 87 Cal. 313, 25 P. 430; Wilson v. White, 161 Cal. 453, 119 P. 895; Sweet v. Watson's Nursery, 33 Cal.App.2d 699, 92 P.2d 812; Smith v. Baker, 95 Cal.App.2d 877, 214 P.2d 94; 14 Cal.Jur.2d sec. 8, p. 568; 8 A.L.R.2d 565.)

[4] Evidence of earlier conversations is admissible on the theory that there was a collateral oral agreement between the parties pertaining to the hay which was not inconsistent with the terms of the escrow instructions, deed and bill of sale given in pursuance thereof, i. e., a prior or contemporaneous collateral oral agreement may sometimes be shown where it is not inconsistent with the terms of the written agreement, even though it relates to the same subject matter. (Cotton v. Riverside Cement Co., 29 Cal.App.2d 588, 85 P.2d 136; Lindsay v. Mack, 5 Cal.App.2d 491, 496, 43 P.2d 350; American Ind. Sales Corp. v. Airscope, Inc., 44 Cal.2d 393, 397, 282 P.2d 504, 49 A.L.R.2d 1344.)

The determinative question is whether the writing was intended to cover a certain subject of negotiations, for⊥if not, then the writing does not embody the transaction on that subject. (Simmons v. Cal. Institute of Technology, 34 Cal.2d 264, 274, 209 ⊥311

P.2d 581, quoting 9 Wigmore on Evidence, sec. 2430, p. 97; Crumley v. Walter M. Ballard Corp., 100 Cal.App.2d 698, 703, 224 P.2d 455.)

Restatement of Contracts, section 240, sets forth two qualifications of this exception: (1) the collateral agreement must have a separate consideration, or (2) it must be such as might naturally be made as a separate agreement by the parties so situated. (3 Corbin on Contracts, sec. 584; Rest., Contracts, sec. 240, subdiv. (1); Greathouse v. Daleno, 57 Cal.App. 187, 206 P. 1019; Sivers v. Sivers, 97 Cal. 518, 32 P. 571.)

[5] Here, the alleged agreement that the growing crop, even though cut after the transaction was first instituted and orally agreed upon, would inure to the benefit of the purchaser, and if the transaction failed defendants would pay plaintiff $28 per ton for the 80 tons, was such an agreement as might be reasonably made as a separate agreement by the parties. Furthermore, it would have been contemplated that the hay was to be consumed by defendants' livestock and therefore would not be a proper subject to be used as security for the chattel mortgage defendants were using as security for the unpaid portion of the purchase price. The question of a possible separate consideration would be a closer question. Had the sale been completed while there was this growing crop, it would have passed by the grant deed. No reservation was shown. Due to the length of time it took to complete the transaction, it was necessary to harvest the crop and all parties realized this. Accordingly, defendants orally agreed to pay plaintiff the power costs and irrigation costs to assist in its production, with the further consideration that if the transaction failed they would purchase the hay at $28 per ton. This appears to be an independent executed oral agreement and there was a sufficient consideration for it. Apparently, defendants were given possession of the hay under the agreement. There was a conflict as to the extent of any growing crop on the land at the time of the actual sale. Defendants placed its height as four to six inches, averred that it was dormant, that the growing season was over, and that it was only good for grazing purposes. Plaintiff said its height was about 12 to 16 inches. We conclude that there is sufficient evidence to show a separate executed oral agreement, not in conflict with the ⊥312 original writings, and that there was sufficient consideration for it.

Judgment affirmed.

SHEPARD and COUGHLIN, JJ., concur.

209 Cal.App.2d 229

⊥229 **Barbara E. SPOTT, and First Western Bank & Trust Co., a corp., and Barbara E. Spott, as Co-Executors of the Estate of Louis H. Spott, Deceased, Plaintiffs and Respondents,**

v.

EQUITABLE LIFE INSURANCE COMPANY OF IOWA, a corp., Defendant and Appellant.

Civ. 19986.

District Court of Appeal, First District, Division 3, California.

Nov. 5, 1962.

As Modified on Denial of Rehearing Nov. 26, 1962.

Hearing Denied Jan. 3, 1963.

Action to recover additional indemnity under a life policy providing therefor if the death of insured resulted from "bodily injuries effected solely through external violent and accidental means." Judgment for the plaintiffs in the Superior Court, County of Alameda, Marvin Sherwin, J., and the defendant insurer appealed. The District Court of Appeal, Draper, P. J., held that recovery was not authorized under the evidence.

Judgment reversed with directions.

1. Insurance 🔑515.3

Application of the term "accidental means" within life policy calling for additional indemnity must turn upon the facts of the particular case.

2. Insurance 🔑515.6

Death of insured did not result from "bodily injuries effected solely through external violent and accidental means" so as to authorize recovery of additional indemnity as result of asphyxia due to bronchial aspiration of regurgitated gastric contents resulting from the consumption of alcohol by the insured where the evidence did not establish any external means of death.

See publication Words and Phrases for other judicial constructions and definitions.

Knight, Boland & Riordan, John H. Riordan, Burton L. Walsh, Richard J. Kilmartin, San Francisco, for appellant.

Stark & Champlin, Carl E. Simon, Jr., Oakland, for respondents.

230 DRAPER, Presiding Justice.

This case requires construction of life insurance policy provisions calling for additional indemnity if death of the insured resulted from "bodily injuries effected solely through external, violent and accidental means". Plaintiffs are beneficiaries of two policies upon the life of one Spott in the aggregate face amount of $75,000. That amount has been paid, and only the provision for payment of $25,000 additionally is here in issue. Judgment was for plaintiffs and defendant appeals.

The body of decedent was found shortly after 2 p. m. in the bedroom of a motel apartment. Autopsy fixed time of death at approximately 3 a. m., and cause of death as "asphyxia due to bronchial aspiration of regurgitated gastric contents". Blood alcohol content was .246 percent. There is medical evidence that irritation of the stomach by alcohol caused the vomiting, which brought into the throat partially digested stomach contents. These were in a semi-liquid or mushy state. There is no evidence of the presence of any wholly undigested pieces of food. A muscle, the epiglottis, serves to close the entrance to the trachea, or windpipe, when food or drink is being swallowed, and to open it for breathing. These are reflex actions. In decedent's case, however, the alcohol he had consumed affected the central nervous system to the extent of slowing or impeding such reflexes. As a result, the glottis remained open, despite the presence of vomitus in the throat. When decedent took a breath the semi-liquid material was 231 sucked into the bronchial tree, blocking the air passages and causing suffocation.

These facts are set forth in the findings, and are not disputed. The sole question is whether they show that death resulted from "bodily injuries effected solely through external, violent and accidental means". We have concluded that there was no external means of death here.

In a broad sense, it is semantically possible to view every cause of death as internal. Although the inducing cause be a blow or a bullet, the ultimately effective cause of death is the cessation of functioning of some vital organ, as the heart or lungs. At the other extreme, it may be argued that a great many deaths result from originally external causes, as by the introduction into the system of infection of any sort, long-term dietary excesses, smoking habits, etc. Obviously, neither of these extremes may be resorted to in interpretation of the policy language. Rather, we must look to the normal interpretation of the words used.

[1] No California decision is directly in point, although general guides are to be found in a number of cases (e. g. Rock v. Travelers' Ins. Co., 172 Cal. 462, 156 P. 1029, L.R.A.1916E, 1196; Price v. Occidental Life Ins. Co., 169 Cal. 800, 147 P. 1175; Horton v. Travelers Ins. Co., 45 Cal.App. 462, 187 P. 1070). These guides are, however, difficult of application to the facts here, as evidenced by the reliance of both parties on the same authorities, each emphasizing different language thereof. Application of the term "accidental means" must turn upon the facts of the particular case (Moore v. Fidelity & Casualty Co.,

203 Cal. 465, 473, 265 P. 207, 56 A.L.R. 860), and it is apparent that a like rule applies to the term "external means".

Four cases from other jurisdictions do, however, directly determine application of like policy provisions to deaths resulting from aspiration of regurgitated material. In one (Peoples Life Ins. Co. v. Menard, 124 Ind.App. 606, 117 N.E.2d 376) a divided court affirmed judgment requiring payment by the insurer. The opposite conclusion has been reached in three decisions (Radcliffe v. National Life etc. Co., Tex.Civ. App., 298 S.W.2d 213; McCallum v. Mutual Life Insurance Co. of New York, 4 Cir., 274 F.2d 431, affirming D.C., 175 F.Supp. 3; Towner v. Prudential Insurance Company of America, La.App., 137 So.2d 449). Each rejects the reasoning of the majority in Menard, and finds the dissent in that case more persuasive. We agree.

232 A different result might well be reached had food, in the process of being swallowed, lodged in the glottis and caused strangulation. There it could be argued that the food was an external element, still in the course of entry into the body. Here, however, the regurgitated material had been in the digestive tract for some time. In the digestive process, it had lost its identity as either solid or liquid food. It had become "internal" quite as much as substances, far earlier consumed, which had been transmuted by bodily processes into flesh or bone.

Nor is our view altered by the fact that alcohol contributed to decedent's nausea and did show the reflexive action of his epiglottis. These effects flowed from knowing consumption of alcoholic beverages. The record indicates that decedent was not unfamiliar with such potations. There is no remote suggestion that he imbibed liquor mistakenly, assuming it to be another liquid. Even his last drink was taken some time before the fatal regurgitation and, like the food, was in the process of digestion. Strangulation resulting from sudden nausea caused by mistaken consumption of some noxious substance is not the problem here presented.

[2] In view of our determination that the death did not result from injury effected by external means, it is unnecessary to consider whether such means were violent and accidental.

Judgment reversed with directions to the trial court to enter judgment for the defendant.

SALSMAN and DEVINE, JJ., concur.

209 Cal.App.2d 242

Wells ROOT et al., Petitioners, 242

v.

SUPERIOR COURT OF the State of California FOR the COUNTY OF LOS ANGELES, Respondent.

NACIONAL FINANCIERA, S.A., an alien corporation, Real Party in Interest.

Civ. 26665.

District Court of Appeal, Second District, Division 2, California.

Nov. 5, 1962.

Rehearing Denied Dec. 4, 1962.

Hearing Denied Jan. 3, 1963.

Proceeding in prohibition to prohibit Superior Court of Los Angeles County from dissolving a writ of attachment or dismissing action. The District Court of Appeal, Fox, P. J., held that California property of Mexican corporation, which was assignee of contract under which plaintiffs claimed, was subject to regular attachment in proceeding in which there was no personal jurisdiction over corporation.

Writ issued.

1. Mandamus 🔑4(1)
Prohibition 🔑3(2)

Writ of mandate or prohibition is appropriate remedy unless appeal is plain, speedy, and adequate remedy. West's Ann. Code Civ.Proc. §§ 1086, 1103.

2. Prohibition 🔑3(5)

Appeal from order quashing writ of attachment in action against Mexican corporation would not be adequate remedy, and prohibition was appropriate remedy, where there would no longer the basis for jurisdiction once attachment was dissolved. West's Ann.Code Civ.Proc. §§ 553, 946, 1086, 1103.

3. Appearance 🔑9(7)

Defendant's attack on attachment is not general appearance which would subject it personally to jurisdiction of court.

4. Attachment 🔑5

Action to recover on contract, against alleged obligor's assignee, is within scope of attachment statute. West's Ann.Code Civ.Proc. § 537, subd. 2.

5. Attachment 🔑25

In case of non-resident defendants, attachment has additional purpose of obtaining jurisdiction quasi in rem.

6. Constitutional Law 🔑309(2)

Traditional notions of fair play and substantial justice are met where adequacy of substituted service is reasonably calculated to give non-resident defendant actual notice of proceeding and opportunity to be heard.

7. Attachment 🔑206

Jurisdiction in proceeding in attachment is wholy independent of jurisdiction acquired by service or public of summons.

8. Corporations 🔑670(6)

California property of Mexican corporation, which was assignee of contract under which plaintiffs claimed, was subject to regular attachment in proceeding in which there was no personal jurisdiction over corporation. West's Ann.Code Civ. Proc. §§ 537 et seq., 537, subd. 2, 553, 946, 1086, 1103.

9. Courts 🔑28

Doctrine of forum non conveniens could not be invoked to defeat California jurisdiction of action against Mexican corporation as assignee of contract under which plaintiff claimed, particularly since California jurisdiction was quasi in rem and based upon valid and proper attachment. West's Ann.Code Civ.Proc. §§ 537 et seq., 537, subd. 2, 553, 946, 1086, 1103.

10. Courts 🔑28

California does not provide debt-free haven for non-residents who desire to hold and maintain assets in California while not subjecting themselves to California jurisdiction.

◆

Sidney Barton, Los Angeles, for petitioners.

Richard H. Dunlap and Barnet M. Cooperman, Los Angeles, for real party in interest.

⊥FOX, Presiding Justice. ⊥243

This is an application for a writ seeking, *inter alia*, to restrain respondent court from making or entering any order quashing or dissolving a writ of attachment and from dismissing the action.

Plaintiffs or their assignors were respectively the screen writer, cinematographer, the director and principal players in a motion picture, "Stronghold", produced in Mexico in 1950–51 who rendered services on the picture under contracts between them and the Mexican production company, Filmadora Internacional S.A., a corporation, not sued herein. The plaintiffs received that portion of their compensation that became payable during the course of production. They sue,⊥however, for certain contingent ⊥244
deferred compensation which was to be paid when the gross receipts reached $100,000.00.[1]

The defendant, Nacional Financiera, S. A., describes itself as "a commercial banking corporation organized and existing under the laws of the federal district of the Republic of Mexico." Defendant held title to the picture "Stronghold" for the period from February 16, 1951, when it took an assignment from Banco Nacional Cinematografico S.A., which had financed a large portion of the picture, until May 18, 1951, when the defendant transferred all the rights in the picture to Producciones Mexico S.A., a private Mexican corporation.

Plaintiffs brought an action on their aforementioned contract and assignment for the collective balance of $142,375, less certain credits plus interest from 1951. Plaintiffs alleged in their complaint that defendant had knowledge of the rights of plaintiffs under the contract and that "defendant Financiera consented to and otherwise undertook performance thereunder unto plaintiffs * * *." At the time plaintiffs filed the complaint in the superior court, they also applied, under section 539,

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[1] They were also given certain rights to share in the net but these rights are not here involved because the picture was a failure and no net was ever realized.

Code of Civil Procedure, for an order to reduce their undertaking on attachment. Plaintiffs apprised respondent court that a proceeding in attachment in accordance with section 537, subd. 2 et seq. of the Code of Civil Procedure was necessary to enforce their claims. Respondent court, through its Presiding Judge, following his examination of the complaint and application and finding good cause therefor, ordered the clerk to issue a writ of attachment on the filing of a declaration for attachment together with an undertaking by a qualified surety corporation in the amount of $10,000. Plaintiffs complied with the above conditions and a writ of attachment in the sum of $230,329.48 was issued.

Subsequently, the Sheriff of San Francisco County perfected a series of garnishments upon certain of defendant's assets within the State of California—specifically, the defendant's bank accounts at the Bank of America National Trust and Savings Association. At least $130,692.33 was so seized and thus subjected to the compulsive power of the respondent court. No conflicting or adverse claims appear to exist with respect to the above amount held by the garnishee.

Thereafter, defendant filed a "notice of motion, per special appearance, for order quashing and dissolving attachment, 245 and for dismissal of the action on ground of lack of jurisdiction over defendant, and intangible personal property of defendant, * * *" Certain affidavits were filed with respondent court on behalf of both parties with respect to the said motion.

Later, petitioner served upon defendant a notice to plead and in due course, plaintiffs noticed a motion for entry of default against defendant. The trial court took the matter under submission and made two minute orders. The first designated defendant's appearance on its motion as special and granted both the motion to quash the attachment and the motion to dismiss the case. The second minute order denied plaintiffs' motion for an order entering defendant's default. Subsequently, the court, on its own motion, made two further orders: the first amended its prior minute order *nunc pro tunc* by staying the effectiveness of all proceedings for a period of sixty days; the second amended the minute order *nunc pro tunc* by changing the stay of execution theretofore granted "to and including August 16, 1962." Although requested by plaintiffs to extend further its stay of execution, respondent court indicated that it would sign its final order dismissing the action and dissolving the attachment on August 13, 1962, unless restrained from doing so by an order of the appellate court.

This court issued an order to show cause why writ of prohibition, mandate, or other appropriate writ should not be issued and stayed all proceedings pending a hearing and determination thereof.

[1, 2] A writ of mandate or prohibition is an appropriate remedy unless an appeal constitutes "a plain, speedy, and adequate remedy." (C.C.P. §§ 1086, 1103; Financial Indem. Co. v. Superior Court, 45 Cal.2d 395, 399, 289 P.2d 233.) An appeal in the instant case would not be adequate for the reason that once the attachment is dissolved, there would no longer be a basis for jurisdiction. In such a case, there is always the clear danger that defendant will remove the assets beyond the jurisdiction of the court. In Atkinson v. Superior Court, 49 Cal.2d 338, 342, 316 P.2d 960, the court stated: "[T]he remedy by appeal was not adequate because of the necessity of prompt action to prevent further movement of the funds out of the jurisdiction of the superior court." Further, plaintiffs show that they cannot make an undertaking in an amount double the amount of their 246 claims against defendant—$460,000, as required under Code of Civil Procedure sections 946 and 553.

[3] The majority rule and the rule in California is that an attack by defendant upon an attachment does not constitute a general appearance which would subject it personally to the jurisdiction of the court. In Willett & Burr v. Alpert, 181 Cal. 652,

185 P. 976, the court held that a general appearance is not necessary to make a motion to dissolve an attachment under the statutory grounds therefor. A dissolution of an attachment is not the type of relief that could only be granted on the hypothesis that respondent court has jurisdiction over its person; therefore, an appearance for that purpose only should not be considered a general appearance. Since no other basis on which personal jurisdiction could be founded is present herein, it necessarily follows that respondent court did not possess in personam jurisdiction.

[4] Respondent court did, however, have quasi in rem jurisdiction by virtue of the attachment. It does not appear that the attachment is deficient in any aspect; there has been no contention that the attachment has been improperly or irregularly issued. On the other hand, it affirmatively appears that this is the type of case in which an attachment is proper under section 537 subd. 2 of the Code of Civil Procedure. This subsection allows an attachment in those cases where (1) the action is upon an express or implied contract, and (2) the defendant is not residing in this state. Both requirements are satisfied in the case *sub judice*. While there is no privity of contract claimed by plaintiffs, the action being based on an assignment of a contract still falls within the scope of this section. Since defendant's motion is based solely upon lack of jurisdiction, the question as to whether the complaint states a cause of action is not before us and we do not decide it. It further appears that the attachment complied with all the procedural steps necessary under the Code.

[5] In the case of non-resident defendants, attachment has the additional purpose of obtaining jurisdiction quasi in rem. (Apollo Bottling Co. v. Superior Court, 138 Cal.App.2d 203, 291 P.2d 52; 1 Witkin, California Procedure, p. 888.) In Security Sav. Bank v. California, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301, the United States Supreme Court stated (p. 287): "[T]he essentials of jurisdiction over the deposits are that there be seizure of the res at the commencement of the suit; and reasonable notice and opportunity to be heard. [Citations.] These requirements are ⌊247 satisfied by the procedure prescribed in the statutes of California." Further, "Power over the person of the garnishee confers jurisdiction on the courts of the state where the writ issues." (Harris v. Balk, 198 U.S. 215, 222, 25 S.Ct. 625, 49 L.Ed. 1023.)

[6, 7] In the instant case, the defendant had actual notice of the proceeding and a full opportunity to be heard; in fact, defendant made an appearance, deemed special, manifesting a consciousness of the action and demonstrating its opportunity to be heard. "Traditional notions of fair play and substantial justice" are met where the adequacy of substituted service is reasonably calculated to give a non-resident defendant actual notice of the proceeding and an opportunity to be heard. (Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278.) Moreover, the jurisdiction of the court in a proceeding in attachment is wholly independent of the jurisdiction acquired by the service or publication of the summons. (Johnson v. Miner, 144 Cal. 785, 78 P. 240.)

In support of its position defendant relies on Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960, Cosper v. Smith & Wesson Arms Co., 53 Cal.2d 77, 346 P.2d 409, and Fisher Governor Co. v. Superior Court, 53 Cal.2d 222, 1 Cal.Rptr. 1, 347 P.2d 1. These cases are concerned with questions regarding in personam jurisdiction and the minimum "contacts" necessary to achieve it and thus were not concerned with quasi in rem jurisdiction acquired by proceeding in attachment. It follows, therefore, that these cases are not applicable to the case at bench.

[8–10] The doctrine of forum non conveniens is not persuasive in the factual context of the instant case, especially considering the fact that jurisdiction herein is quasi in rem in nature and based upon a valid and proper attachment. To hold otherwise would be to provide a debt-free haven for non-residents who desire to hold and maintain assets in California while not subjecting themselves to California jurisdiction—even as against the claims of California residents. This is not the policy nor the law in this state. If it is convenient to hold and maintain property within the state, it should be convenient to defend that property within the state when the need arises. In such circumstances as are herein present, the fair and orderly administration of the laws fully justifies subjecting defendant to the jurisdiction of our courts to the extent of the property seized in this state.

It is ordered that a writ of prohibition issue to prohibit respondent court from dissolving the writ of attachment or dismissing the action.

ASHBURN and HERNDON, JJ., concur.

209 Cal.App.2d 391

391 **The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

William H. TUCKER, Jr., Defendant and Appellant.

Cr. 1829.

District Court of Appeal, Fourth District, California.

Nov. 8, 1962.

Hearing Denied Jan. 3, 1963.

Prosecution on charge of driving a vehicle while being addicted to the use of narcotic drugs. From an adverse judgment of the Superior Court, San Diego County, Gerald C. Thomas, J., the defendant appealed. The District Court of Appeal, Stone, J., held that trial court properly refused to accept defendant's admission of fact as to each alleged prior conviction for which defendant had been committed to the youth authority prior to amendment of statute changing effect of such a commitment from that of a felony conviction to a misdemeanor conviction when defendant would not admit that either conviction constituted a felony conviction, and question whether defendant had suffered such prior convictions was properly submitted to the jury.

Judgment affirmed.

Criminal Law ⚷1202(3, 4)

Trial court properly refused to accept defendant's admission of fact as to each alleged prior conviction for which defendant had been committed to youth authority prior to amendment of statute changing effect of such a commitment from that of a felony conviction to a misdemeanor conviction when defendant would not admit that either conviction constituted a felony conviction, and question whether defendant had suffered such prior convictions was properly submitted to the jury. West's Ann. Pen.Code, §§ 17, 1025.

Thurrell & Corn and George B. Corn, San Diego, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Stanley X. Cook, Deputy Atty. Gen., for respondent.

STONE, Justice.* 392

Defendant appeals from judgment and sentence following conviction of violation of Vehicle Code section 23105, driving a vehicle while being addicted to the use of narcotic drugs. The information which charged defendant with the offense also charged two prior convictions of felony, one on November 14, 1955, the crime of possession of narcotics in violation of Health and Safety Code section 11500; and the second, the crime of burglary in violation of Penal Code section 459, on October 20, 1955. Defendant pleaded not guilty to the offense charged in the information, and denied each of the alleged prior convictions of a felony.

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* Assigned by Chairman of Judicial Council.

On the morning of trial counsel for defendant asked for and were granted a conference in chambers. Counsel advised the court that in their opinion the two alleged prior convictions of felony were actually misdemeanor convictions since defendant had been committed to the Youth Authority in each case. Counsel for defendant cited section 17 of the Penal ⌊393 Code, which defines felony and misdemeanor convictions. They contended this section, which was amended in 1959 to change the effect of a commitment to the California Youth Authority from that of a felony conviction to a misdemeanor conviction, operated retroactively. Counsel for defendant then offered to stipulate as to the prior convictions with the exception of the word "felony" and to have the court determine whether they constituted felony or misdemeanor convictions. The district attorney refused to accept the stipulation. Counsel for defendant then offered an admission of all of the facts concerning each prior conviction, but would not admit that either constituted a felony conviction. The court refused to accept the admission, and asked counsel if defendant wished to change his plea and admit each prior conviction. This defendant did not do, and the case went to the jury on the issues of the substantive crime charged in the information and whether each alleged prior conviction of a felony was true. The jury found defendant guilty as charged in the information and also found each alleged prior conviction of a felony to be true.

This appeal is taken solely on questions on law, since the only error alleged by defendant is the court's refusal to accept the admission of fact as to each alleged prior conviction of a felony. We find no error, since there was no question in law as to the nature of the prior convictions. Both occurred prior to the 1959 amendment to Penal Code section 17. The question raised by defendant in the trial court had been determined by this Court more than a year earlier, in People v. Gotham, 185 Cal.App.2d 47, 8 Cal.Rptr. 20. In that case the court said, at page 56, 8 Cal.Rptr., at page 25:

> "Defendant's trial counsel argued that the 1959 amendment should be given retroactive effect so as to apply at the time of the present charge. The trial court rejected this contention. The date of conviction is the date to be considered in determining whether or not the offense was a felony at a subsequent trial. People v. McConnell, 20 Cal.App.2d 196, 197 [1], 66 P.2d 720; In re Harincar, 29 Cal.2d 403, 406–407 [1], 176 P.2d 58."

Since defendant admitted the facts of each prior conviction and wished to submit the matter as a question of law, and since the law was settled by an Appellate Court decision, the trial court properly compelled defendant to make a choice under Penal Code section 1025. Defendant elected not to withdraw his denial of the prior convictions. There⌊394 fore the court had no alternative but to proceed with the trial according to Penal Code section 1025, which provides:

> "* * * If he answers that he has not, his answer must be entered in the minutes of the court, and the question whether or not he has suffered such previous conviction must be tried by the jury which tries the issue upon the plea of not guilty, or in case of a plea of guilty by a jury impaneled for that purpose, or by the court if a jury is waived. * * *"

No provision is made by Penal Code section 1025 for a partial or intermediate plea, nor for a bifurcated trial. In our view, whether provision should be made for a hyphenated type of plea to a charge of a prior conviction of a felony, or a bifurcated trial thereof, is a matter that the Legislature should deal with, rather than the courts.

The judgment is affirmed.

GRIFFIN, P. J., and COUGHLIN, J., concur.

209 Cal.App.2d 88

⌊88 ⌊**U-TEX OIL COMPANY, a corporation, Plaintiff and Respondent,**

v.

Edwin W. PAULEY, Barbara Jean Pauley, aka Barbara McHenry Pauley, Defendants and Appellants.

Civ. 6657.

District Court of Appeal, Fourth District, California.

Oct. 29, 1962.

Rehearing Denied Nov. 21, 1962.

Hearing Denied Dec. 26, 1962.

Action to quiet title, involving question of lease forfeiture and damages. The Superior Court, of Orange County, Kenneth E. Morrison, J., rendered judgment for plaintiff and defendants appealed. The District Court of Appeal, Shepard, J., held that those having conditional right of reentry under lease were indispensable parties to action, and that plaintiff which had only oral permission of one co-executor to take possession of property which it was endeavoring to purchase while owners' interest was in course of probate and while conditions fixed by court for passage of title had not been complied with and while actual physical possession of oil properties remained in lessees and surface farming remained in possession of tenant farmer, had neither title nor possession necessary to give it right to terminate lease or to effectively give notice thereof.

Reversed.

1. Appeal and Error ⇨187(3)
Parties ⇨75(3)

Failure to include truly indispensable party is defect that can be raised at any time, even by appellate court of its own motion.

2. Mines and Minerals ⇨78(7)

Those having conditional right of reentry under lease were indispensable parties to quiet title action involving question of lease forfeiture and damages.

3. Mines and Minerals ⇨78(1)

Provision of master lease that when lessee quitclaimed any land, drilling requirements would be pro rata reduced remained effective under modification reducing to ten the compulsory number of wells but expressly retaining in effect all other provisions of master lease, and served to effect pro rata reduction of compulsory number of wells to nine upon lessee's quitclaiming of 18% of acreage.

4. Evidence ⇨70

There was presumption of regularity of quitclaim deed where grantee neither rejected it nor made any effort to restore grantor to title claimed. West's Ann.Code Civ.Proc. § 1963, subds. 19, 20; West's Ann. Civ.Code, § 3521.

5. Estoppel ⇨29(1)

Grantee stood squarely in shoes of grantor and could not be heard to challenge validity of quitclaim deed accepted by grantor for benefit of title held by grantee. West's Ann.Code Civ.Proc. § 1963, subds. 19, 20; West's Ann.Civ.Code, § 3521.

6. Executors and Administrators ⇨124

One co-executor may perform valid acts without active consent of others, such as marshalling of assets and performance of other lawful duties involving protection of estate, but may not gratuitously grant possession of valuable property prior to time contemplated by bids, return and order conditionally confirming sale. West's Ann. Prob.Code, § 920.

7. Property ⇨7

Right to possession follows legal title in absence of contrary agreement.

8. Mines and Minerals ⇨78(3)

One which had only oral permission of one co-executor to take possession of property which it was endeavoring to purchase while owners' interest was in course of probate and while conditions fixed by court for passage of title had not been complied with, while actual physical possession of oil properties remained in lessees and surface farming remained in possession of tenant farmer, had neither title nor possession necessary to give right to terminate lease or to effectively give notice thereof.

Dolley, Jessen & Painter, by Louis Miller, Los Angeles, for appellants.

Robert E. Krause, Long Beach, for respondent.

⊥90 ⊥SHEPARD, Justice.

This is an appeal by defendants from a judgment in favor of plaintiff in a quiet title action involving lease forfeiture and damages.

PLEADING

Because of some questions relating to what issues were before the trial court, it is necessary briefly to outline the pleading. Prior to judgment, all defendants except the Pauleys were dismissed from the action. For brevity, plaintiff will hereinafter be called U-Tex and defendants will be called Pauley.

Two causes of action are set forth in the complaint. The first cause is in the form of a quiet title action with the usual allegation of title in U-Tex and claims without right by Pauley. The answer places the right of Pauley in issue. The second cause, in essence, alleges (1) the corporate existence of U-Tex, fictitious names of defendants, and the ownership of U-Tex; (2) execution on February 18, 1945 by C. M. and L. A. McCain, hereinafter called McCain, as lessors, to John McLeod and Delaney Petroleum Corporation, hereinafter called McLeod, as lessees, of an oil and gas lease; recordation thereof; modifications of said lease on April 4, 1946 and May 16, 1946 by agreement between McCain and Beverly Oil Company, a corporation, hereinafter called Beverly, and Signal Petroleum Corporation of California, Ltd., a corporation, hereinafter called Signal; assignment of said lease April 8, 1947 from Beverly to Pauley; recordation thereof; (3) provision in said lease for drilling 14 wells and modification on May 16, 1946 to a requirement of 10 wells; (4) provisions for 90-day notice of breach modified subsequently to 30 days; ⊥91 (5) Pauley's⊥ownership of lease; (6) oil discovery in paying quantities, the drilling of 9 more wells; (7) lack of a well producing for Pauley; (8) failure of Pauley to protect from wells on adjacent land draining from same pool; (9) notice April 21, 1958 to Pauley of alleged failure of Pauley to drill additional wells and of termination of lease on failure to remedy breach within 30 days; demand for quitclaim deed; (10) failure of Pauley to drill the tenth well; (11) failure to drill offset wells; (12) breach of lease by failure to drill and produce as alleged in (8), (9), (10) and (11) above; (13) demand, November 1, 1958, for quitclaim and refusal by Pauley; (14) attorney employment; (15) Pauley's failure to surrender possession after demand; (16) request for $150 forfeiture under Section 794, Civil Code. Prayer is for quiet title, injunction, attorney fees, forfeiture of $150, actual damages of $277,000 and $100,000 punitive damages.

The answer, in essence, denies in detail all allegations of breach of lease conditions and denies U-Tex's right to possession or quitclaim but admits the assignment from Beverly to Pauley and that Pauley claims lease title thereunder. By a second defense Pauley alleged that McCain had relinquished lessors' right to terminate for failure to drill the tenth well and that U-Tex is estopped to claim forfeiture. The third defense alleged release and discharge of Pauley's drilling obligation for a tenth well. The fourth defense alleged that U-Tex was not the owner at the time it gave the 30-day notice of default and that no such notice was ever given by the owner. The fifth defense simply denied default in lease obligations by Pauley. The sixth defense alleged waiver of any asserted breach by acceptance by U-Tex, after complaint was filed, of certain royalty payments, with full knowledge of the facts. The seventh defense asserts that after complaint was filed U-Tex requested, pursuant to the lease, certain electrolog information on the wells drilled and Pauley sent U-Tex said information; that the continued existence of the lease was thus acknowledged by U-Tex and it is estopped to maintain this action.

FACTS

The parties do not disagree substantially as to the facts, but do disagree sharply on their interpretation and legal consequences. In essence, the facts are as follows: On February 8, 1945, McCain as lessors leased to McLeod as lessees under the lease in question 132+ acres of land in Orange County. By ⊥92 mesne assignments Beverly received lessees' interest. On April 4, 1946, Beverly made a partial assignment to Signal but reserved to Beverly a 3½% overriding royalty plus certain drilling rights. On November 15, 1946, Signal reassigned to Beverly but reserved two wells called Signal-McCain 1 & 2. These ultimately went to W. E. Nicolai and Fred E. Christ, hereinafter called Nicolai, and are excepted from the forfeiture provisions of the judgment.

On April 4, 1946, paragraph 4 of the lease (see Note 1), which paragraph provided for conditional compulsory drilling of 14 wells, was modified to change the minimum time lapse between completion of a well to commencement of the next well from 90 to 60 days and the lessee's time to remedy a default after notice was changed from 90 to 30 days. On May 16, 1946 the minimum number of wells was changed from 14 to 10. Paragraph 5 (see Note 2) provided that upon a quitclaim of part of the land by lessee to lessor "the drilling ⊥93 requirements hereunder shall be reduced pro rata according to the acreage retained by the lessee." On April 8, 1947, Beverly assigned its interest to Pauley but reserved a 3½% overriding royalty in production value. On June 6, 1957, Pauley quitclaimed to McCain (then owner-lessor) 24+ acres of the land under lease. (There appears to be a variance of about one acre between the findings and the evidence, but this is immaterial.) Thus the remaining acreage held under lease was then reduced from 132 to about 107, or a pro rata reduction in the neighborhood of 18%.

From the date of the lease until July 1949 there were nine wells drilled and oil in paying quantities was found. No other wells have been drilled. On June 6, 1949, McCain as owner acknowledged that the lease was in full force. During 1949 to 1957, Pauley made royalty payments to

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1. "4. Upon discovery of oil in paying quantities in any well drilled on demised premises, the Lessee shall commence the drilling of another well within ninety days thereafter, and shall thereafter continuously operate not less than one well drilling outfit, allowing ninety days between completion of one well and commencement of the next succeeding, until 14 wells shall have been drilled, including offset wells; provided that, upon failure to find oil in paying quantities in the first or any subsequent well drilled under the terms hereof, this lease shall remain in full force and effect, at the option of the Lessee, if Lessee elects (without forfeiture of any right to subsequently drill for and produce oil) to operate any such well or wells as natural gas wells and operate the premises for natural gas development purposes, in which event the drilling obligations hereinabove in this paragraph contained shall be reduced to one-fourth the number of wells specified. Nothing herein shall be construed to limit the number of wells which the Lessee may drill, should it so elect, in excess of the number hereinabove specified, nor limit the depth to which any well may be drilled or deepened by Lessee should it desire to drill below the depth specified.

   The Lessee shall have the right at all times to operate, deepen, redrill and maintain all producing oil and/or gas wells upon said property."

2. "5. Lessee may at any time, and from time to time, either before or after discovery of oil and/or gas on the demised premises, quitclaim the said premises, or any part thereof, to the Lessor, his successors or assigns. Upon the quitclaiming of any part of the land to the Lessor, his successors or assigns, all rights and obligations of the parties hereto, one to the other, shall cease and determine as to the portions of the premises quitclaimed (except that the Lessee may continue to enjoy such easements on the surrendered premises as may be in use at the time of the surrender) and the drilling requirements hereunder shall be reduced pro rata according to acreage retained by the Lessee. Except as herein provided, full right to said land shall revest in the Lessor free and clear of all claims of the Lessee, except that the Lessor, his successors or assigns, shall not drill any well on said surrendered land within 330 feet of any producing oil well or within 660 feet of any gas well on land retained by Lessee."

McCain with full knowledge by McCain that the tenth well had not been drilled, and without any objection by or notice of lease default by McCain.

On October 21, 1956, L. A. McCain died. On February 27, 1958, U-Tex and Ralph Hawks, hereinafter called Hawks, offered to buy the land covered by the lease, subject to probate court approval. The terms of offer provided a $26,300 deposit, $58,700 within 90 days, the balance of $178,000, to be evidenced by a deed of trust and note, with the buyers taking title as tenants in common, U-Tex as 65% and Hawks as 35%. The order approving the sale was made March 14, 1958. The attorney for the executors on the same day orally told U-Tex' superintendent to take possession. Hawks, on March 17, 1958, gave a grant deed for his interest to U-Tex but the deed was not recorded until June 13, 1958. Actually, U-Tex appears to have been thereafter holding title for the benefit of one Snyder as to a 25% interest and Hawks as to 10% interest. Nothing is said in the ofter of purchase nor in the order confirming sale regarding possession in U-Tex. The deed to U-Tex and payment money were deposited in escrow with the Orange County Title Company and the deed was delivered from escrow and recorded May 26, 1958. Prior to deed delivery McCain collected all rents and royalties, but after deed delivery these amounts were prorated to U-Tex and McCain as of March 14, 1958.

On April 20, 1958, U-Tex gave Pauley a 30-day notice of lease default and election to terminate. U-Tex therein recited that it was the owner. The record does not show that on April 20, U-Tex had deposited in escrow or otherwise tendered the ⌊94 balance of $58,700 necessary for it to receive title. On May 13, 1958, Pauley replied that the Title Company had no record of title in U-Tex and he requested a copy of title instruments. This last request was not complied with but May 26, 1958 U-Tex' attorney, by letter, stated to Pauley that the lease was terminated.

Beverly was made a party defendant but was dismissed from the action on motion of plaintiff prior to judgment. Beverly was dissolved a few years prior to commencement of this action and its assets had been distributed to the estate of William Cary Hay (Beverly's sole owner) and thence to Hay's wife, Dorothy, and daughter Beverly, who were his heirs. Neither of the said heirs were named as parties herein.

During 1958 and 1959, royalty payments were made by check from Pauley to U-Tex. The checks were retained by U-Tex without objection but were not cashed. September 18, 1959, U-Tex requested of Pauley a copy of the electrologs for the wells. Pauley complied.

INDISPENSABLE PARTIES—TIME FOR OBJECTION

Pauley first contends that Beverly and the two distributees of Beverly's assets, that is, Dorothy L. Hay and Beverly E. Hay, were indispensable parties to this action and that failure to join them as parties deprives the court of jurisdiction to render a valid judgment.

The rule requiring indispensable parties to be brought before the court is contained in the first sentence of Code Civ.Proc. section 389, which says, in part:

> "A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties or would seriously prejudice any party before the court or if his interest would be inequitably affected or jeopardized by a judgment rendered between the parties.
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> "When it appears that an indispensable party has not been joined, the court shall order the party asserting the cause of action to which he is indispensable to bring him in."

The meaning of this section has been defined and interpreted in numerous cases. In Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 671, 672, 284 P. 445, 447; quoting with approval from Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L.R.A.,N.S., 275, and Alpers v. Bliss, 145 Cal. 565, 79 P. 171, the court says,

> ⊥95 "* * * But, when the trial court finds, or the record indisputably shows, that a 'complete determination of the controversy cannot be had without the presence of other parties,' such parties become necessary and indispensable parties, and the section is mandatory, and the question then becomes one of jurisdiction in that the court may not proceed without bringing them in.
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> "'It is the general rule in equity, continued in force by the provisions of the Code of Civil Procedure, § 389, that all who are interested in the subject-matter of a litigation should be made parties thereto, in order that complete justice may be done, and that there may be a final determination of the rights of all parties interested in the subject-matter of the controversy.' 'The "other parties" who may be brought in must be persons whose presence is essential to the complete determination of a controversy between the parties who are already before the court.'"

A similar statement of the rule is quoted from Waterman v. Canal-Louisiana Bank & T. Co., 215 U.S. 33, 30 S.Ct. 10 at page 14, 54 L.Ed. 80. See also Bank of California v. Superior Court, 16 Cal.2d 516, 521–523(4–8), 106 P.2d 879; Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 262(19), 73 P.2d 1163.

U-Tex claims that the objection that indispensable parties were not joined cannot be raised for the first time on appeal. Beverly was made a party defendant in the complaint but was dismissed some time before judgment. It is possible that the dismissal occurred prior to trial, but the record does not show this. The objection of nonjoinder of indispensable parties was set forth at length to the trial court in the motion for a new trial. Elbert, Ltd. v. Gross, 41 Cal.2d 322, 260 P.2d 35, cited by respondent, refers to a "necessary" party. All of the other cases cited by respondent refer to "necessary" or "proper" parties and not to "indispensable" parties except Reid v. Gillespie, 87 Cal.App.2d 769, 197 P.2d 566. On the other hand, it was directly held in Hartman Ranch Co. v. Associated Oil Co., supra, 10 Cal.2d p. 265(20), 73 P.2d 1163, 1179.

> "The objection that an indispensable party has been omitted may be raised at any time by the trial or appellate court of its motion if the parties fail to make the objection. The requirement that indispensable parties be before the court is mandatory."

[1] This rule is cited with approval in Bank of California v. Superior Court, 16 Cal.2d 516, 522(5), 106 P.2d 879; Holman v. County of Santa Cruz, 91 Cal.App.2d 502, 522, 205 P.2d 767; ⊥96 Castro v. Giacomazzi Bros., 92 Cal.App.2d 39, 45(6), 206 P.2d 688; Sime v. Malouf, 95 Cal.App.2d 82, 116(33), 212 P.2d 946, 213 P.2d 788; Child v. State Personnel Board, 97 Cal.App.2d 467, 468, 469(1), 218 P.2d 52; and Miracle Adhesives v. Peninsula Tile Assn., 157 Cal.App.2d 591, 595(5), 321 P.2d 482. From the foregoing it is clear that the failure to include a truly indispensable party is a defect that can be raised at any time even by the appellate court of its own motion.

INTEREST OF BEVERLY AND HAY

U-Tex contends that neither Beverly nor Hay were indispensable parties.

By its reservations in the partial assignment to Signal on April 4, 1946, Beverly reserved all drilling and production rights below a depth of 2,700 feet, all wells already drilled, and also an overriding 3⅓% royalty from wells brought into production by Signal, subject to certain specified deductions. On November 15, 1946, Signal reassigned to Beverly but excepted therefrom two producing wells called Signal-McCain Nos. 1 & 2, the 3⅓% overriding royalty remaining in effect as to said two wells and Beverly reassuming the duty to keep lessees obligations under the parent lease fully performed. Said two wells are now operated by Nicolai.

[2] On April 8, 1947, Beverly assigned its remaining interest in the lease to Pauley but reserved to itself a 3½% overriding royalty on Pauley's production, and excepted Signal's reserved interest under the reassignment of November 15, 1946. Pauley assumed the obligations of the parent lease and agreed to give Beverly first refusal after a 30-day notice in case Pauley desired to quitclaim to the owner-lessor any part of the land covered by the lease. While Beverly could not, under the lease, interfere with active operations, it did retain the right of reassignment and reentry in case Pauley decided to quitclaim. Under the foregoing facts there was a conditional right of reentry reserved to Beverly and through Beverly to Hay. From the complicated interrelationship of the rights and duties of the parties it becomes clear that no judgment terminating the rights of Pauley could avoid affecting the rights of Beverly or Hay. As was said in La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132 at page 140 [6], 114 P.2d 351 at page 355, 135 A.L.R. 546,

> "Defendants' overriding royalties were, therefore, interests in real property. [Citations] The interests thus created were not unlimited 97 but were determinable interests limited to the duration of the existing lease. Termination of the oil and gas lease would result in the termination of the interests created under it."

Pauley was the active operator on whose shoulders rested production. But Beverly also had outstanding operative obligations to Nicolai. Whether Beverly-Hay had any defense to the present action could be discovered only by lawful disclaimer or by bringing them in as parties so that they might be heard. By its judgment herein the court excepted from forfeiture Pauley's No. 3 well, also called McCain No. 3 well, with sufficient land to service said well, the tanks tank site and sump for servicing said well and the two Nicolai wells. U-Tex apparently infers that there is some reservation in the judgment preserving the rights of Beverly and Hay. U-Tex does not point out what words of the judgment purport to preserve the rights of such non-joined parties and we have found none. As was said in Hartman Ranch Co. v. Associated Oil Co., supra, 10 Cal.2d at page 263, 73 P.2d at page 1178,

> "It cannot be said that the adjudication for a forfeiture will be binding only as between parent lessor and sublessee, and that the rights of the lessees sublessors may be saved. Under the decree of forfeiture it would be the duty of the sublessee to surrender possession to the parent lessor. Such a surrender would result in the sublessors losing their tenant, the sublessee, and in termination of the parent lease under which they have rights as lessees."

See also Garner v. Knudsen, 129 Cal.App.2d 747, 756, 757, 277 P.2d 890; 30 Cal.Jur.2d 385 (Sec. 241).

Authorities cited by U-Tex are not in point. All of them are cases in which the indispensable parties were before the court as actual litigants or had been served with due process and had defaulted. It would appear that the overriding royalty and right of conditional reversion through reassignment that originally rested in Beverly has long since passed to Hay and that Hay are now the real parties in interest. It is unnecessary to examine that point further, however, as none of them was joined. Whoever held this interest was indispensable since any judgment rendered must inevitably affect that interest and the owner had a right to be heard.

DRILLING REQUIREMENTS

[3] Pauley contends that the court's finding that under the terms of the lease Pauley was obligated to drill a tenth well and that his failure to do so was a breach of the lease was contrary to the provisions of the lease and was error. We 98 agree. It must be noted that on May 16, 1946, paragraph 4 of the master lease was amended to reduce the compulsory number of wells to ten. This modification expressly retain-

ed in effect all other provisions of the master lease. Paragraph 5 of the lease provides, in effect, that when the lessee quitclaims any of the land the drilling requirements of the lease will be reduced pro rata. Under date of June 6, 1957, Pauley quitclaimed 24+ acres to McCain. The deed was recorded July 24, 1957. This quitclaim clearly reduces the drilling requirement to nine since the acreage decreased from 132+ to 107+, about 18%, and nine wells had already been drilled. By paragraph 26 of the master lease, its covenants extend to all assignees. By the assignment from Beverly to Pauley a similar provision is made.

[4, 5] U-Tex, whose predecessor in interest, McCain, accepted the quitclaim deed, now suggests that the evidence does not show the required consent from Beverly or Hay. Nowhere does U-Tex even suggest that McCain or U-Tex either rejected the quitclaim deed or made any effort to restore to Pauley the title gained. (Neet v. Holmes, 25 Cal.2d 447, 458 [5], 154 P.2d 854.) U-Tex made no effort to produce evidence to dispel the presumption (as to U-Tex) of regularity of the deed under the circumstances. (Code Civ.Proc. § 1963 [19], [20]; Ross v. Real Estate Investment Co., 135 Cal.App. 563, 28 P.2d 52; Donovan v. Security-First Nat. Bk., 67 Cal.App.2d 845, 853 [4], 155 P.2d 856; Willis v. Holback, 33 Cal.App.2d 145, 147 [1], 91 P.2d 140.) U-Tex stands squarely in the shoes of McCain and cannot now be heard to challenge the validity of a quitclaim deed accepted by McCain for the benefit of the title now held by U-Tex. (Civ.Code, § 3521; Austin v. Hallmark Oil Co., 21 Cal.2d 718, 727 [5], 134 P.2d 777; Walmsley v. Holcomb, 61 Cal.App.2d 578, 582 [2], 143 P.2d 398.) The maximum compulsory drilling required by the lease under the undisputed facts was nine and not ten.

U-Tex now contends that this point is urged for the first time on appeal. We find no merit in this contention. The record does not support it. Because of this contention we heretofore set forth in some detail the essential elements of the pleadings. An examination of the pleadings clearly shows that the contention that ten wells was the compulsory drilling requirement was in issue. The trial court, by finding number V, found as a fact that Pauley quitclaimed 24+ acres (error of one acre is immaterial). There was, in truth, no contrary evidence.

⊥NOTICE OF DEFAULT AND ELECTION TO TERMINATE ⊥99

Pauley contends that the 30-day notice of default and election to terminate lease was ineffectual for any purpose since U-Tex, at the time it gave the only such notice given, was not the owner nor lawfully in possession of the leasehold land. U-Tex asserts the notice was valid because on March 14, 1958, one McCain executor orally told U-Tex' superintendent to take possession and U-Tex did take token possession by erecting a barbed wire fence and gate along about 80 feet of the boundary of the property. The total boundary of the property was about 10,000 feet; access was had through many different roads. Actual physical possession was held by a tenant farmer except for oil well sites, access roads, and necessary accessories of the wells.

In examining the question, several points of undisputed evidence immediately require attention. First, the owners' interest was in the course of probate; nothing in the call for bids or the U-Tex-Hawks bid nor the order confirming sale makes any provision for possession in the prospective buyer before final consummation of title in the buyer. The order confirming sale was conditional, reciting that upon the buyers' payment to the executors of $85,000 cash and execution and delivery of a promissory note of $178,000 and trust deed, the executors were directed to deliver the deed. As was said in Barnes v. Morrison, 102 Cal.App. 152, 157 [4], 282 P. 986, 988;

> "The order confirming the sale does not convey the title, but merely authorizes the conveyance upon specified terms and conditions."

Mrs. Frazer, a McCain co-executor, testified that on March 14, 1958, the day of sale confirmation, she told Snyder, the U-Tex superintendent, to take possession. Baxter, the other co-executor, states he never gave permission for U-Tex to take possession until May 26, 1958. The will of J. Adrian McCain, under which Mrs. Frazer and Baxter were named as co-executors, made no provision for either to act separately from the other except if one did not qualify. But here both did qualify and act. The question arises under the implications of Probate Code, § 920 whether or not one co-executor may lawfully surrender possession without the consent of the other under the circumstances here present.

[6] We have no doubt that in respect to many duties one co-executor may perform valid acts without the active consent of the other such as the marshalling of assets and the performance of other lawful duties involving protection of the estate. ⊥100 Neither party to this proceeding has cited and we have been able to discover any prior decision touching the precise problem here presented. In reason, however, it would seem improper for either executor acting alone to gratuitously grant possession of valuable property prior to the time contemplated by the bids, the return and the order conditionally confirming sale. Obviously, possession of property is a valuable right. Giving it away at a time prior to that contemplated by the court proceeding might well be to the serious disadvantage of the estate. At the time U-Tex claims oral permission to take possession was given, the conditions fixed by the court for passage of title had not been complied with and, as far as anyone then knew, might never be complied with.

Furthermore, in the case here at bar, the question as to whether U-Tex' token possession was sufficiently real to permit it to take one of the more drastic of all steps which an owner can take, to wit, making the decision that a long term lessee was in default, and taking the first decisive step toward ouster, raises an additional serious challenge. The actual physical possession of the oil properties remained in Pauley and Nicolai. The surface farming remained in the possession of the tenant farmer. Rents were collected by McCain, not U-Tex.

[7] Certainly, U-Tex cannot read into the order confirming sale something that it does not contain. (Baldwin v. Stewart, 218 Cal. 364, 368, 23 P.2d 283; 20 Cal.Jur.2d 716 Sec. 502.) Right to possession follows the legal title in the absence of a contrary agreement. (Stratton v. California Land etc. Co., 86 Cal. 353, 364, 24 P. 1065; Jiral v. Day, 95 Cal.App.2d 214, 217 [3], 212 P.2d 275; Wilson v. Sanchez, 116 Cal.App.2d 670, 675 [4], 254 P.2d 594; Hayward Lumber etc. Co. v. Starley, 124 Cal.App. 283, 287 [1], 12 P.2d 66.) Any notice of forfeiture or termination of an oil lease, prematurely given is ineffectual for any purpose. (Welport Oil Co. v. Fairfield, 51 Cal.App.2d 533, 537, 125 P.2d 97.) Only a person whose title places him in the position of landlord can exercise such prerogatives. (Murphy v. Hopcroft, 142 Cal. 43, 45, 46, 75 P. 567.)

[8] Pauley's prompt investigation of the title after receiving the notice disclosed U-Tex' lack of title. Pauley's demand for evidence of title and U-Tex' failure to comply justified Pauley in refusing to give recognition to the notice. We are forced to the conclusion that U-Tex did not have either the title or possession necessary to give it the right to terminate the lease or to give effective notice thereof.

⊥101 It must, of course, be conceded that if the purchaser at a probate sale fulfills the conditions contained in the court's order confirming sale, the title that passes will, for the purpose of prorating the rents, issues and profits of the land, be considered as having passed as of the date of confirmation in the absence of an order or agreement to the contrary. However, we think that is the extent of that rule unless actual possession is surrendered to the buyer. If this were not true, the confusion which could be created by a buyer who had not complied with the probate court's order would ramify too far for description and could create untold damage to the property of the estate.

Our views hereinbefore set forth render discussion of further points raised by Pauley unnecessary.

The judgment is reversed.

GRIFFIN, P. J., and COUGHLIN, J., concur.

208 Cal.App.2d 803

803 **BALDWIN-LIMA-HAMILTON CORPORATION, a corporation, Petitioner,**

v.

The SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO; Allis-Chalmers Manufacturing Company, a corporation; Ben Benas, as Purchaser of Supplies of the City and County of San Francisco; Harry D. Ross, as Controller of the City and County of San Francisco; and the City and County of San Francisco, a political subdivision, Respondents.

Civ. 20694.

District Court of Appeal, First District, Division 1, California.

Oct. 24, 1962.

Hearing Denied Dec. 19, 1962.

Petition for writ of prohibition to restrain the Superior Court in and for the City and County of San Francisco from taking further action in a mandamus proceeding pending therein. The District Court of Appeal, Sullivan, J., held that "a place of manufacture" provision in a contract proposal for purchase of electric generating equipment by city was illegal as being in conflict with treaties and trade agreements of the United States, and that such provision could not be cured by importing therein by legal implication the pertinent clauses of such treaties and agreements, and that the provision was further invalid as failing to provide for full and fair competitive bidding upon a common standard.

Alternative writ of prohibition discharged and petition for a peremptory writ denied.

1. Mandamus 🔑153

Where intervenor intervened on the side of respondents in mandamus proceeding, its complaint in intervention was in effect an answer to the petition of the petitioner.

2. Prohibition 🔑10(1)

The writ of prohibition is an appropriate remedy to arrest the proceedings of a court when there is not a plain, speedy and adequate remedy in the ordinary course of the law and when the proceedings of the court are without or in excess of its jurisdiction. West's Ann.Code Civ.Proc. §§ 1102, 1103.

3. Prohibition 🔑23

Absence of another adequate remedy was determined by the appellate court when it granted an alternative writ of prohibition.

4. Prohibition 🔑10(1)

To permit the issuance of prohibition, it is not necessary that there be a lack of jurisdiction over the subject matter or parties in the fundamental sense, but only that there be a want or excess of the power of the court as defined by statute or by rules followed under the doctrine of stare decisis. West's Ann.Code Civ.Proc. §§ 1102, 1103.

5. Mandamus 🔑22, 72

Remedy of mandamus issues only to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station, and upon petition of the parties beneficially interested and will not lie to control discretion conferred upon a public officer or agency. West's Ann.Code Civ.Proc. §§ 1085, 1086.

6. Mandamus 🔑10, 71

To justify mandamus, there must be a clear, present and usually ministerial duty by the respondent and a clear, present and beneficial right in the petitioner to the performance of that duty. West's Ann.Code Civ.Proc. §§ 1085, 1086.

7. Pleading 🔑403(2)

In determining right to mandamus, the court was entitled to consider the pleadings of the opposite parties and exhibits attached thereto and any defects in the petition could be aided or cured by averments in the pleadings of the opposite parties.

8. Mandamus 🔑163

Where respondent in mandamus proceeding did not stand on its demurrer and it filed simultaneously with its demurrer a complaint in intervention which was in legal effect an answer, by so doing it permitted the doctrine of aider to come into play.

9. Pleading 🔑403(2)

If mandamus petition was defective or lacked an averment of any essential fact, it would be aided or cured by the averments of the answers filed by the respondents thereto, even though a demurrer to the sufficiency of the petition filed by one of the parties had been erroneously overruled.

10. Pleading 🔑8(7)

Allegations that the bid of the petitioner was the lowest responsible bid and that the petitioner was in fact the lowest and best responsible bidder were purely conclusionary.

11. Municipal Corporations 🔑240

Purchasing agent of city was not under a duty to accept any bid submitted for the furnishing of equipment for a generating station, but under the charter and administrative code, he could reject any and all bids.

12. Mandamus 🔑84

Superior Court in mandamus proceeding had no power to order city purchasing agent to award the contract for generating equipment to the petitioner even if respondent's low bid should be disregarded, where the agent had the authority to reject all bids and in the exercise of discretion to decide whether to award the contract to the lowest bidder, whoever that might be.

13. Municipal Corporations 🔑244(1)
States 🔑4.8

City's contract proposal for purchase of generating equipment wherein bids submitted included the "place of manufacture" provision requiring equipment furnished to be manufactured in the United States except as otherwise provided in the California statutes which provision was included in order to comply with the California Buy American statute was unenforceable as conflicting with certain treaties and the "supreme law of the land." West's Ann.Gov. Code, § 4303; General Agreement on Tariffs and Trade, Art. 3, 61 Stat. pars. 2, 5, pp. A18, A19; U.S.C.A.Const. art. 6.

See publication Words and Phrases for other judicial constructions and definitions.

14. Customs Duties 🔑10

Exception in the General Agreement on Tariffs and Trade entered into between United States and other nations that it should not apply to the procurement by governmental agencies of products purchased for governmental purposes and not for resale or use in the production of goods for sale was not operative, where the turbines and other equipment which city proposed to purchase were for use in the generation of electric power for resale and hence for "use in the production of goods for sale." General Agreement on Tariffs and Trade, Art. 3, 61 Stat. pars. 2, 5, pp. A18, A19.

15. Treaties 🔑11

When a state statute conflicts with treaties made under the authority of the United States, the treaties control. U.S. C.A.Const. art. 6.

16. Treaties 🔑11

Compacts and semi-international agreements on tariffs and trade which are negotiated and proclaimed by the President are "treaties" within the supremacy clause of the Constitution. U.S.C.A.Const. art. 6.

See publication Words and Phrases for other judicial constructions and definitions.

17. Municipal Corporations 🔑237

"Place of manufacture" provision contained in proposal by city for purchase of electric generating equipment had no operative effect to restrict or preclude the furnishing of material or equipment produced in Canada or Japan by the bidder so that the provision was nullified as effectively as if it had not been included in the bid call in the first place.

18. Municipal Corporations ⚷237

Where municipal contracts are required to be let upon public bidding, the proposals and specifications inviting such bids must be sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard and must be free of any restrictions tending to stifle competition.

19. Municipal Corporations ⚷237

"Place of manufacture" provision in bid call by city for generating equipment failed to afford a basis for full and fair competitive bidding in that it could not be reasonably concluded that prospective bidders could infer from the specifications that they could submit acceptable bids covering materials of foreign manufacture. West's Ann.Gov.Code, §§ 4300–4305.

20. Municipal Corporations ⚷237

Specifications in city's proposal bids for furnishing of electric generating equipment, which because of "place of manufacture" provision were insufficient to secure full and fair competitive bidding, could not be corrected by importing therein by legal implication, provisions upon which specifications were completely silent.

21. Contracts ⚷168

Terms implied by law become as much a part of contract as those expressly written therein.

22. Municipal Corporations ⚷237

Properly conducted and competitive bidding on municipal contract should not compel a bidder to question the clear language of the proposal and to search out and construe various public documents upon the contingency that they may in some way affect it.

23. Municipal Corporations ⚷240

The awarding of a contract by a public official pursuant to specifications which are illegal and which fail to provide for full and fair competitive bidding is an abuse of discretion.

24. Mandamus ⚷72

While mandamus will not lie to control the discretion exercised by a public officer or board, it will lie to correct an abuse of discretion by such officer or board.

25. Pleading ⚷403(2)

Conclusionary language in petition for mandamus was not fatal where the essential facts of the controversy were found in the pleading.

26. Mandamus ⚷84

Where "place of manufacture" provision in contract proposal for purchase of generating equipment by city was illegal as in conflict with treaties and trade agreements of the United States, the Superior Court had jurisdiction to issue a writ of mandate to correct an abuse of discretion commanding the city officials to refrain from proceeding to award the contract to a particular bidder or any other person.

27. Mandamus ⚷23(1)

Petitioner was a "party beneficially interested" and entitled to invoke remedy of mandamus to prevent city officials from awarding a contract proposal for purchase of generating equipment to another where the granting of the writ would protect the petitioner's interest and if a new bid call were made, it would be beneficial to the petitioner.

See publication Words and Phrases for other judicial constructions and definitions.

28. Trial ⚷387(1)

A memorandum opinion is not itself the court's decision or judgment but the findings of fact and conclusions of law constitute the decision of the court. West's Ann.Code Civ.Proc. § 632.

29. Mandamus ⚷174

Findings of fact are necessary in a mandamus action unless waived. West's Ann.Code Civ.Proc. § 1109.

Chickering & Gregory, San Francisco, for petitioner.

Harold C. Brown, Frank M. Brown, Johnson & Stanton, Gardiner Johnson, Marshall A. Staunton, San Francisco, for respondents.

Thomas M. O'Connor, City Atty., William F. Bourne, Public Utilities Counsel, San Francisco, for respondents Ben Benas, Harry D. Ross and City and County of San Francisco.

SULLIVAN, Justice.

Petitioner Baldwin-Lima-Hamilton Corporation, hereafter referred to as Baldwin, seeks a writ of prohibition restraining the respondent superior court from taking further action in a *mandamus* proceeding pending therein, except such as may be necessary to deny a peremptory writ of mandate, discharge the alternative writ issued, and dissolve an injunction *pendente lite.*

The following background facts appear to be generally undisputed. On July 6, 1961, the purchasing department of the City and County of San Francisco, acting under the direction⌊807 of Ben Benas, purchaser of supplies of said City, issued and published contract proposal No. 12625 inviting and calling for the submission of sealed bids for the furnishing and delivery of certain equipment including turbines, governors, valves and pipes for the Canyon Generating Station at the Canyon-Cherry Power Development. Prior to the time specified for closing of bids on August 7, 1961, both Baldwin and the Allis-Chalmers Manufacturing Company, hereafter referred to as Allis, submitted sealed bids. Baldwin's bid was in the sum of $1,356,386. Allis' bid was in the sum of $1,319,105. Benas first took the position that Allis' bid, although the low bid, was invalid because it deviated from the bid invitation in certain material respects. On October 26, 1961, however, acting pursuant to section 95 of the San Francisco Charter and to section 21.9 of the Administrative Code of the City, Benas formally rejected all bids on the above-mentioned contract proposal No. 12625.[1]

On November 20, 1961, Benas issued, as a new invitation, contract proposal No. 12885 for the same equipment. Such proposal contained the following specification under the heading "'Place of Manufacture'": "'All materials, supplies and equipment covered by this contract proposal shall be manufactured in the United States, except as otherwise provided in the Government Code of the State of California. In the event that alloy steel castings for the "solid" type runner required by the specifications are not produced in the United States, such castings produced outside the United States will be acceptable.'"

In response to the above proposal and prior to the time specified for the closing of bids on December 4, 1961, three bids were submitted: (1) A bid by Allis in the sum of $1,308,555 based on the specification that the equipment, except as noted above, be manufactured in the United States. (2) A bid of Baldwin in the sum of $1,337,036 submitted on⌊808 the same basis. (3) An additional bid of Baldwin in the sum of $1,237,036 based on the furnishing of certain component parts manufactured outside the United States.[2]

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[1] Section 95 of said charter dealing, inter alia, with the letting of contracts by bid for the purchase of materials, supplies and equipment provided in relevant part as follows: "'* * * Each such advertisement shall contain the reservation of the right to reject any and all bids. * * *'"

"'The purchaser of supplies with the approval of the chief administrative officer * * * may reject any and all bids and readvertise for bids.'"

Section 21.9 of the Administrative Code included within chapter 21, entitled "'Purchasing Procedure'" provides in relevant part as follows: "'The purchaser, with the approval of the chief administrative officer, may reject any and all bids and readvertise for bids.'"

[2] The purchaser of supplies and the controller assert that each of the above bids should be increased by $770.

On January 18, 1962, Benas announced his intention to award the contract to Baldwin upon the basis that the additional bid of Baldwin (bid No. 3 above) in the sum of $1,237,036 was the lowest and best responsible bid received. Benas concedes here that he actually made his official award of the contract to Baldwin on the above date. It appears that such action on his part was taken on the advice of the City Attorney of San Francisco, Benas' counsel before us, upon the theory that the "place of manufacture" specification included in the contract proposal and set forth by us above, was illegal and therefore to be disregarded since it was in conflict with the "supremacy clause" of the Constitution of the United States (article VI, clause 2) and certain treaties and trade agreements.

Allis, therefore, on January 24, 1962, and before the awarded contract was certified by Harry D. Ross, the Controller of the City and County of San Francisco, in accordance with applicable provisions of the City's charter, filed in the respondent superior court its "Petition for Writ of Mandate and Injunctive Relief," the pending proceedings of which we are now asked to restrain.

The petition for writ of mandate is directed against Benas and Ross and contains allegations setting forth in substance the above facts with reference to the two contract proposals, the submission of the two bids on August 7 in response to the first proposal No. 12625, the receipt of notification by Allis from Benas that its bid, although low, was invalid because it contained certain material reservations, conditions and deviations from the invitation for bids and that it was the intention of Benas to award the contract to Baldwin, the subsequent rejection by Benas on October 27 of both bids, the three bids received in response to the second proposal No. 12885 thereafter issued, the above "place of manufacture" clause and the ultimate decision of Benas to award the contract to Baldwin. So far as is pertinent here, the petition contains the following additional allegations: that Allis is a Delaware corporation, with its home office in Milwaukee, Wisconsin, organized and licensed to transact business in California, including the 809
City and County of San Francisco; that Benas' action in rejecting Allis' first bid on August 7 "was wrongful, illegal and unlawful" in that such bid was the lowest responsible bid received, was without reservation or deviation from the contract proposal and therefore "should have resulted in the award of said contract" to Allis; that Baldwin, in submitting on December 4, in connection with the second proposal No. 12885, its additional bid based on furnishing component parts from *without* the United States, committed a material deviation from the "place of manufacture" clause and thus the contract proposal; that Baldwin's sole purpose in submitting such a bid was to obtain a competitive advantage over other bidders and as a result Baldwin did obtain such an advantage of not less than $250,000; that the contemplated action by Benas and Ross would be arbitrary and capricious and an abuse of discretion, causing great and irreparable damage to Allis; and that Allis "is the party beneficially interested herein." The prayer of such petition was that an alternative writ of mandate issue directed to Benas and Ross, commanding them "to award the contract * * * to Petitioner as the lowest responsible bidder therefor * * * and to refrain from proceeding to award or certify said contract to Baldwin * * * or to any person other than Petitioner * * * [and] [f]or a temporary restraining order and for an Injunction Pendente Lite enjoining and restraining said respondents * * * [and all persons acting for them] from proceeding with the award or certification of the said contract * * * to Baldwin * * * or to any bidder or person other than Petitioner pending the final determination of this action." The alternative writ of mandate was issued forthwith on January 24, 1962.

On February 6, 1962, Benas and Ross, the respondents below, filed their return and answer to the alternative writ and Baldwin, upon leave of court, filed a complaint in intervention "uniting with the respondents in resisting the claims of petitioner."[3] On the same day Baldwin filed a demurrer.

[1] Since Baldwin is an intervener on the side of the respondents Benas and Ross, its complaint in intervention is in effect an answer to Allis' petition. (Cf. People ex rel. Fogg v. Perris Irrigation District (1901) 132 Cal. 289, 291, 64 P. 399, 773.) Such complaint admits in general substance ⊥810 the background facts of the invitations for bids, the specifications as to place of manufacture, the bids submitted on each contract proposal, and the proposed awarding of the contract to Baldwin on its bid submitted on proposal No. 12885; alleges that prior to the rejection of Allis' bid opened on August 7, 1961, Benas requested opinions of counsel as to the lawfulness of such bid, copies of which opinions by the Public Utilities Counsel and by the City Attorney of San Francisco are attached to the complaint as exhibits and incorporated therein; denies that Allis' bid on the second contract proposal was the lowest responsible bid; denies that by submitting its additional bid (bid No. 3 above) it committed a material deviation from the specifications; denies that the purpose or effect of such bid was to secure for Baldwin a competitive advantage; alleges in substance that Baldwin's above bid of $1,237,036 on the second contract proposal No. 12885 was the lowest and best bid received which the respondents had the right and duty to accept and certify; alleges that prior to determining to award said contract to Baldwin, Benas requested the opinion of counsel as to its lawfulness, a copy of which opinion of the City Attorney of San Francisco is attached to the complaint as an exhibit and incorporated therein; and denies that Allis is a party beneficially interested. The foregoing complaint in intervention also alleges that the petition for writ of mandate does not state facts sufficient to constitute a cause of action or sufficient to constitute cause for the issuance of the writ; that the court below has no jurisdiction over the subject matter of the proceeding; and that the action of the respondents in rejecting Allis' bid on the first contract proposal and in determining to award the contract to Baldwin on the second contract proposal was predicated upon advice of their counsel. The prayer of the complaint in intervention was that Allis' petition be dismissed and the alternative writ of mandate discharged.

Baldwin's demurrer also specifies in language similar to the complaint in intervention that the petition fails to state sufficient facts and that the court below lacks jurisdiction of the subject matter.[4]

⊥811 The return and answer of Benas and Ross is in general similarly responsive to the allegations of the petition; admits in substance the essential and, as we have pointed out, undisputed background facts; alleges that during all of the times within which such events occurred there were in effect the provisions of the San Francisco Charter and Administrative Code referred to by us above; denies, as did Baldwin, that the purpose and effect of Baldwin's accepted bid was to secure for the latter a competitive advantage over other bidders; alleges that because of the supremacy clause of the United States Constitution and certain provisions of a federal treaty, Benas "was required to treat and consider the said bid * * * as being a legal and proper bid and the lowest and best bid submitted to him"; denies that Allis was the lowest and best bidder on either contract proposal; alleges that the awarding of the contract to Baldwin is and will be in conformity to the contract proposal; and admits that Allis is a party beneficially interested. The answer and return also set forth three separately stated defenses relating to the bidding in response to the first contract proposal (No. 12625) which it is not necessary for us to detail here.

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[3] The record does not disclose whether any answers or demurrers were filed to the complaint in intervention. (Code Civ.Proc. § 387.)

[4] Apparently no objection was made below to the filing by Baldwin of a demurrer as well as a complaint in intervention although the order for intervention granted leave to file only the latter. Since the legal issues raised by the demurrer are also raised by the complaint in intervention, which is actually an answer to the petition, and since such legal issues can be properly raised by an answer to the petition for writ of mandate (Scott v. Superior Court (1927) 83 Cal.App. 25, 29–30, 256 P. 603), it is not necessary for us to decide whether the demurrer was properly filed below.

The respondent superior court reserving its ruling on the demurrer which had been argued before it, thereupon proceeded to a hearing upon the above-mentioned pleadings.[5] At the conclusion of the hearing, the court overruled the demurrer and denied Baldwin's motion to strike all of the evidence, oral and documentary. On April 26, 1962, it issued a memorandum opinion holding that the "place of manufacture" provision of contract proposal No. 12885 was in violation of the "supremacy clause" of the United States Constitution and certain trade treaties and that "[t]his illegal provision inserted in the specifications and in the contract proposal defeats the fundamental requirement in awarding public contracts that the call for bids clearly apprise prospective bidders of the terms, conditions and specifications in such a manner as to promote free, open, honest, competitive bidding on equal terms equally open 818 to all prospective bidders. No contract can be awarded on Contract Proposal * * * [No. 12885] as published and issued on or about November 20, 1961." The opinion further stated therein that the petition for a peremptory writ of mandate compelling Benas to award the contract to Allis on its bid "is hereby denied and the alternative writ of mandate * * * hereby dissolved"; and that Benas "be and he is hereby enjoined pendente lite, from awarding a contract" to Baldwin on either of its bids "or to any other person, firm or corporation on that certain contract proposal * * * [No. 12885]. * * *"

Thereupon, and before any additional proceedings were taken in the court below, the petition for writ of prohibition now before us, was filed with the Supreme Court on May 25, 1962, and thereafter transferred to this court on June 7, 1962. We granted an alternative writ of prohibition on June 21, 1962. A return and answer to the alternative writ has been filed by Allis and a separate answer and return filed by Benas, Ross and the City and County of San Francisco, all of whom have been named respondents in the instant proceedings.

[2-4] As it is stated in City of Los Angeles v. Superior Court (1959) 51 Cal.2d 423, 429-430, 333 P.2d 745, 748: "The writ of prohibition is an appropriate remedy to arrest the proceedings of a court when there is not a plain, speedy, and adequate remedy in the ordinary course of the law and when the proceedings of the court are without or in excess of its jurisdiction. Code Civ.Proc. §§ 1102, 1103. The absence of another adequate remedy was determined by this court when we granted an alternative writ. Cf. Atkinson v. Superior Court, 49 Cal.2d 338, 342, 316 P.2d 960; Bowles v. Superior Court, 44 Cal.2d 574, 582, 283 P.2d 704. To permit the issuance of prohibition it is not necessary that there be a lack of jurisdiction over the subject matter or parties in the fundamental sense but only that there be a want or excess of the power of the court as defined by statute or by rules developed and followed under the doctrine of *stare decisis*. Tide Water Associated Oil Co. v. Superior Court, 43 Cal.2d 815, 821, 279 P.2d 35; Abelleira v. District Court of Appeal, 17 Cal.2d 280,

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[5] In the proceedings for a writ of prohibition now before us, the parties have admitted that the demurrer was argued on February 6, and taken under submission, that further hearings for the taking of testimony were held on February 7, 8, 16, 28 and March 14, 1962, and that on April 18, 1962, in chambers, the court announced its ruling on the demurrer and motion to strike. The record before us does not disclose any minute or written orders in reference to the above.

287 et seq., 109 P.2d 942, 132 A.L.R. 715." (See also City & County of San Francisco v. Superior Court (1959) 53 Cal.2d 236, 1 Cal.Rptr. 158, 347 P.2d 294.)

Baldwin contends before us that Allis' petition for a writ of mandate filed in the respondent court does not state facts sufficient to constitute cause for the issuance of a writ of mandate or to entitle Allis to incidental injunctive relief; that as a result, any further proceedings in said court, except such as may be necessary to deny the peremptory writ of mandate and discharge the alternative writ, are in excess of that court's jurisdiction; and that more specifically, the action which the respondent court has announced it intends to take in preventing Benas from awarding the contract in question to Baldwin or any other bidder by issuing an injunction *pendente lite* and in addition in holding that the bid call is illegal and that therefore no contract can be awarded pursuant thereto, is and will be in excess of the court's jurisdiction.

In the foregoing position, Baldwin is joined by Benas, Ross and the City and County of San Francisco who urge that the bid call was and is legal and that the respondent court should be restrained from taking action of any kind which will prevent the awarding of the contract to Baldwin.

Allis, on the other hand, takes the position that the intended action of the court below is not in excess of its jurisdiction and that the peremptory writ of prohibition here sought should be denied.

We therefore proceed to examine the proceedings below and to determine whether the judicial action announced to be taken therein is in excess of the jurisdiction of the respondent superior court.

[5, 6] It is elementary that the remedy of mandamus which was sought below issues only "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station" (Code Civ.Proc. § 1085) upon the petition "of the party beneficially interested" (Code Civ.Proc. § 1086) and will not lie to control discretion conferred upon a public officer or agency. (Lindell Co. v. Board of Permit Appeals (1943) 23 Cal.2d 303, 315, 144 P.2d 4; Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 326, 253 P.2d 659.) It is also well settled, and the parties before us admit, that two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent (Faulkner v. California Toll Bridge Authority, supra; Sherman v. Quinn (1948) 31 Cal.2d 661, 664, 192 P.2d 17; Browning v. Dow (1923) 60 Cal.App. 680, 682, 213 P. 707); and (2) a clear, present and beneficial right in the petitioner to the performance of that duty (Parker v. Bowron (1953) 40 Cal.2d 344, 351, 254 P.2d 6). (See generally 3 Witkin, Calif. Procedure, pp. 2520 et seq.; 32 Cal.Jur.2d, Mandamus, § 6, p. 122.)

So far as is pertinent here, the petition for writ of mandate alleges that Benas issued the second contract proposal No. 12885 on November 20, 1961;[6] that its specifications included the "place of manufacture" provision above-mentioned; that in response to the proposal Allis submitted one bid in the sum of $1,308,555 and Baldwin submitted two bids, one for $1,337,036 and an "alternative proposal" in the sum of $1,237,036 "based upon the furnishing of component parts procured outside the United States"; that Allis' bid "was the lowest responsible bid submited in accordance with the Contract Proposal and the specifications"; that Baldwin, in submitting its alternative bid "committed a material deviation and variance" from the "place of manufacture" specifications; that although Allis demanded of Benas that he award the contract to it as the lowest responsible bidder, the latter announced his intention to award the contract to Baldwin on the basis that its alternate bid was the lowest and best responsible bid received.

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[6] We do not deem it necessary to consider the first contract proposal of July 6, 1961, since Benas, as authorized by the San Francisco Charter and Administrative Code, rejected all bids submitted in response thereto.

As already set forth by us in detail, the respondents Benas and Ross filed an answer and return and Baldwin filed a complaint in intervention and demurrer to meet Allis' petition. Since Baldwin's complaint was in legal effect an answer (People ex rel. Fogg v. Perris Irrigation District, supra, 132 Cal. 289, 291, 64 P. 399, 773) all of the other parties actually answered the petition. Attached to Baldwin's complaint in intervention (answer) are three exhibits consisting of three opinions of Benas' counsel including the City Attorney's opinion of December 29, 1961, the authenticity of which exhibits has not been disputed on this record.

[7] In determining whether Allis' petition filed in the respondent superior court shows the two basic ingredients requisite for mandamus and therefore whether said court's intended action is in excess of its jurisdiction, we are entitled to consider the above pleadings of the opposite parties and the exhibits attached thereto. Any defects in Allis' petition may be aided or cured by averments in the above pleadings of ⊥815 the opposite parties. (2 Witkin, Calif. Procedure, pp. 1511–1512; see 39 Cal.Jur.2d, Pleading, §§ 355–356, pp. 482–483 and cases therein cited.)

We note that Baldwin in its petition for a writ of prohibition filed with this court alleges, and Allis in its return and answer thereto admits, that Baldwin's demurrer, specifying insufficiency of facts and lack of jurisdiction, was argued prior to the taking of evidence but ruling thereon reserved by the court below, that Baldwin maintained throughout the subsequent hearings that the demurrer should be sustained, and that at the close of the testimony Baldwin's motion to strike all the evidence, oral and documentary, was denied and its general demurrer thereupon overruled. This is confirmed by the following statement of counsel for Baldwin found in the transcript of the proceedings below which has been lodged with this court: "Before I commence any testimony with this witness of mine, the Court will recall that I have urged and still urge to the Court that the Court has no jurisdiction in this case, based on the pleadings filed with the Court, and I have a demurrer and I am still urging that demurrer and I am not waiving it, it is a jurisdictional question anyway. And I am calling a witness at this time."

[8, 9] On oral argument before us, counsel for Baldwin contended that in the light of the foregoing record we should not consider anything beyond Allis' petition for a writ of mandate. We do not agree. Baldwin did not stand on its demurrer. As we have already shown, it filed simultaneously with its demurrer a complaint in intervention which was in legal effect an answer. By so doing it permitted the doctrine of aider to come into play. As in the case of a complaint, if Allis' petition is defective or lacks an averment of any essential fact, it may be aided or cured by the averments of the answers filed thereto, even though a demurrer to the sufficiency of the petition, filed by one of the parties, has been erroneously overruled. (Cf. Daggett v. Gray (1895) 110 Cal. 169, 172, 42 P. 568; Kreling v. Kreling (1897) 118 Cal. 413, 420, 50 P. 546; Savings Bank of San Diego County v. Barrett (1899) 126 Cal. 413, 418, 58 P. 914; Bledsoe v. Stuckey (1920) 47 Cal.App. 95, 101–102, 190 P. 217; Mann v. Mueller (1956) 140 Cal.App.2d 481, 484, 295 P.2d 421.)

The relief sought by Allis in the respondent court is twofold. In the prayer of its petition Allis seeks a writ of mandate commanding Benas and Ross (1) to award the contract to ⊥816 Allis as the lowest responsible bidder, and (2) to refrain from proceeding to award or certify the contract to Baldwin or to any person other than Allis.

[10, 11] Clearly Allis' petition, even when considered with the other pleadings, does not establish any enforceable duty on the part of Benas and Ross to award the contract to Allis. True, the petition alleges that Allis' bid was the "lowest responsible

bid submitted in accordance with the Contract Proposal and specifications" and that Allis was "in fact the lowest and best responsible bidder." But these allegations are purely conclusionary, the apparent theory of the pleader being that the alternate low bid of Baldwin based on furnishing foreign components should be disregarded, despite the fact that it was accepted by Benas in the exercise of his discretion, and the acceptance of the next lowest bid—Allis' bid—be ordered by the court below quite apart from any discretion in Benas to accept or reject any bid. It is not, and of course could not be, alleged that Benas was under a duty to accept any bid submitted. On the contrary, under the Charter and Administrative Code of San Francisco, he could reject any and all bids.

In Judson Pacific-Murphy Corp. v. Durkee (1956) 144 Cal.App.2d 377, 301 P.2d 97, the petitioner Judson, the second lowest bidder, brought a proceeding in mandamus against the director of public works to restrain the latter from awarding a bridge contract to the lowest bidder upon the claim that such bidder was not properly qualified and licensed and to compel the director to award the contract to Judson as the next lowest, qualified and responsible bidder. In affirming the denial of such relief, this court, speaking through Mr. Justice Peters, said: "It will be noted that appellant in its petition prays that respondent be ordered to reject intervener's bid and be ordered to award the contract to Judson. It is quite clear that neither the trial court nor this court has the power to order respondent to award the contract to Judson, even if the contract awarded to United States Steel Corporation were a nullity. This is so because the notice to contractors expressly notified prospective bidders that the Director of Public Works reserved the right to reject any or all bids. * * *

"It is apparent that were the court to order respondent to award the contract to Judson as the next lowest qualified bidder (assuming, contrary to the fact, that United States Steel Corporation was not qualified), it would be substituting the court's judgment and discretion for those of respondent. 817 Clearly, the call for bids and the law confers on the Director the duty of exercising his judgment as to whether it is in the best interests of the state to award the contract to the lowest bidder. The lowest qualified bidder has no legal right to compel the acceptance of his bid. Charles L. Harney, Inc., v. Durkee, 107 Cal.App.2d 570, 237 P.2d 561 [31 A.L.R.2d 457]; see also Stanley-Taylor Co. v. Board of Supervisors, 135 Cal. 486, 67 P. 783; Laurent v. City and County of San Francisco, 99 Cal.App.2d 707, 222 P.2d 274." (144 Cal.App.2d at pp. 381–382, 301 P.2d at pages 101, 102.

[12] So, in the case before us, the respondent superior court had no power to order Benas to award the contract to Allis, even if it is assumed that Baldwin's low bid should be disregarded. Benas had the authority to reject any and all bids and in the exercise of his discretion to decide whether to award the contract to the lowest bidder, whoever that might be. He was under no legal compulsion to award it to Allis.

We are mindful of the fact that in the present posture of this case, the respondent superior court has not indicated an intention to compel the award of the contract to Allis and has actually indicated a contrary intention by stating in its memorandum opinion that it has denied or will deny the peremptory writ of mandate and discharge the alternative writ. Baldwin, of course, makes no plea before us to arrest such judicial action obviously favorable to it. However we have considered the foregoing question of the trial court's power to order an award of the contract to Allis because it has been presented to us by the parties and because we feel it is necessary to a full determination as to whether the proceedings below are in excess of such court's jurisdiction as that term relates to proceedings in prohibition.

We now turn to the second aspect of the relief sought in the court below and proceed to discuss whether such court, while admittedly having no power to compel an award of the contract to Allis, has the power to restrain Benas and Ross from proceeding to award or certify the contract to Baldwin or any other person.

[13] The resolution of this question turns upon the legality and validity of the City's contract proposal of November 20, 1961. The pleadings establish that all three bids which generate the instant controversy were submitted to Benas in response to such proposal and that such proposal included the "place of manufacture" provision set out by us above. This provision ⌊818 required that the materials, supplies and equipment furnished under the proposal "'be manufactured in the United States, except as otherwise provided in the Government Code of the State of California.'" It is not disputed that the above provision was included in the proposal or bid call in order to comply with the California Buy American statute (Gov.Code § 4303[7]). The above provision in the bid call however contained an express exception to the effect that if certain alloy steel castings for runners required by the specifications were not produced in the United States, they would be acceptable from outside the United States.

The record shows that all of the three bids involved were presented on the basis that the so-called runners would be manufactured in Switzerland since they were not ordinarily manufactured within the United States. All bids therefore took advantage of the permissible exception created by the "place of manufacture" provision. It is also established by the record that Allis' bid in the sum of $1,308,555 (bid No. 1 above) and Baldwin's bid in the sum of $1,337,036 (bid No. 2 above) were both submitted on the basis that all materials and equipment would be manufactured in the United States, except of course the runners which were to be from Switzerland. Both bids were therefore responsive to the bid call in all respects including the specifications prescribed as to place of manufacture. In comparison, Allis' bid (bid No. 1) was the lower in amount. The record also establishes that Baldwin's separate bid (bid No. 3) in the amount of $1,237,036 which Benas accepted, was based on furnishing, in addition to the runners from Switzerland, certain parts such as governors, valve controls and light weldment which would be manufactured either in Japan or Canada. In this respect it is clear that such bid was not responsive to the place of manufacture provision of the bid call.

However, it is also clear, under the authorities relied upon by the City Attorney of San Francisco in his opinion rendered to Benas, adopted by the respondent superior court ⌊819 in its memorandum opinion, recognized by Baldwin and not disputed by Allis in their arguments before us, that the California Buy American statute and the above "place of manufacture" clause in the bid call of November 20, 1961, are unenforceable in the situation now before us since they conflict with certain treaties and agreements and thus with the "'supreme law of the land.'"

At Geneva on October 30, 1947, the United States and 22 other nations entered into a "General Agreement on Tariffs and Trade" (61 Stat., Part 5) which for brevity we will hereafter refer to as GATT. Canada was an original signatory thereto. Japan became a signatory thereto effective September 10, 1955.[8]

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[7] Section 4303 provides: "The governing body of any political subdivision, municipal corporation, or district, and any public officer or person charged with the letting of contracts for (1) the construction, alteration, or repair of public works or (2) for the purchasing of materials for public use, shall let such contracts only to persons who agree to use or supply only such unmanufactured materials as have been produced in the United States, and only such manufactured materials as have been manufactured in the United States, substantially all from materials produced in the United States."

[8] Pursuant to Protocol of Terms of Accession of Japan to GATT dated at Geneva June 7, 1955, and "entered into force" September 10, 1955. (See Vol. 6 United States Treaties and Other International Agreements, p. 5833. Publication of U. S. Printing Office, 1956.)

Paragraph 2 of Article III of Part II of GATT (61 Stat., Part 5, p. A18) provides: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use. * * *"

[14] Paragraph 5 of Article III of Part II (61 Stat., Part 5, p. A19) provides: "The provisions of this Article shall not apply to the procurement by governmental agencies of products purchased for governmental purposes and not for resale or use in the production of goods for sale, * * *."

Under GATT therefore the products of Canada and Japan imported into the United States must be treated no less favorably than like products of such nation of destination. The exception contained in paragraph 5, which we quote immediately above, is not operative in the instant situation since the turbines and other equipment are for use in the generation of electric power for resale and hence for "use in the production of goods for sale." Electricity is a commodity which, like other goods, can be manufactured, transported and sold. (See Terrace Water Co. v. San Antonio Light & Power Company (1905) 1 Cal.App. 511, 513, 82 P. 562.)

[15, 16] The United States Constitution provides in Article VI thereof that "* * * Treaties made * * * under
⌊820 the Authority of the United States, shall be the supreme Law of the Land; * * *." When a state statute conflicts with any such treaty, the latter will control. (Clark v. Allen (1947) 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633; United States v. Pink (1942) 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796.) Compacts and similar international agreements, such as GATT, which are negotiated and proclaimed by the President are "treaties" within the above supremacy clause of the Constitution. (United States v. Belmont (1937) 301 U.S. 324, 330–332, 57 S.Ct. 758, 81 L.Ed. 1134.)

The written opinion of the City Attorney of San Francisco to Benas under date of December 29, 1961, which we find attached as an exhibit to Baldwin's complaint in intervention, follows the above reasoning and authorities to hold that the foreign components proposed to be obtained by Baldwin from Canada and Japan were protected by GATT and that the Japanese components were also accorded " 'most-favored-nation treatment' " under the " 'Treaty of Friendship, Commerce and Navigation,' " signed at Tokyo April 2, 1953. It was in this opinion that the City Attorney advised Benas that the California Buy American statute was superseded by the above treaties and that Benas was required to disregard the factor that Baldwin's low bid (bid No. 3) did not conform to the specifications set forth in the "place of manufacture" provision.[9]

[17] We agree that under the foregoing authorities the "place of manufacture" provision contained in the November 20, 1961, bid call has no operative effect in the instant case to restrict or preclude the furnishing of material or equipment produced in Canada or Japan. The result therefore is a nullification of the provision as effectively as if it had not been included in the bid call in the first place. It is superseded, or in other words replaced, by the treaty provisions.

What, if any, effect therefore do the foregoing conclusions have upon the contract proposal or bid call itself which clearly prescribed that bids submitted in response thereto should comply with "place of manufacture" specifications now held to be superseded? Baldwin and the other parties hereto who join with it maintain

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[9] The city attorney also relied upon the opinion found in 34 Ops.Cal.Atty.Gen. 302 which, in a generally similar situation, reaches the same conclusions with respect to the GATT agreement and the supremacy clause.

⊥821 that the original bid call ⊥ and advertising procedure are in no way affected. Baldwin urges that the treaties are the supreme law of the land which "is by operation of law a necessary part of the terms and conditions of every contract, and, hence, of any contract specifications" issued by Benas. The city attorney in his letter of opinion to Benas referred to by us above disposes of the problem of noncompliance with the City's own specifications by taking the position that the "treaty provisions must as a matter of law and to the extent to which applicable be read into the City's proposal as part and parcel thereof." In the instant proceeding before us, the City and its officials offer the explanation that, although Baldwin's low bid did not propose to furnish materials of American manufacture as the City itself specified, such bid was "validated by the interposition (upon the 'Buy American' clause in the City's bid proposal) of the 'supremacy' clause of Article VI of the U. S. Constitution." In plain language, the gist of all of the foregoing arguments is this: the bid call may not mean what it says when specifying Amercan goods, but it is still a valid proposal because the bidder can always determine for himself what has to be read into it. This is indeed a new concept in the letting of public contracts.

[18] It is a long and well-established rule that where municipal contracts are required to be let upon public bidding, the proposals and specifications inviting such bids must be sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard and must be free of any restrictions tending to stifle competition. (43 Am.Jur., Public Works and Contracts, § 36, p. 777; 63 C.J.S. Municipal Corporations § 998, p. 573; 10 McQuillin, Municipal Corporations, § 29.30, p. 268.) The San Francisco Charter required such full and fair competitive bidding in the instant case.

[19] In conformity with the mandate of section 95 of the Charter, the respondent Benas in advertising for bids incorporated in his proposal a specific requirement that (except for the castings for runners) "[a]*ll* materials, supplies and equipment * * * shall be manufactured in the United States, except as otherwise provided in the Government Code of the State of California." (Emphasis added.) The plain meaning of this language is that the bid must be based on goods of American manufacture or it will not be accepted. The bidder is apprised ⊥ of certain possible exceptions in the ⊥822 Government Code (not applicable to the problem at hand), the reference apparently being to sections 4300–4305. Nothing contained therein or in any other part of the Government Code could in any way inform the bidder of exceptions arising because of treaty provisions. Nothing in the contract proposal states that the "buy American" specifications obtain except, as for example, "as otherwise provided in certain treaties and general trade agreements of the United States." On the contrary, the bidder is in effect told that *all* materials must be of American manufacture, whether they come within favorable treatment provisions of treaties or not. Apart from the runners, the bid call requires American manufactured goods without exception.

We are of the opinion that the "place of manufacture" provision in the bid call of November 20, 1961, failed to afford a basis for full and fair competitive bidding upon which the contract in question could be legally awarded. It cannot be reasonably concluded that prospective bidders could infer from the specifications of the bid call that, despite its clear language to the contrary, they could submit acceptable bids covering materials of foreign manufacture. It is a reasonable assumption that the clear and certain language of the bid call would indeed have the opposite result and would deter persons from submitting bids covering goods of foreign manufacture, thus reducing the number of bidders and defeating the real objectives of competitive bidding. (See generally 43

Am.Jur., Public Works and Contracts, § 26, p. 767.)

[20, 21] We find no merit in Baldwin's argument that specifications which are insufficient to secure full and fair competitive bidding can be corrected or improved by importing therein by legal implication ("reading into them") provisions upon which the specifications are completely silent. While Calpetro Producers Syndicate v. Chas. M. Woods Co. (1929) 206 Cal. 246, 252, 274 P. 65, and Standard Box Co. v. Mutual Biscuit Co. (1909) 10 Cal.App. 746, 750, 103 P. 938, cited by Baldwin, state the established rule that terms implied by law become as much a part of a contract as those expressly written therein, neither case applies such principle to bidding specifications in the way here urged by Baldwin. Nor is there merit in the argument of the other respondents joined with Baldwin that the bid call is valid when made since it cannot be then known that foreign products will be involved and the conflict between the bid call and the treaties thus provoked. ⊥823 The simple answer ⊥ to this is that the bid call plainly specifies that foreign products must not be used.

[22] To insist, as the City and those joining with it do, that the bidder must read the treaty provisions into the bid call is absurd and unrealistic. Properly conducted competitive bidding should not compel a bidder to question the clear language of the proposal and to search out, examine and construe various public documents upon the contingency that they may in some way affect it. This would require the bidder to become to a great extent a lawyer, in some degree a judge and, perhaps, in no small way a clairvoyant.

We therefore hold that the "place of manufacture" provision in contract proposal No. 12885 issued by Benas on November 20, 1961, is, in the instant case, illegal and invalid as being in conflict with the aforementioned treaties and trade agreements of the United States, that such provision cannot be cured or corrected by importing therein by legal implication the pertinent clauses of such treaties and agreements, and that, as a result, it can be reasonably concluded by the respondent court that such provision is further invalid as being insufficient in the instant case to provide for full and fair competitive bidding upon a common standard.

[23, 24] The awarding of a contract by a public official pursuant to specifications which are illegal and invalid and which fail to provide for full and fair competitive bidding, is, we think an abuse of discretion. It is within the power of the respondent superior court to determine whether or not an abuse of discretion exists in the instant case. While mandamus will not lie to control the discretion exercised by a public officer or board (Lindell Co. v. Board of Permit Appeals, supra, 23 Cal.2d 303, 144 P.2d 4; Faulkner v. California Toll Bridge Authority, supra, 40 Cal.2d 317, 253 P.2d 659) it will lie to correct an abuse of discretion by such officer or board. (Inglin v. Hoppin (1909) 156 Cal. 483, 491, 105 P. 582; Walker v. City of San Gabriel (1942) 20 Cal.2d 879, 881, 129 P.2d 349, 142 A.L.R. 1383; Roussey v. City of Burlingame (1950) 100 Cal.App.2d 321, 326, 223 P.2d 517; Bess v. Park (1955) 132 Cal.App.2d 49, 55, 281 P.2d 556; Palmer v. Fox (1953) 118 Cal.App.2d 453, 457, 258 P.2d 30; Naughton v. Retirement Board of San Francisco (1941) 43 Cal.App.2d 254, 257, 110 P.2d 714; see generally 17 McQuillin, Municipal Corporations, § 51.18.)

⊥[25] The issue of the abuse of discretion on the part of Benas in awarding and on the part of Ross in certifying the contract to Baldwin on its so-called alternative bid has been properly raised in the court below. As we have pointed out, all of the essential facts bearing upon the submission of the three bids and upon the legality and validity of the place of manufacture provision are established by the pleadings and exhibits attached thereto. In addition, Allis has alleged that the sole purpose of Baldwin in submitting its al- ⊥824 ternative bid "was to give it a competitive advantage over any and all bidders complying with the provisions of the specifications, * * *". This issue has been raised by the denials of the other parties. Finally Allis alleges that "unless restrained" by the respondent court Benas and Ross will proceed with the award of the contract to Baldwin "in conflict with and in disregard of the provisions of the Charter and ordinances of the City and County of San Francisco, the provisions of the Contract Proposal and the specifications; that such action on the part of said respondents in certifying and awarding said contract would be arbitrary and capricious and *an abuse of discretion*, * * *". (Emphasis added.) While the last language is conclusionary, it is not fatal since the essential facts of the controversy are found in the pleadings and it does significantly point up that the issue of the legality of the bid call and of Benas' abuse of discretion in proceeding to make an award pursuant to it was before the court. Contrary to Baldwin's claim, the respondent court was not "creating and determining issues not raised by the parties or their pleadings."

[26] We therefore hold that it is within the power of the respondent court to issue a writ of mandate to correct "an abuse of discretion" commanding Benas and Ross according to the prayer of the petition to refrain from proceeding to award or certify said contract to Baldwin or to any other person.

[27] Allis was peculiarly affected by such alleged abuse of discretion. It was the only other bidder. Of the two bids which were responsive to all of the bidding specifications including those referring to place of manufacture, Allis' bid was the lower. Benas did not reject any of the bids submitted. His decision to disregard the place of manufacture provision therefore had a direct and injurious result on Allis. If relief is granted below, Allis will have the opportunity to bid on a new invitation which presumably will provide full and fair competitive bidding. Thus the granting of the writ will sub⊥825serve and protect Allis' interest and if a new bid call is made will be beneficial to Allis. (Parker v. Bowron, supra, 40 Cal.2d 344, 351, 254 P.2d 6.) We are of the view therefore that Allis is a "party beneficially interested" and as such entitled to invoke the remedy of mandamus. Indeed the City and its officials admit this.

We wish to make clear that we do not say that the remedy invoked should issue. The propriety of its issuance is not before us. Our holding is that the respondent court has the power to issue the writ and that such action on its part is not without or in excess of its jurisdiction.

[28, 29] Finally, we point out that the record before us is unclear in certain important respects. While the respondent court states in its memorandum opinion that the bid call is illegal and that no contract can be awarded on it, it also states that Allis' petition for a peremptory writ of mandate compelling Benas "to award a contract to petitioner on its bid 'A' [bid No. 1 above] is hereby denied and the alternative writ * * * is hereby dissolved." Since the parties have not brought before us the minutes of the court below, we have no evidence that the foregoing and other language concluding the opinion are actually minute orders of the court. A memorandum opinion is not itself the court's decision or judgment. (De Cou v. Howell (1923) 190 Cal. 741, 751, 214 P. 444; Lord v. Katz (1942) 54 Cal.App.2d 363, 367, 128 P.2d 907.) The findings of fact and conclusions of law constitute the decision of the court. (Code Civ.Proc. § 632; De Cou v. Howell, supra.) Findings of fact are necessary in a mandamus action, unless waived. (Code Civ.Proc. § 1109; Davis v. State Board of Optometry (1939) 35 Cal.App.2d 428, 434, 95 P.2d 959.) In the instant case certain factual issues were presented to the court below. In addition, Baldwin alleges in its petition filed with us and Allis admits that special findings of fact and conclusions of law have been demanded but not as yet submitted. All of

the foregoing points up the fact that although the respondent court is alleged to have proposed certain judicial action, it has not yet made its decision.

We note that the court orders or will order that the peremptory writ compelling Benas to award the contract to Allis will be denied. This is in conformity with our views previously expressed herein. It is not clear to us whether or not the respondent will issue a peremptory writ restraining 826 Benas from awarding the contract to Baldwin or anyone else. This we have shown would be within its powers. No mention is made of this phase of the relief which is sought in Allis' petition. Instead the court indicates that it orders or will order Benas enjoined *pendente lite* from awarding the contract to Baldwin or any other person. The opinion does not indicate the nature of the "lis" that will be "pending." In addition, while the court states and all parties concede that it will hold that "[n]o contract can be awarded on Contract Proposal * * * [No. 12885]," the court's opinion does not indicate how such holding will be translated into and implemented by an enforceable judgment.

Our foregoing observations are not intended to be and should not be construed as critical of the court below, which was prevented from completing its decision by the instant proceeding in prohibition. It may be that the court contemplated a writ of mandate consonant with our present views. On the other hand, it may be that the court intended permanent relief of an injunctive nature with the injunction *pendente lite* as auxiliary thereto. There is no indication in the record that the court intends to use a permanent injunction rather than mandate to enforce its ruling that no contract can be awarded on the bid call. We therefore do not feel called upon to determine whether such type of relief would be within the court's powers.[10] We assume that the court will not exceed its jurisdiction in this respect.

The alternative writ of prohibition is discharged and the petition for a peremptory writ is denied.

BRAY, P. J., and SALSMAN, J., concur.

209 Cal.App.2d 196

196 **The PEOPLE, Plaintiff and Respondent,**
v.
Gilbert Leho KIIHOA, Defendant and Appellant.
Cr. 7423.

District Court of Appeal, Second District,
Division 3, California.
Nov. 1, 1962.

Prosecution for selling narcotics. From a judgment of the Superior Court, Los Angeles County, Julian Beck, J., the defendant appealed. The District Court of Appeal, Shinn, P. J., held that fact that police had formerly pursued an erroneous procedure of waiting until informers had left jurisdiction before commencing narcotics prosecutions so as to protect the informers from reprisal and maintain their usefulness, and fact that such methods had resulted in reversal of defendant's conviction on the first trial did not preclude the present re-trial where the informer had once again become available as a witness and where informer's absence from state at time of first trial had not been procured by state.

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[10] As an illustration, in Cullinan v. Superior Court (1938) 24 Cal.App.2d 468, 475, 75 P.2d 518, 77 P.2d 471, 472, it is stated by the Supreme Court upon its denial of a hearing that "since the superior court has jurisdiction to entertain the proceeding in *mandamus* pending before it, that court has the power to decide all questions properly presented to it in such a proceeding, and any limitation placed on that power in the opinion and order denying the writ of prohibition was inappropriate."

Affirmed.

1. Criminal Law ⚷1189

Fact that police had formerly pursued erroneous procedure of waiting until informers had left jurisdiction before commencing narcotics prosecutions and fact that such method had resulted in reversal of conviction of defendant did not preclude re-trial where informer had again become available as a witness and where informer's absence from state at first trial had not been procured by state. West's Ann.Health & Safety Code, § 11500; U.S.C.A.Const. Amends. 5, 6; West's Ann.Const. art. 1, § 13, cl. 4; West's Ann.Pen.Code, §§ 1262, 1382.

2. Witnesses ⚷216

Prosecution may not be maintained while identity of an informer is wilfully concealed after proper demand for disclosure.

3. Criminal Law ⚷1171(1)

Prosecutor's claimed unnecessary denunciation of narcotic traffic was not basis for reversal where his remarks conveyed no information not of common knowledge, where alleged departures from record had been objected to and corrected at trial, and where remaining objectionable remarks had not been objected to at trial.

4. Criminal Law ⚷1037(1)

Claim of misconduct on part of prosecutor cannot be sustained in absence of objection at trial unless statements were productive of harm so grievous that it could not be removed by an admonition of the court.

5. Poisons ⚷9

Prosecution for selling narcotics based upon direct and unequivocal testimony of police officer that he had purchased heroin from defendant as charged in the information was based upon evidence sufficient to justify guilty verdict. West's Ann.Health & Safety Code, § 11500.

Harry Margid, Los Angeles, under appointment by District Court of Appeal, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Jack K. Weber, Deputy Atty. Gen., for respondent.

⊥SHINN, Presiding Justice. ⊥197

This is an appeal from defendant's second conviction of the sale of narcotics in violation of Health and Safety Code, section 11500. The conviction was reversed (People v. Kiihoa, 53 Cal.2d 748, 3 Cal. Rptr. 1, 349 P.2d 673), on the ground that appellant was denied a fair trial in that the prosecution of the charge was deliberately postponed until an informer who participated in the sale had departed from the jurisdiction.

Prior to commencement of his second trial, defendant moved to dismiss the action on the ground that because of the State's conduct as set forth in People v. Kiihoa, supra, 53 Cal.2d 748, 3 Cal.Rptr. 1, 349 P.2d 673, he was denied his constitutional right to a speedy trial (U. S. Constitution, Sixth Amendment; California Constitution Article I, section 13). The motion was denied, trial was had, the informer was produced and testified against defendant.

From the judgment defendant appeals on the grounds (1) he was denied a speedy trial for the reason urged on his motion for dismissal or, alternatively, was placed once in jeopardy so as to preclude his second trial (U. S. Constitution, Fifth Amendment; California Constitution, Article I, section 13, cl. 4); (2) he was deprived of a fair trial by the prosecuting attorney's purported appeal to passion and prejudice in argument to the jury; and (3) the evidence was insufficient to justify the verdict.

There is no contention, nor does it appear that the time limit set forth in Penal Code, section 1382 (implementing the speedy trial guarantee) was exceeded before either the first or the second trial

[1] As noted in People v. Kiihoa, supra, 53 Cal.2d 748 at page 753, 3 Cal.Rptr. 1, 349 P.2d 673, there was no evidence that the absence of the informer was procured by the State nor did such evidence appear at the second trial.

The delay in the arrest of defendant and bringing him to trial until after the informer had left the jurisdiction was pursuant to a mistaken policy of the police to protect informers from reprisal and to maintain their usefulness as informers in future narcotic investigations. It was this erroneous procedure which deprived defendant of a substantial ⊥198 right and furnished the sole ground of the reversal on the former appeal. Such erroneous practices and methods of the police, even though they have resulted in the reversal of convictions, do not preclude a re-trial.

[2–4] The consequences to appellant were the same as they would be to any accused in a similar situation from whom the identity of an informer was concealed after proper demand for disclosure. It cannot be questioned that if, in appellant's case, the informer had not returned to be available as a witness, the People would have forfeited the right to further prosecute the case, just as they would be precluded from maintaining a prosecution while wilfully concealing the identity of an informer. (Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39.) But the informer here was available to defendant as a witness, although he was called only by the People. In the numerous cases in which the identity of an informer was concealed by the State, the deprivation of the right of the accused to disclosure, although ground for reversal of the conviction, has not operated as a bar to a re-trial. The judgment of reversal on the former appeal was in effect a remand for a re-trial. (Pen.Code, § 1262.) In the brief filed by defendant in propria persona the contention is made that the district attorney in argument was guilty of prejudicial misconduct. We have read the record and find this contention to be unwarranted. The district attorney's denunciation of the narcotic traffic and those who engaged in it was carried to an unnecessary extent but it conveyed no information of facts which are not of common knowledge. Furthermore, in addressing the jury the attorney for appellant gave his full approval to the views stated by the district attorney. Defendant had able representation by appointed counsel. Upon two occasions the court interrupted the argument of the district attorney when he spoke of the sale of narcotics to children and of the low percentage of narcotic users who recover from the habit. The jury was admonished to disregard the remarks. In other instances, when defendant's attorney believed the district attorney to be departing from the record, objection was promptly made and the mistake, if any, was corrected. It is clear from the record that if the district attorney had made any remarks which in the opinion of defendant's attorney were subject to objection or to a charge of misconduct, or which called for an admonition to the jury, objection would have been made promptly and any admonition that might have been necessary would have been given. There were no such ⊥199 instances. It is sufficient to mention the familiar rule that claims of misconduct on the part of the prosecutor cannot be sustained in the absence of objection at the trial, unless the statements are productive of harm so grievous that it could not be removed by the court's admonition. (48 Cal.Jur.2d, Trial § 444.) And in the most critical view of the entire argument of the district attorney there is to be found no statement of that nature.

[5] There was direct and unequivocal testimony of a police officer that he purchased heroin from defendant as charged in the information. Defendant denied he had had any transaction with the officer. It is futile to contend there was insufficient evidence to establish defendant's guilt.

The judgment is affirmed.

FORD and FILES, JJ., concur.

209 Cal.App.2d 85

⌊85 **Donald R. PLUNKETT, Plaintiff and Respondent,**

v.

John HILL et al., Defendants and Appellants.

Civ. 26307.

District Court of Appeal, Second District, Division 1, California.

Oct. 29, 1962.

Action for misrepresentation and negligence. The defendants asserted defenses of res judicata and estoppel as to each cause of action. The Superior Court, Los Angeles County, Frederick F. Houser, J., sustained the defenses to the first cause of action and overruled the defenses to the second cause of action and entered judgment. The defendants appealed. The District Court of Appeal held that the ruling was not in favor of defendants as to entire action and that consequently order based on ruling, though erroneously denominated a judgment, was not a judgment and was not appealable.

Appeals dismissed.

Appeal and Error ⚿123, 870(2)

Ruling sustaining res judicata and estoppel defenses to cause of action for misrepresentation and overruling same defenses to cause of action for negligence was not in favor of defendants as to entire action and consequently order based on ruling, though erroneously denominated a judgment, was not a judgment and was not appealable; such order would be reviewable on appeal from judgment entered after trial of cause of action for negligence. West's Ann.Code Civ.Proc. § 597.

Craig, Weller & Laugharn, and John Hill, Los Angeles, for appellants.

John N. Frolich, Los Angeles, for respondent.

PER CURIAM.

Motion to dismiss appeals. The complaint alleged two causes of action for damages—the first one was based upon alleged misrepresentation, and the second one upon alleged negligence. Each of the two defendants alleged affirmative defenses of res judicata and estoppel as to each cause of action. Pursuant to the provisions of section 597 of the Code of Civil Procedure, a trial of those special defenses was had before the trial of any other issue in the case.

The court found: (1) That an order of a referee in bankruptcy has determined the issue alleged in the first cause of ⌊86 action herein, and that said order acts as collateral estoppel and res judicata as to that issue; and (2) that said order has not determined the issue alleged in the second cause of action herein, and it does not act as collateral estoppel or res judicata as to that issue. As conclusions of law, the court stated that the plaintiff is barred from prosecuting the first cause of action; and is not barred from prosecuting the second cause of action.

A formal judgment, based upon those findings and conclusions, was entered on October 10, 1961. The judgment provided: "That the first count of the complaint be and the same is hereby dismissed; and that the second count of the complaint remains for trial on the issues of negligence and damages; * * *."

Each defendant has filed a notice of appeal stating that he appeals from the judgment on the second cause of action.

The plaintiff filed a notice of motion to dismiss "the appeal of Appellants." The notice stated the motion is made on the ground that this court lacks jurisdiction to hear the appeal in that the judgment is interlocutory and not final. The notice was duly served on defendants. The motion to dismiss was heard by this court on October 23, 1962. Defendant Mr. Hill was not present or represented.

Section 597 of the Code of Civil Procedure provides: "When the answer pleads that the action is barred by the statute of limitations * * * or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar * * * to the prosecution thereof, the court may * * * proceed to the trial of such special defense or defenses before the trial of any other issue in the case, and if the decision of the court * * upon any special defense so tried * * * is in favor of the defendant * * * judgment for such defendant shall thereupon be entered and no trial of other issues in the action shall be had unless such judgment shall be reversed on appeal or otherwise set aside or vacated; * * *. If the decision of the court * * * upon the special defense or defenses * * * shall be in favor of the plaintiff, trial of the other issues shall thereafter be had upon the motion of either party, and judgment shall be entered thereon in the same manner and with the same effect as if all the issues in the case had been tried at one time. In such event any and all decisions * * * upon such special defense or defenses * * * shall be deemed excepted to and may be renewed on motion for a new trial or upon appeal from such judgment." (It seems that the ⌊187 word "renewed," which appears in the last sentence above quoted, is not an appropriate word to be used therein—it might be that the word "reviewed" was intended to be used there. The provision that all decisions, verdicts, and rulings may be *renewed* on motion for a new trial or upon appeal seems to be pointless.)

In Evans v. Horton, 115 Cal.App.2d 281, 251 P.2d 1013, upon a trial of a special defense of res judicata as to certain issues, judgment in favor of the defendant upon those issues was entered; and the plaintiff appealed from the judgment. It was said therein (p. 287, 251 P.2d p. 1017): "It is only when the decision on the trial of the special defense is that the entire action is barred by a prior judgment that the court is empowered to render judgment for the defendant who has pleaded the special defense. [Citations.] When, as here, the court proceeds to try a special defense which does not constitute a bar to the entire action before the trial of any other issue, and the decision on such special defense is in favor of the defendant, the proper procedure is to make a minute order to that effect, proceed to trial of the remaining issues, make findings of fact and conclusions of law on all issues, and render judgment accordingly. In such a case, the decision of the court on the special defense and all rulings on it may be *reviewed* on appeal from the judgment." (Italics added.)

In Nelson v. Jensen, 177 Cal.App.2d 270, p. 273, 2 Cal.Rptr. 180, p. 182, it was said: "It is apparent upon the face of the code section under which the special defense was separately tried (Code Civ.Proc., § 597) that but one judgment is to be entered in the action. Since plaintiff prevailed on the special defense, no judgment thereon should have been entered, but any error in that proceeding could be reviewed on appeal from the final judgment on the merits." In McCarty v. Macy & Co., 153 Cal.App.2d 837, p. 840, 315 P.2d 383, p. 385, it was said: "[T]here can be but one final judgment in an action regardless of how many counts the complaint contains, or how many issues of law or fact are presented." (See also Woodhouse v. Pacific Elec. Ry. Co., 112 Cal.App.2d 22, 245 P.2d 701.)

In the present case, upon the trial of the special defenses, the court ruled in favor of the plaintiff as to one cause of action and in favor of defendants as to the other cause of action; and entered a judgment accordingly. Since the ruling of the trial court, upon the special defenses, was not in favor of defendant as to the entire action, a judgment should not ⌊188 have been entered. Under such circumstances the order with respect to the trial of the special defenses was erroneously denominated a judgment. That order was not a judgment and was not appealable, but it would be reviewable on appeal from the judgment entered after the trial of the other issues which, under the order, were reserved for trial (i. e., the issues as to the second cause of action). The document, erroneously denominated a judgment, is in effect a nonappealable interlocutory order which is a record or memorial of a preliminary determination of part of the issues in the case. The contemplated procedure is that such an order will be included in the judgment, as to the entire case, which will be entered after a trial of all the issues.

The appeals are dismissed.

209 Cal.App.2d 387

387 **The PEOPLE, Plaintiff and Respondent,**

v.

Carrall Thomas FURGERSON, Defendant and Appellant.

Cr. 1731.

District Court of Appeal, Fourth District, California.

Nov. 8, 1962.

Defendant was convicted in the Superior Court of San Bernardino County, Edward P. Fogg, J., of arson and of burning insured property with intent to defraud insurer and he appealed. The District Court of Appeal, Coughlin, J., held that testimony to effect that defendant had recovered upon claims under fire policies as result of prior fires was admissible, even though prior fires were not of incendiary origin.

Judgment affirmed and attempted appeal from order denying new trial dismissed.

1. Criminal Law 🔑1023(13)

Order denying motion for new trial is not appealable. West's Ann.Pen.Code, § 1237.

2. Arson 🔑40

Whether anyone entered or left defendant's store after defendant departed, whether preparations for setting fire were extensive and would have taken more time than elapsed between defendant's departure and starting of fire and whether defendant had motives for setting fire and collecting on his insurance in that his business was unsuccessful were jury questions in prosecution for arson and burning insured property with intent to defraud insurer. West's Ann.Pen.Code, §§ 448a, 450a.

3. Arson 🔑29

Testimony to effect that defendant had recovered upon claims under fire policies as result of prior fires was admissible over objection of defendant charged with arson and burning insured property with intent to defraud insurer, even though prior fires were not of incendiary origin. West's Ann.Pen.Code, §§ 448a, 450a.

4. Criminal Law 🔑1171(1)

Asking defendant, who was charged with arson and burning insured building with intent to defraud insurer, whether he had recovered under fire policy on account of loss involving automobile was not prejudicial misconduct. West's Ann.Pen.Code, §§ 448a, 450a.

5. Criminal Law 🔑1144(15)

Presumably jury heeded court's admonition to disregard question asked of defendant.

◆

C. A. Broderick, San Bernardino, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and S. Clark Moore, Deputy Atty. Gen., for respondent.

COUGHLIN, Justice. 388

[1] The defendant was charged with the offense of arson, as defined by Section 448a of the Penal Code, and of burning insured property with intent to defraud the

insurer thereof, i. e., a violation of Section 450a of the Penal Code; was tried by a jury; was convicted of both offenses; was placed on probation; moved for a new trial, which was denied; and appeals from the judgment of conviction and the order denying his motion for a new trial. Such an order is not appealable and the attempted appeal therefrom should be dismissed. (Pen.Code, sec. 1237.)

The claimed grounds for reversal are:

1. That the evidence is insufficient to establish that the defendant set the fire in question;

2. That the court erred in admitting evidence that the defendant had collected on other fire insurance claims;

3. That the district attorney was guilty of bad faith and prejudicial misconduct in asking a question of the defendant as to which the latter's objection was sustained.

⊥389 ⊥The defendant was the operator of a food market, and the insured under a policy of fire insurance in the sum of $15,000 covering his equipment, in the sum of $14,000 covering his stock in trade, and in the sum of $1500 covering business interruption. On May 3, 1961, after closing hours, a fire of incendiary origin broke out within his store, causing substantial damage.

[2] The defendant concedes the incendiary nature of this fire but contends that he was not the person who set the same. This contention is without merit. There was substantial evidence establishing that the defendant closed the store and left for home about 8:15 o'clock on the evening in question; that no one was present therein at the time he left; that all of the doors were either nailed, bolted or locked shut; that, from the nature of the fire and the condition of all available means of entry at the time the firemen arrived, it may be inferred that no one entered or left the store after the defendant departed; that the fire started between 15 and 30 minutes after he had left; that the preparations for setting the fire were extensive and would have taken more time than this period allowed; and that candles were used as wicks to ignite inflamatory material which had been deposited on the floor close to where the fire started and thus provided a delayed ignition. There also was evidence which showed that the defendant had depleted his stock; had been using capital from outside sources to finance the operation of his business; after giving notice of his intention to vacate the premises, had asked for an extension of time in this regard; and his principal existing investment was in his fixtures and equipment, which would have to be moved; all of which indicate that his business was unsuccessful and furnished a motive for setting the fire and collecting upon his insurance. (Generally see People v. Kessler, 62 Cal.App.2d 817, 821, 145 P.2d 656.) No appellate purpose would be served in detailing the evidence which establishes the foregoing facts and, for this reason, we refrain from doing so. (Fomco, Inc. v. Joe Maggio, Inc., 55 Cal.2d 162, 164, 10 Cal.Rptr. 462, 358 P.2d 918; Edwards v. Container Kraft Carton, etc. Co., 161 Cal.App.2d 752, 756, 327 P.2d 622; Pores v. Purity Milk Co., 135 Cal.App.2d 305, 309, 287 P.2d 169.)

[3] Over objection, the court admitted evidence that in 1955, and again in 1956, the defendant sustained losses resulting from fire, for which he made and recovered upon claims under his insurance policies; that as a result of the 1955 fire⊥he received ⊥390 $7700 on account of damage to a dwelling; and following the 1956 fire he received a total of $9190.93 consisting of a building loss in the sum of $3486.31, equipment loss in the sum of $2464.53, stock loss in the sum of $2752.74, and business interruption loss in the sum of $487.35. He contends that this evidence was inadmissible because there was no proof that the fires in question were incendiary. The losses from those fires were indemnified under policies of insurance issued by the same company which

issued the policy of insurance in the instant case. The latter policy had been increased in amount; originally provided for a $5000 coverage on the equipment, $4000 on the stock, and $1500 on business interruption; in May, 1960, when the defendant moved to the subject premises, was increased to $10,000 on equipment, and $10,000 on stock in trade; and in August, 1960, again was increased to $15,000 on the equipment and $14,000 on the stock in trade.

The ruling of the court in admitting the testimony objected to is supported by the decisions in People v. Miller, 41 Cal.App.2d 252, 256, 106 P.2d 239, and People v. Bragdon, 103 Cal.App. 20, 24, 283 P. 881. The defendant was charged not only with setting fire to a building, i. e., a violation of Penal Code Section 448a, but also with setting fire to insured personal property with intent "to injure or defraud the insurer", i. e., a violation of Penal Code Section 450a. The evidence which showed the making of and recovery upon prior insurance claims was relevant to the issue of intent as proof of the fact that the reason the defendant set the instant fire was to collect on his insurance and thus injure or defraud his insurance carrier; he had recovered on other insurance claims after sustaining loss by fire and it is reasonable to infer from this fact that in setting the subject fire he intended to create a loss which would enable him to recover under an insurance claim he would make thereafter; that his motive in setting the fire was to recover on his insurance rather than for some other reason, such as to terminate his lease, or to spite his landlord with whom, the evidence showed, he was engaged in a controversy. The evidence objected to also was proof of a mental state respecting the ease of recovery upon an insurance claim, of the defendant's familiarity with the method of recovery, and of an acute consciousness that insurance benefits are a ready source of cash. The fact that the prior fires were not of an incendiary origin did not establish that the evidence in question was irrelevant. (People v. Miller, ⌊391 185 Cal.App.2d 59, 79, 8 Cal.Rptr. 91; People v. Miller, supra, 41 Cal.App.2d 252, 256, 106 P.2d 239; People v. Bragdon, supra, 103 Cal.App. 20, 24, 283 P. 881.)

[4, 5] The defendant also objected to a question asked him as to whether he had recovered under a policy of fire insurance in 1959 on account of a fire loss involving his automobile; the objection was sustained; and the jury was admonished to disregard the question. It is claimed that the asking of this question was prejudicial misconduct; that it carried the inference that the defendant had set fire to his automobile; and that the asking thereof was in bad faith. Even assuming that the court, in the exercise of its discretion, was authorized to sustain the subject objection because the fire loss referred to involved an automobile instead of a building and its contents, the asking of the question did not constitute prejudicial misconduct. As heretofore noted, the question related to legitimate issues of intent, motive, and knowledge; there is no showing of bad faith; and it must be presumed that the jury heeded the court's admonition in the premises. (People v. Gould, 54 Cal.2d 621, 628, 7 Cal.Rptr. 273, 354 P.2d 865; People v. Reddick, 176 Cal.App.2d 806, 819, 1 Cal.Rptr. 767; People v. Darby, 114 Cal.App.2d 412, 438, 250 P.2d 743.)

The judgment is affirmed and the attempted appeal from the order denying a new trial is dismissed.

GRIFFIN, P. J., and SHEPARD, J., concur.

209 Cal.App.2d 207

⊥207 ⊥**Tom E. NORCROSS, Plaintiff and Respondent,**

v.

R. W. WINTERS et al., Defendant and Appellant.

Civ. 26403.

District Court of Appeal, Second District, Division 1, California.

Nov. 2, 1962.

Rehearing Denied Nov. 21, 1962.

Action by a general contractor for damages for the subcontractor's failure to honor his bid to perform certain subcontracting work. Judgment for the general contractor in the Superior Court of Los Angeles County, Beach Vasey, J., and the subcontractor appealed. The District Court of Appeal, Fourt, J., held that the doctrine of promissory estoppel was applicable so as to authorize general contractor to recover for breach of contract and that the award of damages based on the difference between the subcontractor's bid and the amount of the actual cost to the general contractor for performing the job was proper.

Judgment affirmed.

1. Estoppel 🔑85

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character by the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

2. Contracts 🔑19, 22(1)

Mere fact that a general contractor uses a subcontractor's bid as part of the general contractor's overall bid does not thereby create a contract between the general contractor and the subcontractor but it does make the subcontractor's bid irrevocable.

3. Estoppel 🔑85

In action by general contractor for subcontractor's failure to honor his bid to perform certain subcontracting work at an agreed price, doctrine of promissory estoppel made the subcontractor's bid irrevocable without the necessity of the general contractor notifying the subcontractor that the general contractor had been awarded the general contract.

4. Estoppel 🔑85

In action by general contractor for subcontractor's failure to honor his bid to perform subcontracting work at an agreed price, doctrine of "promissory estoppel" was not inapplicable on ground that general contractor could not reasonably rely upon subcontractor's bid, where finding was authorized that general contractor relied upon the bid and acted reasonably in relying thereon and did not have reason to know that subcontractor had made a mistake in submitting his bid.

5. Contracts 🔑322(4)

In action by general contractor for subcontractor's failure to honor his bid to perform certain subcontracting work at an agreed price, evidence authorized finding that the requests were made upon the subcontractor to perform and that he refused to do so.

6. Contracts 🔑32

Where subcontractor's offer to perform subcontract became irrevocable, he could not by refusing to execute the written subcontract insulate himself from his obligation to perform according to the terms of his offer.

7. Damages 🔑120(3)

In action by general contractor for subcontractor's failure to honor his bid to perform certain subcontracting work at an agreed price, awarding general contractor as damages the amount representing the difference between the subcontractor's bid and the actual cost to the general contractor for the performance of the job was proper where the general contractor made reasonable efforts to negotiate a contract with other subcontractor but was unsuccessful in doing so. West's Ann.Gov.Code, § 4104, subd. (d).

Robert M. Devitt, Long Beach, John Walter Norby, Long Beach, of counsel, for appellant.

Kirkpatrick & Kirkpatrick, Long Beach, for respondent.

⊥208 ⊥FOURT, Justice.

Defendant subcontractor appeals from a judgment rendered in favor of plaintiff contractor after a trial by the court sitting without a jury. Plaintiff's action for damages was predicated upon defendant's failure to honor his bid to perform certain subcontracting work consisting of the furnishing and installation of chalk and tack boards for the Department of Public Works of the State of California at the agreed price.

Viewing the evidence in the light most favorable to the prevailing party, a résumé of the facts is as follows:

On April 1, 1959, the Department of Public Works of the State of California solicited bids for a construction job known as the Industrial Arts Building of Long Beach State College, Long Beach, California (hereinafter referred to as "job"). The time set for submission of bids was 2:00 p. m., April 1, 1959. Plaintiff, a general contractor, duly licensed under the laws of the State of California, was a bidder for the job.

For some time prior to the submission date plaintiff had solicited bids from various subcontractors for various phases of the work, to be incorporated into plaintiff's bid for the job.

On April 1, 1959, sometime prior to the time for submission of bids for the job, defendant telephoned to plaintiff a bid to perform, furnish and install the chalk and tack boards in accordance with the plans and specifications for the sum of $4,800.00. The bid was clear and definite, and there were no exclusions or qualifications. A written memorandum made by plaintiff's employee of defendant's oral bid was introduced in evidence (Plaintiff's Exhibit 16).

Defendant's bid of $4,800.00 for the chalk and tack board work was low, and was used by plaintiff in computing, preparing and submitting its bid for the job. Plaintiff's bid was low and he was awarded the general contract for the job. The general contract called for a completion date of July 1, 1960, and con⊥tained a liquidated damage clause ⊥209 in the amount of $200.00 per day if completion was not made on that date.

In the joint pre-trial statement which was attached to and incorporated into the pre-trial order it was agreed between the parties that "6. Plaintiff made demand upon defendant that he perform, furnish, install all chalk, tack and bulletin boards in accordance with the plans and specifications in accordance with said bid and verbal promise of defendant. 7. Defendant did not perform, furnish and install said chalk, tack and bulletin boards upon said construction project."

The trial court did not make any express finding relating to communication.[1] During the argument on defendant's motion for a new trial the trial judge commented on what he termed "a fantastic lack of communication on both sides." The reporter's transcript discloses the following in pertinent part:

"THE COURT: I don't think that the question of communication is vital under the Drennan case [i. e. Drennan v. Star Paving Co., 51 Cal.2d 409 [333 P.2d 757]], and I think this present case is as nearly on all fours with the Drennan case as you ever get. * * *

"I mentioned the fantastic lack of communication. If we are to apportion blame here, the subcontractor [i. e. defendant] shows a fantastic lack of tending to business. He didn't return calls and certainly he got some of these letters. It can't be that all of these letters were misdirected and it is inferrable in this case that he was dodging being held to the bid that he made, but I don't think it is necessary for the Court to determine that."

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[1] One of defendant's contentions on this appeal is that the doctrine of promissory estoppel is not applicable unless the general contractor notifies or communicates with the subcontractor upon the general contractor receiving notice that he was awarded the general bid. This contention will be discussed *infra.*

Although the trial court failed to make any express finding on communication there was much evidence introduced relating to communication by plaintiff. Plaintiff's evidence disclosed the following:

1. Mr. Lawrence H. Frembling, plaintiff's office manager and chief estimator, testified as follows in pertinent part:

"Q Subsequent to the submission of the bid was your bid accepted and was the contract issued and awarded by the Department of Public Works?

"A Yes, it was.

"Q. Would you state to the Court after
⊥210 you were awarded⊥the bid the extent and nature of the communication with * * * [defendant]?

* * * * * *

"Q Did you prepare and submit a contract to the * * * [defendant]?

"A Yes, I did, on our standard sub form.

"Q When did you do that?

"A I believe the date on it would be April 28th.

* * * * * *

"Q BY MR. KIRKPATRICK: I direct your attention to Standard form transmittal letter dated April 28, 1959, indicating a transmittal of a contract.

"A Yes, that is correct.

"Q Was this the document that you were talking about that was mailed out on April 28th?

"A That is correct.

* * * * * *

"THE COURT: It may be received as Plaintiff's Exhibit 1.

"Q BY MR. KIRKPATRICK: I show you what is labeled Tom E. Norcross standard form contract, and it has filled in the date April 27, 1959, and the name * * * [defendant]. Is this a copy of the standard form contract that was transmitted with the letter?

"A It is.

* * * * * *

"THE COURT: It may be received as Plaintiff's Exhibit No. 2."

During the cross-examination of Mr. Frembling, the record discloses the following in pertinent part:

"Q With reference to Exhibits 1 and 2, which are copies—at least a carbon copy of a transmittal letter dated April 28, 1959—

"A Yes.

"Q —and a copy of a contract dated April 27, 1959, where did you get those copies to bring them into court?

* * * * * *

"A Out of my file.

"Q Do you have anything to do with the preparation of the transmittal letter or the subcontract?

"A Yes, I do.

"Q What do you have to do with it?

"A Well, I personally handwrote the subcontract for the typist to type up.

"Q In this instance?

"A. Yes. I instructed her to send it, accompanied by a transmittal, this letter, instructing the particular subcontractor what to do. We were submitting it for his signature and to return the two copies.

* * * * * *

"Q Do you know from your own knowledge whether or not either of those were sent to Mr. Winters?

"A Yes, I do.

"Q How do you know it?

"A The copies, once they were⊥rendered, I signed the original of this and then directed her to mail it. ⊥211

* * * * * *

"Q Isn't it an assumption that this is the usual procedure?

"A This is the procedure and it has been followed faithfully for years.

"Q That is the basis from which you are testifying, you can honestly say?

"A Yes, I can.

"Q And you don't have an independent recollection, then, do you?

"A From April 28, 1959?

"Q Yes.

"A I made no mark on here that I saw or looked at it.

"Q The question is: You have no independent recollection?

"A All right, I don't."

2. Mrs. Beverly Jean Bailey, who had been an employee of plaintiff, testified concerning her attempts to reach defendant by telephone. The reporter's transcript discloses the following in part:

"Q Mrs. Bailey, in your capacity as an employee for * * * [plaintiff], did you have occasion to attempt to reach Mr. Winters on the telephone?

"A Yes, I did.

"Q When did this occasion occur?

"A It was sometime in July, August, and September.

"Q On how many occasions did you attempt to reach Mr. Winters by telephone?

"A Well, generally speaking, I would say on the average possibly three or four times a day, and three or four days out of the week. Every spare moment that I had I would dial the number.

"Q Were you able to reach Mr. Winters on any of those occasions?

"A No.

"Q Was the line busy or was there just no answer?

"A Most of the time it was busy. It did ring a few times, but there was no answer.

"Q. Now, later on during this period was there a telephone answering service?

"A Yes.

"Q During what portion of this period was the telephone answered by the answering service?

"A Well, it was somewhere around the end of August or in September. I don't remember the exact date.

"Q And after the telephone answering service was installed, on how many occasions would you say you called the * * [defendant]?

"A I would say at least six or seven messages, if not more.

"Q Were any of them returned?

"A No."

⊥3. Mr. Frembling testified that the next ⊥212 written communication between plaintiff and defendant was by a letter dated October 7, 1959 (Plaintiff's Exhibit 3). Defendant on direct examination admitted receipt of the letter (Plaintiff's Exhibit 3). He testified that this was the first communication that he had with respect to the matter of this particular job. Defendant further admitted that between April and October he had received notification ("probably six times") that plaintiff had called but asserted that none of the messages was to the effect that defendant's bid had been accepted. Defendant further testified that he did telephone plaintiff approximately five times between April 1, 1959, and October 7, 1959, but never spoke to "anybody of responsibility."

4. On October 13, 1959, plaintiff again wrote defendant advising defendant that numerous requests from the Department of Public Works of the State of California had been received for the shop drawings and material samples required by the plans and specifications, and requesting that defendant contact plaintiff immediately. Plaintiff's Exhibit 4 was a copy of the correspondence dated October 13, 1959. Plaintiff's Exhibit 5 was the envelope and the original of the letter dated October 13, 1959, which had been sent by registered mail but had been returned to plaintiff on or about October 27, 1959, unopened and unclaimed.

5. Mr. Frembling testified that on November 19, 1959, plaintiff contacted the State of California Contractors License Board

and that on November 20, 1959, plaintiff received a call from defendant, at which time defendant stated that Mr. Houser of the license board had contacted him (defendant) with regard to plaintiff's call. Mr. Frembling testified as to the substance of the telephone conversation as follows:

"A One of the main points was that I had asked Mr. Winters if he would send shop drawings and material samples to us. I asked him about signing and returning the subcontract form which had been submitted to him for signature. He advised me that he needed the plans and specifications to be able to render shop drawings and submit samples. I agreed with him and advised him that a set of plans and specifications were available to him, and he advised me that he would be by on Monday—November 20th was on a Friday, as I recall, and he would be by Monday and pick them up. However, he did not come by the following Monday. In fact, to the best of my knowledge, Mr. Winters has never been in the office of Tom E. Norcross."

⊥213 ⊥Defendant testified concerning the telephone conversation of November 20, 1959, as follows:

"A Well, I then advised him we still did not have a contract, that there were—I agreed that there were shop drawings that he would probably need, but that we would have to have the blueprints and specifications, and to start with we should have a contract in writing to proceed.

"Q What did he say?

"A The conversation was on this line and then he agreed to meet with me the following Monday, which was November 23rd."

As correctly stated in defendant's brief, "The parties never did get together on November 23, and there is a conflict of testimony as to the reason for this."

It would serve no useful purpose to set forth further the evidence relating to additional attempts at communication. Suffice it to say, in the words of the defendant, "Thereafter, there were further attempts at communication and then the Plaintiff requested approval of a change of subcontractors from the State." [2]

The Department of Public Works approved the substitution on February 5, 1960, and advised plaintiff of such approval on February 10, 1960. Ultimately, plaintiff performed the work himself.

On September 22, 1960, plaintiff filed a complaint wherein damages were sought in the amount of $9,105.49, "* * * the difference between the cost to plaintiff of obtaining said chalk, tack and bulletin boards in the amount of * * * ($13,905.49) and the verbal promise and bid of defendant to furnish and install said chalk, tack and bulletin boards in the amount of * * * ($4800.00); * * *."

⊥On October 31, 1961, the findings of fact and conclusions of law were filed.[3] Judg- ⊥214

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[2] Government Code section 4104 provides as follows:

"No general contractor whose bid is accepted shall, without the consent of the awarding authority, either:

"(a) Substitute any person as subcontractor in place of the subcontractor designated in the original bid.

"(b) Permit any such subcontract to be assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the bid.

"(c) Sublet or subcontract any portion of the work in excess of one-half (½) of one per cent (1%) of the general contractor's total bid as to which his original bid did not designate a subcontractor.

"(d) The awarding authority may consent to the substitution of another person as a subcontractor, when the subcontractor named in the bid after having had a reasonable opportunity to do so, fails or refuses to execute a written contract, when said written contract, based upon the general terms, conditions, plans and specifications for the project involved, or the terms of such subcontractor's written bid, is presented to him by the contractor."

[3] The findings of fact and conclusions of law provide in pertinent part as follows:

"FINDINGS OF FACT

"III

"That plaintiff as such general contractor was, on April 1, 1959, engaged in ment was entered November 2, 1961, and provides in part as follows:

"IT IS ORDERED, ADJUDGED AND DECREED:

"I

"That plaintiff * * * have judgment against the defendant * * * in the sum of * * * ($8,392.01), together with his costs of suit incurred herein in the sum of * * * ($32.25).

"II

⊥"That all relief prayed for by said defendant herein is hereby denied." ⊥215

Defendant's motion for a new trial was denied on November 28, 1961, and this appeal followed.

business as such general contractor and bidding for a construction job known as the Industrial Arts Building, Long Beach State College, Long Beach, California, for the Department of Public Works of the State of California, which bid, in accordance with the bidding instructions, had to be submitted in writing to the said Department of Public Works of the State of California in Los Angeles, California, not later than 2:00 o'clock P.M. on said April 1, 1959.

"IV

"That plaintiff did submit a bid to the Department * * *; that said bid was accepted and approved by the Department * * *; that, pursuant thereto, plaintiff entered into a construction contract as prime contractor, with the Department. * * *

"V

"That, prior to submission of plaintiff's bid for the construction of said Industrial Arts Building, to wit, on said April 1, 1959, between the hours of 10:30 A.M. and 12:00 noon, plaintiff received from defendant at his office at 6053 Atlantic Avenue, Long Beach, California, a verbal promise that defendant would perform, furnish and install all of the chalk and tack boards, in accordance with plans and specifications for said Industrial Arts Building * * * for the sum of * * * ($4,800.00).

"VI

"That in making said verbal promise, defendant stated to plaintiff's authorized agent, BEVERLY BAILY [sic], that he was submitting a bid for chalk and tack boards for the sum of $4,800.00, in accordance with the plans and specifications, tax included, installed; that no exclusions from said work were mentioned or specified.

"VII

"That plaintiff relied upon said verbal promise of defendant and used the said bid of defendant for chalk and tack boards in computing his said bid for submission to the Department * * * and did, in submitting his said bid, name defendant as the subcontractor to perform, furnish and install the chalk and tack boards in connection with the construction of said Industrial Arts Building. * * *

"VIII

"That plaintiff acted reasonably in relying upon the bid for chalk, and tack boards by defendant, as aforesaid.

"IX

"That in submitting said bid to plaintiff, defendant knew that plaintiff was preparing and submitting a bid to the Department * * *; that defendant reasonably expected that his said bid for chalk and tack boards would induce plaintiff to submit his said bid to the Department * * * based thereon.

"X

"That, although requests and demands were made by plaintiff upon defendant to perform, furnish and install chalk and tack boards for the sum of $4,800.00 defendant failed, refused and neglected to perform, furnish and install the said chalk and tack boards in accordance with the said promise of defendant.

"XI

"That in order to fulfill his commitments pursuant to his contract with the Department * * * for the construction of said Industrial Arts Building, plaintiff was compelled to make other arrangements for the furnishing and installation of said chalk and tack boards. That plaintiff made reasonable efforts, over a period of more than two months, to negotiate a contract with other chalk and tack board subcontractors, including those that had originally submitted bids upon said Industrial Arts Building, but was unsuccessful in negotiating a firm contract therefor within the period required under his said contract with the Department * * *; that plaintiff thereupon arranged directly for the materials and labor necessary to fabricate, furnish and install the chalk and tack boards.

"XII

"That in arranging directly for the materials and labor necessary to fabricate, furnish and install said chalk and tack boards as aforesaid, plaintiff acted rea-

Defendant's first contention is that the doctrine of promissory estoppel (hereinafter sometimes referred to as "doctrine") is not applicable to the case at bar. Defendant advances several arguments in support of this contention.

In Drennan v. Star Paving Co., 51 Cal.2d ⊥216 409, 413, 333⊥P.2d 757, 759, a statement of the doctrine is set forth in pertinent part as follows:

[1] "[1] Section 90 of the Restatement of Contracts states: 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.' This rule applies in this state. Edmonds v. County of Los Angeles, 40 Cal.2d 642, 255 P.2d 772; Frebank Co. v. White, 152 Cal.App.2d 522, 313 P.2d 633; Wade v. Markwell & Co., 118 Cal.App.2d 410, 258 P.2d 497, 37 A.L.R.2d 1363; West v. Hunt Foods Co. [Inc.] 101 Cal.App.2d 597, 225 P.2d 978; Hunter v. Sparling, 87 Cal.⊥App. ⊥217 2d 711, 197 P.2d 807; see 18 Cal.Jur.2d 407–408; 5 Stan.L.Rev. 783."

Defendant first asserts that in order for the doctrine to be applicable, it is necessary for the general contractor to notify or communicate with the subcontractor upon the general contractor's receiving notice that he (general contractor) was awarded the general contract. (See footnote 1.)

[2] The mere fact that a general contractor uses a subcontractor's bid as part of the general contractor's overall bid does

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sonably and exercised reasonable care and diligence.

"XIII

"That the actual cost to plaintiff of fabricating, furnishing and installing the chalk and tack boards in accordance with the plans and specifications of the Department * * * was * * * ($13,192.01).

"XIV

"That plaintiff has been damaged in the sum of * * * ($8,392.01).

"XV

"That injustice can be avoided only by the enforcement of defendant's promise to perform, furnish and install the chalk and tack boards in accordance with his said promise.

"XVI

"That the chalk and tack boards, the subject of defendant's bid and promise, were to be manufactured, fabricated and fashioned according to specifications provided by the Department * * * and were required to be cut in particular sizes, shapes and dimensions as is specified in the plans and specifications, and were required to be installed in accordance with the plans and specifications.

"XVII

"That all of the allegations of defendant inconsistent with the foregoing findings are untrue.

"CONCLUSIONS OF LAW

"I

"That defendant made a verbal bid and promise to plaintiff to perform, furnish and install all chalk and tack boards in accordance with the plans and specifications prepared by the Department * * * for the sum of * * * ($4,800.00).

"II

"That defendant should have reasonably expected that his said bid and promise would induce the plaintiff to submit a bid based thereon to the Department * * * and that such promise did induce this action, and that injustice can be avoided only by enforcement of the promise.

"III

"That plaintiff reasonably relied upon the bid and promise of defendant.

"IV

"That by its bid defendant induced action by plaintiff of a definite and substantial character, to plaintiff's detriment and prejudice.

"V

"That under all of the facts and circumstances of this case, defendant is estopped, by virtue of the doctrine of promissory estoppel, from revoking, denying or repudiating his agreement to perform, furnish and install all of the chalk and tack boards in accordance with plans and specifications of the Department * * * for the sum of $4,800.00.

"VI

"That the promise and agreement upon which this action is based is not barred or invalid by the Statute of Limitations or the provisions of Section 1724 of the Civil Code of California.

"VII

"That plaintiff is entitled to judgment against defendant in the sum of * * * ($8,392.01), together with his costs of suit incurred herein."

not thereby create a contract between the general contractor and the subcontractor. It is stated by Mr. Justice Peters in Klose v. Sequoia Union High School Dist., 118 Cal.App.2d 636, at pages 640–641, 258 P.2d 515, at page 517, as follows in pertinent part:

"[2] Petitioner's arguments are necessarily predicated upon the concept that a subcontractor, whose name is submitted with the bid of the general contractor, in some undefined way, secures some legal rights when the general contractor's bid is accepted by the awarding authority. In the absence of statute that is not the law. A subcontractor bidder merely makes an offer that is converted into a contract by a regularly communicated acceptance conveyed to him by the general contractor. *No contractual relationship is created between the subcontractor and the general contractor even though the bid is used as part of the general overall bid by the general contractor and accepted by the awarding authority.* Williams v. Favret, 5 Cir., 161 F.2d 822; 1 Corbin on Contracts, p. 58, § 24, particularly cases cited in footnote 11 on p. 59." (Emphasis added.)

Therefore, while the use of a subcontractor's bid by the general contractor does not ipso facto create a contract between the general contractor and the subcontractor (i. e. does not constitute an implied acceptance of the subcontractor's offer), it does, as illustrated by Drennan v. Star Paving Co., 51 Cal.2d 409, 333 P.2d 757, make the subcontractor's bid (offer) irrevocable.

This distinction between "irrevocable offer" and "acceptance" is illustrated by what is stated in the Drennan case at page 415, 333 P.2d at page 760:

"[5] When plaintiff [i. e. general contractor] used defendant's [i. e. subcontractor] offer in computing his own bid, he bound himself to perform in reliance on defendant's terms. Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it 218 would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by plaintiff in his bid. It was to its own interest that the contractor be awarded the general contract; the lower the subcontract bid, the lower the general contractor's bid was likely to be and the greater its chance of acceptance and hence the greater defendant's chance of getting the paving subcontract. Defendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. Given this interest and the fact that plaintiff is bound by his own bid, *it is only fair that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him.*

"[6] It bears noting that *a general contractor is not free to delay acceptance after he has been awarded the general contract in the hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer.*" (Emphasis added.)

Implicit in the above dictum (headnote 6 of the Drennan case) is recognition that the "irrevocable offer" which comes into existence through the operation of the doctrine does not mean irrevocable in perpetuity. The rationale for holding the offer to be irrevocable is to allow the general contractor an "opportunity to accept defendant's bid after the general contract has been awarded to him." Or, as stated at page 414, 333 P.2d at page 760:

"[3] * * * [T]he subsidiary promise [i. e. not to revoke] serves to preclude the injustice that would result if the offer could be revoked after the offeree had acted in detrimental reliance thereon."

Defendant's failure to distinguish between the "irrevocable offer" which comes into existence through the operation of the doctrine of promissory estoppel, and manifestation of assent to create the bilateral contract (communication of acceptance of the offer) is disclosed by his statement that, "If the Court were to hold now that communication is not necessary to the *formation of a contract,* then the rationale of the law review article [i. e. 47 Cal.L.Rev. 405] would apply in full force as the countractor [sic] would be allowed to speculate on the damages allegedly attributable to the Defendant." (Emphasis added.)

There is nothing appearing in the case at bar which would support a conclusion that plaintiff delayed acceptance in the ⊥219 hope of getting a better price or that he reopened bargaining with defendant while claiming, at the same time, a continuing right to accept the original offer.

Where the elements of Restatement of Contracts, section 90, are satisfied, the doctrine makes defendant subcontractor's offer (bid) irrevocable without the necessity of the general contractor notifying defendant that he (general contractor) has been awarded the general contract.

[3] Defendant's next argument in support of his contention that the doctrine is not applicable is that plaintiff could not reasonably rely upon defendant's bid.

The trial court found (findings VII and VIII—footnote 3) that plaintiff relied upon defendant's bid and "acted reasonably in relying upon the bid."

The thrust of defendant's argument is that "there is a substantial discrepance between the $4,800.00 bid [i. e. defendant's bid] and the other two bids in the amount of $7,990.99 and $8,145.00."

The reporter's transcript discloses the following which occurred during the cross-examination of Mr. Frembling by defense counsel:

"Q BY MR. DEVITT: Did the discrepancy between the $4,800 as opposed to $7,990 * * * and the $8,100—I believe Mr. Kirkpatrick [i. e. plaintiff's attorney] asked whether there was anything to occasion you to wonder whether a mistake might have been made—wouldn't the discrepancy in the figures raise any question in your mind that it is substantially lower?

"A There is no indication here which bid came in first. These bids come in as late as within seconds of bid time. I cannot testify when any one of these three bids came in, and therefore I cannot tell you how much time I had to analyze this particular item. However, we will say that Mr. R. W. Winters has apparently, over the years, been a reputable concern and I had no question or reason to question his bid.

"Q The figures themselves would not occasion you to wonder whether there was any need for clarification, would they?

"A Not necessarily.

"Q Would that be a sharp difference in price?

"A No, not necessarily.

"Q As I see it, I believe these other two bids are probably about 80 per cent higher.

"A Well, $8,100 as against—

"THE COURT: That is a mathematical computation.

"Q BY MR. DEVITT: But this difference in no way prompted you to wonder?

"A No, I would have to take other cases as an ⊥220 example and attempt to prove it to you that the difference there would not cause concern."

[4] There is substantial evidence to support the trial court's findings. We cannot hold as a matter of law that plaintiff had reason to know that defendant had made a mistake in submitting his bid. It is stated in the Drennan case, 51 Cal.2d at page 416, 333 P.2d at page 761:

"[7] Of course, if plaintiff had reason to believe that defendant's bid was in error, he could not justifiably rely on it, and section 90 would afford no basis for enforcing it. (Citation.) Plaintiff, however, had no reason to know that defendant had made a mistake in submitting its bid, since there was usually a variance of 160 per cent between the highest and lowest bids * *. He committed himself to performing the main contract in reliance on defendant's figures. Under these circumstances defendant's mistake, far from relieving it of its obligation, constitutes an additional reason for enforcing it, for it misled plaintiff as to the cost * * *. [8] As between the subcontractor who made the bid and the general contractor who reasonably relied on it, the loss resulting from the mistake should fall on the party who caused it."

Defendant's next contention is that the evidence is insufficient to support findings of fact X (footnote 3) which provides:

"X

[5] "That, although requests and demands were made by plaintiff upon defendant to perform, furnish and install chalk and tack boards for the sum of $4,800.00, defendant failed, refused and neglected to perform, furnish and install the said chalk and tack boards in accordance with the said promise of defendant."

This contention is so totally devoid of merit as to hardly warrant consideration by this court.

As set forth in the statement of facts it was stipulated by the parties in their pretrial statement that "6. Plaintiff made demand upon defendant that he perform, furnish, install all chalk, tack and bulletin boards in accordance with the plans and specifications in accordance with said bid and verbal promise of defendant. 7. Defendant did not perform, furnish and install said chalk, tack and bulletin boards upon said construction project."

In addition, a reading of the record confirms the trial court's apt observation (made 221 during defendant's argument on a motion for new trial), "It can't be that all of these letters were misdirected and it is inferrable in this case that he [i. e. defendant] was dodging being held to the bid that he made." Defendant's statement in his opening brief that the evidence shows that he was "anxious to create and perform a contract" is hardly sustainable by the record.

Defendant's next contention apparently is that he was not under any obligation to perform the terms of his promise (offer) because "the parties never intended a contract to be formed until such time as a written document was signed by both parties."

The gist of this contention is that since plaintiff submitted a written subcontract to defendant for his signature, and since defendant failed to execute said written contract, "the relationship between the parties * * * [is merely] one of mutual intent to enter into a written contract."

Perhaps this argument stems from defendant's failure to make a proper analysis of the effect of the doctrine of promissory estoppel. Once defendant's offer became irrevocable, he was in no position to refuse to perform according to his bid when plaintiff manifested assent to accept the offer.

The defendant's bid was clear and explicit without qualification. Plaintiff's conduct in the case at bar was for the purpose of getting defendant to execute a confirming contract or otherwise to confirm that he (defendant) was going to do the chalk and tack board work in accordance with his bid, and getting defendant to submit the shop drawings and material samples, and proceed with the work, all as required by the plans and specifications in accordance with his bid.

[6] Defendant could not, by the simple expedient of refusing to execute the written subcontract, thereby insulate himself from his obligation to perform according to the terms of his offer. To hold otherwise would render nugatory the effect of the doctrine of promissory estoppel which makes defendant's offer to perform irrevocable.

Lastly, defendant asserts that the trial court erred in the amount of the award of damages.

[7] The trial court found (finding XIII—footnote 3) that "the actual cost to plaintiff of fabricating, furnishing and installing the chalk and tack boards in accordance with the plans and specifications of the Department * * * was * * * ($13,192.01)" and awarded plaintiff damages in the amount of $8,392.01, said sum representing the difference between defendant's bid ($4,800.00), and the amount 222 of the actual cost to plaintiff for performance of the job.

In addition the court found (findings XI and XII—footnote 3) that "in order to fulfill his commitments pursuant to his contract with the Department * * * plaintiff was compelled to make other arrangements for the furnishing and installation of said chalk and tack boards. *That plaintiff made reasonable efforts, over a period of more than two months, to negotiate a contract with other chalk and tack board subcontractors, including those that had originally submitted bids upon said Industrial Arts Building, but was unsuccessful in negotiating a firm contract therefor within the period required under his said contract with the Department * * *; that plaintiff thereupon arranged directly for the materials and labor necessary to fabricate, furnish and install the chalk and tack boards."* And, that *"in arranging directly for the materials and labor necessary to fabricate, furnish and install said chalk and tack boards as aforesaid, plaintiff acted reasonably and exercised reasonable care and diligence."* (Emphasis added.)

Defendant does not question the sufficiency of the evidence to support the finding (finding XIII) that the actual cost to plaintiff in his performance of the job was $13,192.01. However, defendant does take the position "that the cost of completing the work is unreasonable."

The crux of defendant's argument is that it was unreasonable for plaintiff to perform the work himself; that it was incumbent upon plaintiff to accept the next lowest bid (i. e. the bid of Educational Equipment Company in the amount of $7,990.00); and that therefore the maximum allowable damages are in the amount of $3,190.00, computed by deducting defendant's bid of $4,800.00 from the Educational Equipment Company's bid in the amount of $7,990.00.

Defendant's position must of necessity be predicated upon the assumption that the Educational Equipment Company's bid, which originally was submitted by that company on or about April 1, 1959 (i. e. Educational Equipment Company was one of the three subcontractors who originally submitted bids for the job), was still open for acceptance by plaintiff subsequent to February 10, 1960.[4]

⊥223 The above necessary assumption is directly contrary to finding of fact XI, supra (footnote 3), that "plaintiff made reasonable efforts, over a period of more than two months, to negotiate a contract with other chalk and tack board subcontractors, including those that had originally submitted bids * * * but was unsuccessful in negotiating a firm contract therefor * *."

Therefore, although defendant does not couch his argument in the form of an attack upon the sufficiency of the evidence to support the above finding of fact, of necessity, the question of sufficiency of the evidence is vital to defendant's contention.

Viewing the evidence in the light most favorable to the prevailing party and disregarding all conflicts it would appear that there was substantial evidence to support the trial court's determination.

During direct examination of Mr. Frembling the reporter's transcript discloses the following in pertinent part:

"Q Was the * * * [plaintiff] ever able to get a definite commitment from any of these subcontractors at any price for proceeding with this chalk, tack, and bulletin board work?

"A No, we were not. We were not able to get a firm commitment or a written commitment. I did not specifically request a written commitment, because there seemed to be no cause or need. There seemed to be a particular lack of interest. I had realized that the time was going by and everything was becoming more urgent, and I saw definitely the need to take some action on this work * * *."

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[4] It was not until the Department of Public Works consented to a substitution, based upon Government Code section 4104, subdivision (d) on February 5, 1960 (communicated to plaintiff on February 10, 1960), that plaintiff was in a position to make arrangements with other subcontractors.

For the reasons stated, the judgment is affirmed.

WOOD, P. J., and LILLIE, J., concur.

209 Cal.App.2d 179

⊥179 ⊥**The PEOPLE, Plaintiff and Respondent,**

v.

James Luther TATUM, Defendant and Appellant.

Cr. 8103.

District Court of Appeal, Second District, Division 4, California.

Oct. 31, 1962.

Hearing Denied Dec. 26, 1962.

Convicted, in the Superior Court of Ventura County, E. Perry Churchill, J., of concealing or withholding stolen property, defendant appealed. The District Court of Appeal, Burke, P. J., held that in absence of facts indicating complete divorcement of concealing activities from course of conduct of a thief in initial concealing of property stolen by him, a thief may not be found guilty of concealment in violation of statute, and that in absence of any evidence of concealment independent of that involved in theft, it was prejudicially erroneous to instruct that jury could find defendant guilty of concealment, though they believed he had stolen goods.

Conviction reversed and purported appeal from denial of new trial dismissed.

1. Receiving Stolen Goods 🔑2

Thief may not be convicted of buying or receiving goods he has previously stolen at least unless he has disposed of goods and subsequently received them back in transaction separate from original theft. West's Ann.Pen.Code, § 496, subd. 1.

2. Receiving Stolen Goods 🔑1

Statute making it an offense to buy, receive, withhold or conceal stolen property is directed at the traditional "fence" and those who lurk in background of criminal ways in order to provide thieves with market or depository for loot. West's Ann. Pen.Code, § 496, subd. 1.

3. Receiving Stolen Goods 🔑9(1)

A defendant may be both charged as a thief and as a non-thief for concealing or withholding but it is for trier to determine of which offense he is guilty. West's Ann. Pen.Code, §§ 484, 490, 496–496c.

4. Receiving Stolen Goods 🔑2

In absence of facts indicating complete divorcement of concealing activities from course of conduct of thief in initial concealing of property stolen by him, thief may not be found guilty of concealment in violation of statute. West's Ann.Pen. Code, § 496, subd. 1.

5. Criminal Law 🔑200(3)

Statute prohibiting successive prosecutions for same act or omission bars, after trial on theft charge, subsequent prosecution of alleged thief for concealment where concealment of booty is incident of theft. West's Ann.Pen.Code, §§ 484, 496, 654; West's Ann.Const. art. 1, § 13.

6. Criminal Law 🔑1172(1)
Receiving Stolen Goods 🔑9(2)

Absent any evidence of concealment independent of that involved in theft, it was prejudicially erroneous to instruct that jury could find defendant guilty of concealment, though they believed he had stolen goods. West's Ann.Pen.Code, § 654; West's Ann. Const. art. 1, § 13.

◆

Donald D. Roff, Ventura, for defendant and appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Woodruff J. Deem, Dist. Atty., John R. Hetland, Robert K. Garst, Deputy Dist. Attys., Ventura County, for plaintiff and respondent.

⊥BURKE, Presiding Judge. ⊥180

On November 7, 1960, the police received a report that a 21-foot house trailer had been stolen from the property of its owner near Lancaster, California. On November

10, 1960, the stolen trailer was discovered in Moorpark, California, parked behind a house, trees, shrubbery and a fence, about 200 feet back from the road, on a lot owned by defendant's father. It could be seen only by coming onto the property. The license plate and serial number plaque had been removed from the trailer and state and national park decals had been scraped off the windows. The trailer had been ⊥181 connected to water and electricity and it was apparent that it had recently been lived in. The trailer owner's personal effects had been removed and placed in a trash pile near the parked trailer and some of the food which had been left in the trailer by its owner had been consumed. The owner testified the trailer had been taken from its location and used without his knowledge or consent.

Defendant was tried and acquitted in Los Angeles County on a charge of stealing the trailer. Thereafter an information was filed charging him in the first count with the crime of receiving stolen property, the trailer, and in a second count with concealing the same trailer in violation of section 496(1), Penal Code, which proscribes knowingly receiving, or concealing and withholding, stolen property. The first count was dismissed and the jury returned a verdict of guilty to the count of concealing and withholding. Defendant's motion for new trial was denied and he was sentenced to the state prison for the term prescribed by law. This is an appeal from the judgment and order denying motion for new trial.[1]

Testimony at the trial of the concealing charge presented three versions to the jury concerning how the trailer got to its location on defendant's father's property. Each of the versions support the inference that it had been stolen by someone.

Police officer Edson testified as to the location and condition of the trailer when it was discovered in Moorpark. He said that following his arrest defendant told police officers he had purchased the trailer from a "Larry Jackson" for $1,000, having paid $300 down with the balance due in monthly installments. He said he met Larry Jackson "up north" where Jackson was working for defendant's brother. Defendant told officers he did not know where he was to make the monthly payments due on the balance of the purchase price, nor could he produce a bill of sale at the time of the interview. Later he produced a purported bill of sale. Defendant stated to the officers that at the time he purchased the trailer it did not have a license or registration papers and he supposed it was stolen property when he purchased it.

At a later date defendant repeated essentially the same story to other police officers. At this time he stated further that he had asked his father to make some of the payments for him. Defendant's father testified defendant had told him he ⊥182 purchased the trailer but he did not recall any request by his son for him to make any of the payments. Defendant's father further testified that, while he did not see who parked the trailer, the only person he ever observed near the trailer was his son.

Defendant abruptly changed his story on September 1, 1961, when he told police officers he had nothing to do with the stolen trailer and that his former story of having purchased it was concocted to protect his father and brother. In support of this changed position a letter was read into evidence on defendant's behalf which was purported to have been written by defendant's father to defendant's attorney. The letter, dated September 18, 1961, denied defendant had ever stated to his father that the trailer was his. Defendant's father testified that the letter had been written by defendant's sister as a result of a letter received by her from defendant requesting such a letter. Defendant's father admitted that he had signed the letter but he stated he had not read it before signing.

Another version of the facts was presented by the testimony of Judy Ross, defendant's paramour, who was granted immunity from prosecution and compelled to testify as one of the prosecution's witnesses. She testified that she and defendant had been looking for a trailer to steal when they came upon the trailer in question near Lancaster. They attached the trailer to their car and brought it to defendant's father's property where they parked it. She stated she cleaned the trailer out, removed the owner's personal effects and scraped the decals off the windows. She testified however that she did not remove the license or serial number plaques.

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[1] The order denying motion for new trial is nonappealable. (§ 1237, Pen.Code.)

The third version was given by defendant's brother who was the only witness for the defense. He testified he was the person who had stolen the trailer, parked it on his father's lot and removed the license and identification material. He said he told his father he purchased it for a rental and did not reveal to defendant that he had stolen the trailer until after they had traveled from Moorpark to Sacramento. They did not return to Moorpark until after the trailer had been discovered and returned to its owner.

The court instructed the jury: "* * * if the defendant charged with concealing or withholding stolen property is found to be the thief, it is necessary for the People to prove that the defendant committed acts or omissions amounting to concealment or withholding of the ⌊183 property from its owner after the completion of the asportation or transportation of the property immediately connected with the perpetration of the theft of the property." This instruction would enable the jury to find defendant guilty of concealing and withholding property which he himself had previously stolen.

[1] Clearly a thief may not be convicted under section 496(1) of the Penal Code of "buying" or "receiving" the goods which he has previously stolen (see, e. g. People v. Jacobs, 73 Cal.App. 334, 341, 238 P. 770; People v. Bausell, 18 Cal.App.2d 15, 18, 62 P.2d 774), with the possible exception of the situation where the thief has disposed of the property and subsequently received it back in a transaction separate from the original theft. (See People v. Kot, 171 Cal.App.2d 9, 14, 339 P.2d 899.) Whether or not he may be adjudged guilty of violating that section by reason of concealing or withholding such property following his theft of it, a question not heretofore decided in this state, is the problem presented here.

[2] Section 496 provides that (1) "Every person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion, knowing the same to be so stolen or obtained, or who conceals, withholds or aids in concealing or withholding any such property from the owner, knowing the same to be so stolen or obtained, * * * is punishable by imprisonment in a state prison for not more than 10 years, or in a county jail for not more than one year." In our view, this section is directed at those who knowingly deal with thieves and with their stolen goods after the theft has been committed. In other words, it is directed at the traditional "fence" and at those who lurk in the background of criminal ways in order to provide the thieves with a market or depository for their loot. Such offenses are essentially different from the actual theft of property prohibited by section 484. Every theft, every wrongful misappropriation, of necessity, contemplates and involves a permanent withholding from the owner. To conceal and withhold is the thief's purpose from the very moment that he gains possession of the property. It is part and parcel of the theft. But such concealment and withholding is not that envisaged by section 496. If the Legislature had intended in that section to embrace concealment of stolen property by the thief, it would have been a simple matter to say "every thief or any other person * * * who conceals, etc."

It is apparent that other sections in the penal code section in the 496 series (§§ 496–496c) are directed principally at ⌊184 activities of others than the thief and which take place subsequent to the actual theft of the property. Experience has shown that by cutting off the "fence" a major obstacle is placed in the path of encouraging thefts as a profitable venture. These sections are patently designed to accomplish that objective, as can be seen by a cursory reading thereof. They make clear that in the eyes of the law the "fence" is more dangerous and detrimental to society than is the thief for "receiving" or "concealing" of stolen goods draws the heavier maximum penalty. To view these sections otherwise, to consider both the theft and the receiving or concealing sections as being aimed at the thief, would lead to anomolous results. For instance, a thief who steals under $200 may be convicted under section 484 of the theft but the punishment would be limited by section 490 to a $500 fine or maximum imprisonment in the county jail for six months, or both. Yet the same thief, if convicted under section 496 of "concealing" his booty would be subject to imprisonment in the state prison for a period up to ten years. These conflicts and untoward results are avoided, leaving the underlying purposes unimpaired, by construing section 496 as a statute directed primarily at persons who do not physically participate in the actual theft of property.

[3] A defendant may, of course, be charged with both crimes, but it is for the trier of fact to determine whether he is guilty as a thief or as a non-thief of concealing and withholding. Similarly, this view is in harmony with certain receiving cases wherein it is held that an accessory of the thief who receives the stolen property may be tried either for receiving or as a principal for the theft. (See People v. Stoddard, 48 Cal.App.2d 86, 90, 119 P.2d 160.) As in the Stoddard case, the failure of the accessory to participate in the actual caption and asportation of the property would be the distinguishing feature. This result is consistent with the view, noted above, that section 496 is aimed principally at those who aid the thief in ways other than the actual taking.

[4] We conclude that, in the absence of facts indicating a complete divorcement of the concealing activities from the course of conduct of the thief in the initial concealing of the property stolen by him, a thief may not be found guilty of concealment in violation of section 496(1). (Accord: People v. Daghita, 301 N.Y. 223, 93 N.E.2d 649.) In the instant case a review of the testimony reveals there was no evidence of concealment independent of that ⊥185 involved in the theft. In the absence of such evidence it was error to instruct the jury that they could find defendant guilty of concealment even though they believed he had stolen the trailer.

Had there been evidence of acts of concealment entirely separate and apart from the theft and sufficiently removed therefrom to constitute an independent course of conduct, then an instruction which clearly spelled out such distinction could properly have been given.

The People assert that dictum in People v. Foogert, 85 Cal.App.2d 290, 301, 193 P.2d 14, is tailor made to sustain the conviction in the case at bar. An analysis of the decision leads to the conclusion that, as respects the present case, it refutes rather than sustains the People's position and presents an independent ground for the conclusion we have reached. In Foogert the court stated "While in a proper case it might be held that the thief could also be guilty of a violation of section 496bb [now § 496(1)] by reason of affirmative acts of concealment occurring subsequent to the theft and constituting a new and distinct offense on the analogy that a thief may be guilty of driving the car without the owner's consent as an offense separate from the theft (See People v. Cuevas, 18 Cal.App.2d 151, 63 P.2d 311), in view of the entire record here it is unnecessary to decide the point." In People v. Cuevas, 18 Cal.App.2d 151, 63 P.2d 311, the analogy given to support the dictum in the Foogert case, supra, the defendant was found guilty of driving the car without the owner's consent at a time three years after the theft had occurred. In the present case, a period of three days elapsed between theft of the trailer and its discovery by the police. Therefore, any acts of concealment necessarily occurred within the three days. This disparity in time lapse distinguishes the present case from the dictum in Foogert, since the analogous Cuevas case has been distinguished on the same basis in People v. Kehoe, 33 Cal.2d 711, 204 P.2d 321. In Kehoe, the court held that a thief could not be convicted of theft of an automobile *and* of driving it without permission of the owner where the arrest while driving the car occurred one week after theft of the car.

The rationale of the Kehoe case is based on section 654 of the Penal Code. This section recites: "An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than ⌊186 one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. * * *" Thus, it was stated in Kehoe "Obviously the [applicable] statutes are a part of a general legislative plan of protection and punishment conceived to prevent the taking or use of an automobile without the owners' consent. Different punishment is fixed to correspond with the intent with which each offense is committed, but the legislation is directed against one evil. Insofar as they relate to a single act [violations of different sections of the Penal Code] may subject the offender to but one punishment." (People v. Kehoe, 33 Cal.2d 711, 714, 204 P.2d 321.)

[5] Section 654 is equally applicable to bar subsequent prosecution of the thief for concealment where concealment of his booty is an incident of the theft. "Section 654 has been applied not only where there was but one 'act' in the ordinary sense * * but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654." (People v. Brown, 49 Cal.2d 577, 591, 320 P.2d 5, 14.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (Neal v. State of California, 55 Cal.2d 11, 19, 9 Cal.Rptr. 607, 611, 357 P.2d 839, 843.) Indeed, the People concede a *conviction* for theft in violation of section 484 would bar conviction for concealing under section 496. The reason one could not be convicted for both offenses is that the concealment upon stealing the property is part of the "act" of theft proscribed by section 484 so that further grounds for convictions are removed by section 654 and considerations of double jeopardy.

While an acquittal on the theft charge does not have the effect of a judicial determination that defendant is not the thief[2] its effect is the same as a conviction insofar as barring a further prosecution for the immediate concealment of ⌊187 the stolen property which is attendant to the theft is concerned. This is the mandate of section 654's injunction against harassment through multiple prosecutions. Any other result is inconsonant with the rule against double jeopardy (Art. I, § 13, Calif.Const.), and the limitations of section 654, Penal Code.

[6] The instruction quoted above was inappropriate under the evidence presented. The defendant was seriously prejudiced thereby on the trial and the conviction cannot stand.

Judgment of conviction is reversed and the purported appeal from denial of the motion for new trial is dismissed.

JEFFERSON and FORD*, JJ., concur.

Hearing denied; SCHAUER and McCOMB, JJ., dissenting.

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[2] "The acquittal was 'merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.'" (In re Anderson, 107 Cal.App.2d 670, 672, 237 P.2d 720, 721; see Helvering v. Mitchell, 303 U.S. 391, 397, 58 S.Ct. 630, 82 L.Ed. 917; Teitelbaum Furs, Inc. v. The Dominion Insurance Co., Ltd., Cal., 25 Cal.Rptr. 559, 375 P.2d 439).

* Assigned by Chairman of Judicial Council.

209 Cal.App.2d 343

343 **Floyd V. SMITH, Leonard A. Smith and Ernest A. Smith, Plaintiffs, Cross-Defendants and Respondents,**

v.

Clinton E. SMITH, Defendant, Cross-Complainant and Appellant.

Civ. 20851.

District Court of Appeal, First District, Division 3, California.

Nov. 8, 1962.

Suit for declaratory relief and to establish a trust. From a judgment of the Superior Court, Contra Costa County, Martin E. Rothenberg, J., dismissing the cross-complaint, the cross-complainant appealed. The District Court of Appeal, Devine, J., held that where plaintiffs filed a prior petition to determine heirship in probate proceeding and they filed the present complaint for declaratory relief and to establish a trust as a precautionary measure in case jurisdictional defects arose in the heirship proceeding, but they were successful in the heirship proceeding, and there was no further relief which they could have under their complaint, but defendant could not proceed because of judgment of dismissal of cross-complaint without leave to amend, judgment dismissing cross-complaint was final and appealable.

Motions to dismiss appeal and to affirm judgment denied.

1. Appeal and Error 🔑80(6)

Ordinarily, a cross-complaint is not considered sufficiently independent to allow a separate final judgment to be entered upon it where the parties to the complaint and cross-complaint are identical, but where judgment dismissing cross-complaint finally disposes of the action as to the appellant, it is appealable.

2. Appeal and Error 🔑80(6)

Where plaintiffs filed prior petition to determine heirship in probate proceeding and they filed present complaint for declaratory relief and to establish a trust as precautionary measure in case jurisdictional defects arose in heirship proceeding, but they were successful in heirship proceeding, and there was no further relief which they could have under their complaint, but defendant could not proceed because of judgment of dismissal of cross-complaint without leave to amend, judgment dismissing cross-complaint was final and appealable.

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Bohnett, Hill & Bonnett, by L. D. Bohnett, San Jose, for appellant.

Tinning & DeLap, by Robert Eshleman, Martinez, for respondents.

DEVINE, Justice.

Plaintiffs move to dismiss the appeal of defendant and cross-complainant from judgment dismissing the cross-complaint based upon an order sustaining a demurrer to the cross-complaint without leave to amend, upon the ground that the judgment is nonappealable. Plaintiffs also move for
an order affirming said judgment on the 344
same ground and on the ground that the appeal is frivolous.

Plaintiffs contend that the judgment is nonappealable because, the parties to the complaint and to the cross-complaint being the same, the judgment dismissing the cross-complaint does not finally dispose of anyone's claims, for the complaint and the answer to it remain.

[1] It is, indeed, the rule that a cross-complaint is not ordinarily considered sufficiently independent to allow a separate final judgment to be entered upon it, where the parties to the complaint and cross-complaint are identical, and appeal does not lie from judgment dismissing the cross-complaint. (Sjoberg v. Hastorf, 33 Cal.2d 116, 199 P.2d 668, and cases cited therein.) There is an exception, however, when the judgment appealed from finally disposes of the action as to the appellant. Thus, where judgment on the pleadings was granted to plaintiffs upon the proposition, erroneous as the appellate court found it to be, that

cross-complaint would not lie, the judgment finally disposed of the matter, and was appealable. (Woman's Athletic Club of San Francisco v. Anglo Cal. Nat. Bank, 90 Cal. App.2d 850, 853, 204 P.2d 411.)

[2] The judgment of dismissal was based upon an order sustaining a demurrer to the cross-complaint without leave to amend, upon the ground that the content of the cross-complaint was res judicata under the decision of this court, Division One (Estate of Smith, 196 Cal.App.2d 544, 16 Cal.Rptr. 681). Plaintiffs in the case before us took two steps for the protection of their rights under a certain written contract with decedent, Clara I. Smith: (1) they filed a petition to determine heirship in the probate proceedings, and (2) they filed a complaint for declaratory relief and to establish a trust, which commenced the present case. As respondents stated frankly to the court below, they filed the complaint simply as a precautionary measure in case jurisdictional defects should arise in respect of the petition to determine heirship. They succeeded completely in the petition to determine heirship, and everything that is in their complaint in the present case has been decided effectively in their favor by the judgment which was affirmed in Estate of Smith, supra. Therefore, the situation is similar to that in Woman's Athletic Club, supra. There is no further relief which plaintiffs may have under their complaint, and defendant cannot proceed because of the judgment of dismissal against them.

The cross-complaint is based upon an alleged oral contract 345 between Clara I. Smith, deceased, and appellant. It may be that the decision in Estate of Smith forecloses any claim under the oral contract as a matter which was, or which might have been, litigated in the probate proceedings, but that is the very question of the appeal on its merits. Under the circumstances related herein, the judgment dismissing the cross-complaint is final between the parties, and is appealable.

As to the motion to affirm the judgment upon the ground that the appeal is frivolous, we prefer to hear the appeal in the regular way, rather than to undertake consideration of the matter without the help of briefs.

Motions to dismiss appeal and to affirm judgment are denied.

DRAPER, P. J., and SALSMAN, J., concur.

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209 Cal.App.2d 258

258 FIRST NATIONAL BANK OF HAYS CITY, Plaintiff and Appellant,

v.

Norman K. SPRIGG, Edward Dyer Mathews, Thelma Mathews, City Chevrolet Company, Carl Patloff, Kasey Pontiac Company and Bank of America National Trust & Savings Assn., Defendants and Respondents.

Civ. 6752.

District Court of Appeal, Fourth District, California.

Nov. 5, 1962.

Action for claim and delivery of automobile, and for conversion. The Superior Court, San Diego County, Dean Sherry, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Stone, J., assigned by Chairman of Judicial Council, held that even under rule of comity, Kansas bank which took chattel mortgage on automobile and recorded it, but neglected to endorse its lien on certificate before delivering certificate to mortgagor, was estopped to assert claim against innocent California buyer who bought on strength of unencumbered certificate.

Affirmed.

Estoppel ⚷75

Even under rule of comity, Kansas bank which took chattel mortgage on automobile and recorded it, but neglected to endorse its lien on certificate before delivering certificate to mortgagor, was estopped to assert claim against innocent California buyer who bought on strength of unencumbered certificate.

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Ruel Liggett, San Diego, for appellant.

Selleck & Sinclair, Willard M. Sinclair, White, Froehlich & Peterson and Charles W. Froehlich, Jr., San Diego, for respondents.

259 STONE, Justice.

The First National Bank of Hays City, Kansas, brought a complaint in two counts: one for claim and delivery of an automobile, and a second for damages for conversion of the vehicle. This appeal is taken from a judgment for defendants.

Defendant Sprigg bought a used automobile from one Geiber, at Hays City, Kansas. Geiber owed money on the car, and Plaintiff Bank agreed to loan Sprigg the money to satisfy the lien and to pay Geiber for his equity. In turn, the Bank required a note and chattel mortgage on the automobile as security. The transfer took place in the offices of the Bank. The Geiber loan was satisfied by the Bank, Geiber was paid off, and an assignment from Geiber to Sprigg was typed on the back of the title certificate by an employee of the Bank, who also notarized Geiber's signature. The Bank did not insert a record of its lien on the certificate, although there was a space provided for this notation in the assignment form on the back. Plaintiff Bank delivered the certificate of title to Sprigg, and recorded its chattel mortgage in the office of the county registrar of deeds.

Kansas law does not condition validity of motor vehicle liens upon registration with the Department of Motor Vehicles; the only requirement is that they be recorded in the proper county. It is the duty of a new owner, however, to endorse all liens against his vehicle in a space provided on the back of the certificate before applying to the Director of the Kansas State Highway Commission for a new certificate of title.

Although the Bank handled the transaction, including preparation of the certificate of title for transfer, it delivered the certificate to Sprigg without endorsing its own lien thereon. Apparently the Bank either neglected to note its lien through an oversight or it made the mistake of trusting Sprigg to endorse its lien in the proper place on the back of the certificate before obtaining a new certificate of title. Sprigg violated this trust and secured a new certificate showing clear title in him without liens or encumbrances of any kind.

After making three monthly payments to Plaintiff Bank, Sprigg drove the car to the State of California, where he sold it to the City Chevrolet Company in San Diego, a dealer in automobiles and one of the defendants in this action. The other defendants are subsequent purchasers and lienholders.

California is known as a "full title" State insofar as registration of motor vehicles is 260 concerned. This means that anyone transacting business with the owner of a motor vehicle can rely upon the title as reflected by the registration certificate, without further inquiry. Plaintiff contends that Kansas is not a "full title" State in that a lien such as the chattel mortgage here in question, is a valid and enforceable document if recorded in the proper county. Thus, argues plaintiff, under the rule of comity one in California transacting business with the owner of a vehicle registered in Kansas is under a duty to make inquiry in the proper office of the proper county in Kansas before accepting an assignment of the certificate of title.

There seems to be some question as to whether Kansas is an "incomplete title" State as plaintiff contends, or a "full title" State as defendants contend. The authors of an article in 47 California Law Review 543, at 581, classify Kansas as a "full title" State. We think it unnecessary to pursue this question, however, because the judgment must be affirmed upon the doctrine of estoppel.

As noted above, Geiber delivered the certificate of title to a representative of the Bank. The Bank handled the transfer to insure that the money loaned to Sprigg would be used to pay Geiber's creditor, yet the Bank did not protect its own loan by listing it as a lien in the space provided on the certificate. Thus the negligence of Plaintiff Bank enabled Sprigg to turn in the old certificate and secure a new one showing his title to be clear. He used the new certificate of title to sell the vehicle to an innocent purchaser for value in California.

Under similar facts, had the transaction occurred entirely within the State of California, plaintiff would have been estopped from recovering from any of the defendants. (Crestline Mobile Homes Mfg. Co. v. Pacific Finance Corp., 54 Cal.2d 773, 8 Cal.Rptr. 448, 356 P.2d 192.) There is authority, also, that under like circumstances the doctrine of comity is not an obstacle to the application of the doctrine of estoppel in California. In Atha v. Bockius, 39 Cal.2d 635, at page 642, 248 P.2d 745, at page 748, the Supreme Court said:

> "There is nothing in the comity doctrine, * * * to preclude application of the universally accepted principle, incorporated in section 3543 of the Civil Code, that when one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must bear the loss."

Even under the rule of comity the doctrine of estoppel obtains in this case, since the same doctrine has been applied to similar facts by the courts of Kansas. In the case of General Motors Acceptance Corporation v. Davis, 169 Kan. 220, 218 P.2d 181, 18 A.L.R.2d 808, a Kansas court was faced with facts comparable to those before us, except that the entire transaction occurred within the State of Kansas. The court followed the principle of estoppel, and held, at pages 183–184 of 218 P.2d:

> "Hope invested Gray with possession of the automobile and every indicia under the statute, of a full and complete title free of any lien or encumbrance. Under such circumstances any person, member of the public generally, or a dealer in used cars, had the right to purchase from Gray upon satisfying himself that the certificate of title correctly identified the automobile being purchased, and to rely upon the certificate of title that there was no lien or encumbrance thereon. Hope, having invested Gray with indicia of full ownership may not say that one dealing with Gray without actual notice of Hope's rights, if any, dealt at his peril."

(See also Whisnant v. Don Schmid Motor Co., 184 Kan. 348, 336 P.2d 398.)

In another Kansas case involving transfer of title to a vehicle, we find a situation analogous to that before us except that the original sale of the car occurred in the State of Michigan. The seller neglected to note his claim of lien on the certificate of title, the buyer transported the car to the State of Kansas, and it was a Kansas citizen who relied upon the Michigan certificate showing clear title in the seller. In that case, Commercial Credit Corporation v. Kemp, 176 Kan. 350, 270 P.2d 209, the Kansas court held that the Michigan seller was negligent in not noting his lien on the certificate of title, and denied recovery against the Kansas buyer. (See also 18 A.L.R.2d 813; 47 Cal.L.Rev. 543, 556.)

The judgment is affirmed.

GRIFFIN, P. J., and COUGHLIN, J., concur.

58 Cal.2d 702, 375 P.2d 833

⊥702 ⊥**Katherine Margaret BRUCE et al., Plaintiffs and Appellants,**

v.

Elenita E. ULLERY, as Administratrix, etc., Defendant and Respondent.

L. A. 26893.

Supreme Court of California,
In Bank.

Nov. 9, 1962.
Rehearing Denied Dec. 5, 1962.

Action for injuries arising out of an automobile collision wherein a cross-complaint was interposed by a defendant who subsequently died and was succeeded by his administratrix. The plaintiffs appealed from an adverse judgment of the Superior Court, Los Angeles County, Arnold Praeger, J. The Supreme Court, Tobriner, J., held that the deadman's statute does not prevent cross-defendant from testifying as to facts preceding death of original cross-complainant in case in which estate presses cross-complaint, but, in such case, there is waiver of statute which attaches to testimony of all witnesses defending against cross-complaint.

Affirmed in part and reversed in part and remanded.

Opinion, 21 Cal.Rptr. 310, vacated.

1. Witnesses ⇨181

Estate waives protection of deadman's statute by filing action for or on its own behalf to obtain relief upon facts occurring before death of decedent. West's Ann.Code Civ.Proc. § 1880, subd. 3.

2. Witnesses ⇨176(2)

The deadman's statute does not prevent cross-defendant from testifying as to fact preceding death of original cross-complainant in case in which estate presses cross-complaint, but, in such case, there is waiver of statute which attaches to testimony of all witnesses defending against cross-complaint. West's Ann.Code Civ.Proc. § 1880, subd. 3.

3. Trial ⇨139(1), 140(1)

Determination of credibility of witnesses and weight to be given their testimony is for the jury.

4. Negligence ⇨134(2)

Negligence may be proved circumstantially like any other issue of fact, and indirect evidence may outweigh direct evidence on the contested point.

5. Automobiles ⇨244(43)

Jury could have concluded that plaintiff westbound motorist entered intersection where her vehicle collided with southbound vehicle while light for plaintiffs was red.

6. Automobiles ⇨242(1)

In absence of other evidence on issue and on proof of co-ownership and use of vehicle by one co-owner, inference normally arises that the other co-owner consented to the use.

7. Automobiles ⇨246(42)

Where both complaint and cross-complaint alleged that plaintiffs, husband and wife, owned vehicle, and plaintiffs drew no issue as to matter of husband's consent and wife's use of automobile and specification of issues in pretrial order and joint pretrial statement did not mention consent, court properly instructed that wife's use was with husband's consent.

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Abe Mutchnik, James D. Garibaldi, Theodore A. Horn, Warren J. Lane and David S. Smith, Los Angeles, for plaintiffs and appellants.

Parker, Stanbury, Reese & McGee and George Babcock, Los Angeles, for defendant and respondent.

⊥TOBRINER, Justice. ⊥704

To hold that the so-called deadman's statute (Code Civ.Proc. § 1880, subd. 3) prevents a cross-defendant from testifying as to facts preceding the death of a cross-complainant in a case in which the estate presses the cross-complaint would be to permit the use of the statute as a weapon of aggression rather than protection and to give it application beyond that of the precedents. As we point out in more detail infra, we hold that in this action of plaintiffs for injuries incurred in an intersection automobile collision the trial court erred in applying the statute to foreclose cross-defendant from so defending against the estate's cross-complaint for injuries to decedent and for property damages. We find no merit, however, in two further alleged grounds for appeal: that the evidence did not sufficiently support the verdict and that the court erred in its instruction that plaintiff wife at the time of the accident operated the vehicle with her husband's permission.

Plaintiffs Bruce, husband and wife, originally brought this action against defendant Ullery. Ullery filed an answer and a cross-complaint which sought recovery for ⊥705 personal injuries and property damages that he alleged he sustained in the accident. When Ullery died of causes not connected with the accident the court substituted his widow, the administratrix of his estate, as defendant and cross-complainant. The jury returned a verdict in favor of defendant and cross-complainant in the sum of $3,244, which amount was reduced to $2,250 on motion for a new trial.

The facts disclose a typical intersection collision. Plaintiff Mrs. Bruce drove west on Rush Street toward the intersection; Ullery approached it from the north on Hoyt Street. The only eye-witness, Ebert, Mrs. Bruce's uncle, who was riding with her, testified that their station wagon was going 25 miles per hour; that the traffic light showed green but changed to amber about the time the vehicle entered the intersection. He testified that Ullery was coming at a speed of 40 to 55 miles per hour when the signal for westbound cars still displayed amber. Ebert could not say whether Mrs. Bruce looked to her right, but their station wagon proceeded straight ahead without any change in speed. Neither vehicle slowed down before the collision. The Ullery car hit the Bruce station wagon just ahead of the dashboard on the right side; the station wagon skidded, straightened out after the impact and went half a length ahead, stopping not more than seven or eight feet west of the west curb line of Hoyt Street. Ebert's cross-examination, however, revealed discrepancies with his deposition.

Ullery's son testified that he saw his father's car that evening; that the car had been damaged at the left front; that the whole left front had been moved to the right; that the left door had been broken, and the car had been bowed like a V-shape. Everything on the left side of the front half of the car had been ruined and pushed against the engine, but the right side of the engine had not been damaged. The frame had been bent to the right.

A highway patrol officer testified that he arrived at the scene 10 to 15 minutes after the collision. He stated that although the Ullery car left no brush marks after the impact, the Bruce station wagon left 63 feet of brush marks. In contrast to Ebert's testimony, the officer stated the Bruce vehicle finally came to a stop 42 feet west of the west edge of Hoyt Street. The officer further testified that in a conversation with Ullery at the scene of the accident, Ullery stated that as he was traveling 25 to 35 miles an hour on Hoyt Street he observed a westbound vehicle (the Bruce station wagon) ⊥706 on Rush Street but that the traffic light for the north-south traffic on Hoyt Street showed green; the officer could not state whether Ullery said that when he saw the light turn green Ullery was 70 or 7 feet from the intersection. Plaintiffs interposed no objection to this hearsay testimony. (Powers v. Board of Public Works (1932) 216 Cal. 546, 552, 15 P.2d 156; Crocker-Anglo National Bank v. American Trust Co. (1959) 170 Cal.App.2d 289, 299, 338 P.2d 617.)

Turning to the issue of the deadman's statute, we first describe the procedural background for the interposition of the objection based upon it. Because their medical witnesses were detained, plaintiffs could not conclude the presentation of their case. To proceed with the trial, the court, upon stipulation of counsel, permitted defendant's witnesses to testify in support of the answer and cross-complaint. Ullery's son, as we have noted supra, testified as to the damage to the Ullery car. Defendant administratrix then described decedent's damages: the medical expenses, the extent of personal injuries, the loss of earnings, the loss of the use of the car. After plaintiffs called a medical witness, defendant presented the testimony of the highway patrol officer.

Plaintiffs thereafter resumed the presentation of their case, their medical witness testified, and then plaintiff wife, Mrs. Bruce, took the witness stand in her own behalf. At that point defendant's counsel objected to "any testimony" from Mrs. Bruce "relating to any event prior to the death of Mr. Ullery under section 1880 of the Code of Civil Procedure," and the court sustained the objection.

[1, 2] As we shall point out, we believe that this court has long recognized that an estate waives the protection of the statute by filing an action for and on its own behalf to obtain relief upon facts occurring before the death of decedent. While some cases have placed procedural limitations upon the application of the waiver, we do not believe that the particular method or order of presentation of the evidence should overcome the principle. Nor can we accept the contention of the administratrix that she only partially waived the statute, limiting the waiver to the single issue of damages. The waiver covered the whole defense to the cross-complaint.

The early case of Sedgwick v. Sedgwick (1877), 52 Cal. 336, held that the exclusionary provision of the statute cannot operate to silence the testimonial defense of the party against whom the executor or ⊥707 the administrator of the estate levels his⊥action. To that extent the estate must necessarily waive the statute. In Sedgwick this court said at page 337: "This action is brought by the executrix, and is brought upon a demand, not against, but in favor of the estate, and therefore does not fall within the above cited provision. (Code Civ.Proc., § 1880, subd. 3.)"

Webster v. Freeman (1938) 27 Cal.App. 2d 5, 80 P.2d 497, applied the waiver to the defense of a plaintiff to a counterclaim. There the claimant brought an action to recover for services rendered a decedent. The executor counterclaimed for credits and cash advancements in excess of the claimed services. Construing the counterclaim as an action by the executor against the claimant, the court held that the limitation of the section did not preclude plaintiff from testifying in defense of the counterclaim.

Two cases, Norgard v. Estate of Norgard (1942) 54 Cal.App.2d 82, 128 P.2d 566 and George v. McManus (1915) 27 Cal.App. 414, 150 P. 73, place procedural conditions upon the waiver of the statute. Norgard holds it inapplicable to a situation in which the counterpleading is dismissed before evidence is introduced in its support. In that case the administrator sued the estate; the estate filed a cross-complaint. Prior to the trial the estate dismissed the cross-complaint. On the basis of the statute the court excluded the plaintiff's testimony and rendered judgment in favor of the estate. Plaintiff appealed on the ground that he was a competent witness to testify on his own behalf since the estate had originally filed the cross-complaint. Rejecting plaintiff's contention, the court held that the "cross-complaint having been abandoned by respondent estate, and no evidence having been introduced by respondent in support thereof," the limitation of the section properly applied in bar of plaintiff's testimony. (54 Cal.App.2d 88, 128 P.2d 568.) The concurring opinion implies that in the absence of the dismissal of the cross-complaint, plaintiff would have been entitled to testify: "It is not error to dismiss a cross-complaint, to which dismissal a pleader would otherwise be entitled, merely because the cross-defendant may thereby lose his right to testify against a dead man, contrary to the provisions of section 1880." (54 Cal.App.2d 91, 128 P.2d 570.)

The Norgard court relies upon George v. McManus (1915) 27 Cal.App. 414, 150 P. 73, supra. In McManus plaintiff sued for damages sustained in an automobile collision; the personal representatives of the deceased defendant filed a counterclaim. At the trial, over objection based on the ⊥708 statute, the court permitted plaintiff to testify in support of his complaint on matters occurring before the death of the decedent. On appeal the court held the testimony inadmissible because the estate had not yet produced witnesses in support of the counterclaim. After declaring that the mere fact of the filing of the counterclaim did not render plaintiff's testimony competent, the court concluded (27 Cal.App. 418, 150 P. 75): "It is apparent * * * upon an examination of the record presented, that the evidence of plaintiff was offered, received, and considered by the court in support of the allegations of his complaint. *Since defendants had offered no evidence in support of their counterclaim* when plaintiff was called to testify, it is clear, therefore, that such evidence was not offered *in rebuttal* of any testimony given by defendants' witnesses." (Emphasis added.)

We do not believe the right to defend against the cross-complaint of the estate founded upon facts occurring before decedent's death should turn on the fortuity of whether the estate has as yet produced evidence in support of the counterpleading. Once the counterpleading has been filed, the estate has opened up the issue to the defense of the cross-defendant and foregoes the protection of the statute.

In any event, the estate in the instant case did introduce testimony in support of the cross-complaint before the court rejected the proffered testimony. Ullery's son, earlier in the trial than plaintiff wife, testified as to the condition of decedent's car in order to establish plaintiffs' liability. Having fully presented this evidence of Ullery, which, of course, supports the cross-complaint, defendant administratrix would seize the statute as a sword instead of a shield if she were now to wield it to cut off rebuttal testimony. Even on the McManus premise, the court here should have admitted Mrs. Bruce's testimony.

Finally, we cannot accept the suggestion of defendant administratrix that since she herself only testified on the issue of damages, plaintiffs' proffered testimony should be limited to that issue. The administratrix contends that she waived the protection of the statute only partially; that she did not lose the benefit of the disqualification of the witness on all subjects but only as to matters "concerning which the protected party has testified." (97 C.J.S. Witnesses § 242, p. 723.)

We believe the waiver should embrace the entire defense to the cross-complaint. The court could apply the waiver in three ways: (1) only to evidence in rebuttal to the subject matter of the testimony of the ⊥709 administratrix, (2) only to evidence in rebuttal to the testimony of the administratrix herself and not to that of any witness on her behalf, (3) generally and to all relevant, competent and material testimony in defense of the cross-complaint. The first two applications arbitrarily constrict the defense of the party who must meet the cross-complaint; indeed, the second ground enables the administratrix, by eschewing the witness stand, to prove her case by other witnesses without encountering rebuttal. Only the third application affords the opportunity for a full defense to the cross-complaint.

Such opportunity does no more than fulfill the purpose of the statute whose "object * * * is to so balance rights as between the survivor and the deceased that no advantage may be taken of a deceased person because of the fact that his lips are sealed by death, and that the personal representative may not take advantage of the survivor." (Moul v. McVey (1942) 49 Cal. App.2d 101, 105–106, 121 P.2d 83, 86.)

It would be a strange reversal of judicial history if we were now to ignore the trend of the cases and hold that the waiver of the statute did not cover the defense which the estate itself has provoked. The story of the deadman's statute has, indeed, been a record of court contraction of its scope and expansion of such conduct as might constitute its waiver. The very recognition that it is subject to waiver narrows it, because, literally, the statute renders the witness *incompetent* to testify, as an infant or insane person; and such incompetency would not theoretically be amenable to waiver. Yet numerous cases have held that the executor or administrator may waive the benefit of the provisions (see Kinley v. Largent (1921) 187 Cal. 71, 200 P. 937; Deacon v. Bryans (1931) 212 Cal. 87, 298 P. 30; Moul v. McVey, supra, 49 Cal. App.2d 101, 121 P.2d 83; Thompson v. Hickman (1948) 89 Cal.App.2d 356, 364, 369, 200 P.2d 893). Such waiver may be manifested by the taking of plaintiff's deposition (McClenahan v. Keyes (1922) 188 Cal. 574, 206 P. 454); by the defendant executrix proceeding, on the cross-examination of plaintiff, beyond the direct examination and asking questions as to facts occurring during the life of the decedent (Lucy v. Lucy (1937) 22 Cal.App.2d 629, 71 P.2d 949); by waiver of the privilege at a previous trial (Deacon v. Bryans, supra).

The curtailment of the coverage of the statute finds expression in the ruling that the reference in the statute to actions on a "claim, or demand" applies to money claims and not to ⊥710 an action to redeem mortgaged property (Wadleigh v. Phelps (1906) 149 Cal. 627, 87 P. 93) or to comparable actions (Witkin, Calif. Evidence 442). The statute does not apply to an action against a partnership in a case in which the member who had handled the transaction had died (Panno v. Russo (1947) 82 Cal.App.2d 408, 186 P.2d 452). In sum, as we have recently stated in Trabin v. Title Ins. & Trust Co. (1959) 52 Cal.2d 149, 152, 339 P.2d 136, 137: "This court has been reluctant to extend the effect of subdivision 3 of section 1880 beyond what is compelled by its language and in many cases has narrowly construed the statute against the disqualification of a witness and in favor of the admissibility of evidence."

Concurring in Witkin's comment that "The dead man statute has been strongly criticized by nearly all authorities in the field of evidence, and the movement for its statutory repudiation is steadily gaining ground," we see no reason to give it a new and strained application. (Witkin, Calif. Evidence, § 394, p. 444; see Chadbourn, History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization, 4 U.C.L.A.L.Rev. 175, 202.) We conclude that in the instance of a cross-complaint of an estate founded upon facts preceding decedent's death, the waiver of the disqualification attaches to the testimony of all witnesses defending against the cross-complaint. (97 C.J.S. Witnesses § 241, p. 721.[1]

Our study of plaintiffs' second ground of appeal discloses no basis for holding that the evidence does not sufficiently support the judgment. The point rests upon the proposition that the testimony of the sole eye-witness, Ebert, placed the fault upon Ullery. Plaintiffs argue that while the jury could have disregarded all of Ebert's testimony, it could not reject some parts of it and accept other parts for the purpose of finding plaintiff driver negligent.

[3, 4] Plaintiffs' position, however, does not accord with the settled rule that the determination of the credibility of a witness ⊥711

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[1] Defendant further contends that the court's refusal to allow plaintiff wife to testify did not prejudice plaintiffs; that plaintiffs did not make any offer of proof to indicate the nature of the proposed testimony. The cases hold, however, that when "the trial court states that it will not receive evidence, a specific offer of proof is not necessary and would be idle under the circumstances, and it therefore may be claimed that it was error to exclude such evidence." (Tomaier v. Tomaier, (1944) 23 Cal.2d 754, 760, 146 P. 2d 905, 908; see also Caminetti v. Pacific Mut. Life Ins. Co. (1943) 23 Cal. 2d 94, 100, 142 P.2d 741; Van Horn v. Southern Pac. Co. (1956) 141 Cal.App. 2d 528, 536–537, 297 P.2d 479.)

and the weight to be given his testimony lies exclusively within the province of the jury. "[T]he jury properly may reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected available material. (citing cases.)" (Nevarov v. Caldwell (1958) 161 Cal.App.2d 762, 777, 327 P.2d 111, 121.) Furthermore, negligence may be proved circumstantially like any other issue of fact, and indirect evidence may outweigh direct evidence on the contested point. (Scott v. Burke (1952) 39 Cal.2d 388, 398, 247 P.2d 313.) As we said in Gray v. Southern Pacific Company (1944) 23 Cal.2d 632, at page 641, 145 P.2d 561, at page 566: The jury "could reject positive testimony and accept circumstantial evidence as proof of the facts, as it is elementary that direct evidence may be disbelieved and contrary circumstantial evidence relied upon to support a verdict or finding." (See also McNulty v. Copp (1949) 91 Cal.App.2d 484, 490, 205 P.2d 438.)

[5] Here the jury could properly have inferred that since plaintiffs' station wagon struck the Ullery car with such force on the left side that it pushed that side into the engine and bent the frame to the right, plaintiff wife drove into the intersection without looking to the right and at a high rate of speed. The 63 feet of brush marks which the plaintiffs' station wagon left after the collision signify high speed. Since the officer testified that Ullery said that when he drove into the intersection the traffic light was green, the jury could have concluded that when plaintiff wife entered the crossing the light was red. Such inferences sufficiently support the verdict.

Plaintiffs' third point, that the court erred in its instruction that plaintiff wife operated the station wagon with her husband's consent,[2] cannot stand. Plaintiffs argue that the trial court "erroneously assumed, from the mere fact that *co-ownership* of the vehicle was admitted * * * that this * * * could therefore be entirely removed from the consideration of the jury." Yet, say plaintiffs, the issue was a factual one.

[6, 7] The record lends no support to plaintiffs' argument. ⊥ In the absence of other evidence upon the issue, but upon proof of co-ownership, and use of a vehicle by one co-owner, an inference normally arises that the co-owner consented to such use. (Krum v. Malloy (1943) 22 Cal.2d 132, 135, 137 P.2d 18.) Here both the complaint and the cross-complaint alleged that plaintiffs owned the Pontiac station wagon. Moreover, plaintiffs drew no issue as to the matter of Mr. Bruce's consent and Mrs. Bruce's use of the car; the specification of issues in the pretrial order and joint pretrial statement did not mention the subject of consent (Campbell v. Magana (1960) 184 Cal.App.2d 751, 757, 8 Cal.Rptr. 32; Dell'Orto v. Dell'Orto (1959) 166 Cal.App.2d 825, 831, 334 P.2d 97); plaintiffs offered no evidence on the issue of permissive use; the court read the instruction in question to counsel in chambers and plaintiffs tendered no objection. ⊥712

While we thus concur with the trial court's disposition of the last two issues we cannot agree with that of the first since it neither followed the precedents nor the policy of contraction, rather than expansion, of the deadman's statute.

The judgment that Katherine Margaret Bruce and Merle V. Bruce take nothing by reason of their complaint is affirmed; the judgment that Elenita E. Ullery, as administratix of the Estate of Richard Eugene Ullery, have and recover from said Katherine Margaret Bruce and Merle V.

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[2] The instruction read: "It has been established in this case that at the time of the accident in question, the vehicle then being used by Mrs. Bruce was owned by both Mr. and Mrs. Bruce and that it was being used with the permission of Mr. Bruce. It follows, therefore, under the law, that if one is liable, both are liable."

Bruce on the cross-complaint damages in the sum of $2,250 is reversed, and the cause is remanded for retrial on the cross-complaint in accordance with this opinion. Each party shall bear his costs on appeal.

GIBSON, C. J., TRAYNOR, SCHAUER, McCOMB and PETERS, JJ., and WHITE, J. pro tem., concur.

Rehearing denied; WHITE, J., sitting pro tem.

58 Cal.2d 713, 375 P.2d 839

⌊713 ⌊**The PEOPLE, Plaintiff and Appellant,**

v.

Joseph W. CROSBY et al., Defendants and Respondents.

Cr. 7149.

Supreme Court of California,
In Bank.
Nov. 9, 1962.
As Modified on Denial of Rehearing
Dec. 5, 1962.

Prosecution on charge of criminal conspiracy, grand theft, and falsification of corporate records. From a judgment of the Superior Court, Los Angeles County, Martin Katz, J., setting aside certain counts of indictment, the state appealed. The Supreme Court, Schauer, J., held that where certain of defendants were charged with theft of money in several counts by payment of checks of four alleged premiums on credit insurance taken out by new management of a company, including several of the defendants, and through a simple clerical or typographical mistake in drawing up the multiple counts two of the counts referred to the same payment, amendment of indictment to correct the defect did not amount to changing the offense and adding an offense not charged by the grand jury, and state was entitled as a matter of right to amend the indictment when at time of motion to amend defendants had not yet pleaded to the indictment, and when no demurrer thereto had been sustained.

Order affirmed in part and reversed in part.

Opinion, 20 Cal.Rptr. 525, vacated.

1. Indictment and Information 🔑137(1)

An indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming possibility that an offense has been committed and the accused is guilty of it.

2. Criminal Law 🔑238

Evidence before grand jury was sufficient to hold defendants to answer to counts of indictment charging them with criminal conspiracy to commit crimes, to cheat and defraud by criminal means and to obtain money by false promises with fraudulent intent not to perform such promises and with grand theft. West's Ann.Pen.Code, §§ 182, subds. 1, 4, 5, 487, subd. 1.

3. Indictment and Information 🔑159(1)

Where certain of defendants were charged with theft of money in several counts by payment of checks of four alleged premiums on credit insurance taken out by new management of a company, including several of defendants, and through a simple clerical or typographical mistake in drawing up multiple counts two of the counts referred to the same payment, amendment of indictment to correct defect did not amount to changing the offense and adding an offense not charged by grand jury, and state was entitled as a matter of right to amend indictment when at time of motion to amend defendants had not yet pleaded to the indictment, and when no demurrer thereto had been sustained. West's Ann.Pen.Code, §§ 182, subds. 1, 4, 5, 487, subd. 1, 1009.

4. Indictment and Information 🔑159(3)

Proposed amendment of allegation of facts tolling statute of limitations did not change the offense and amendment should have been allowed, particularly when offered before entry of defendants' pleas. West's Ann.Pen.Code, §§ 800, 1009.

5. Indictment and Information ⚷87(2)

An indictment which when filed shows on its face that it is barred by statute of limitations fails to state a public offense only in the sense that, if not amended, it will be subject to being set aside on motion, and a conviction based thereon will be subject to attack, either directly or collaterally.

6. Indictment and Information ⚷159(2)

If required notice is given, omission of an allegation charging a technically essential element of the offense may be corrected by timely amendment. West's Ann. Pen.Code, § 1009.

7. Indictment and Information ⚷159(2)

An amendment adding an omitted allegation of a substantive element of the offense sought to be charged does not change the offense. West's Ann.Pen.Code, § 1009.

8. Indictment and Information ⚷10.2(1)

An indictment or count thereof which is wholly without evidential support cannot stand.

9. Indictment and Information ⚷87(1)

An accusatory pleading must allege facts showing that prosecution is not barred by statute of limitations, and if period of time in excess of that permitted by statute has elapsed since commission of offense, further facts must be alleged to show absence of defendant from state for a period sufficient to toll the statute. West's Ann. Pen.Code, § 802

10. Criminal Law ⚷145½, 327

Bar of statute of limitations is a jurisdictional defect rather than simply an affirmative defense which must be raised by special plea, and burden is on state of establishing that offense was committed within applicable period of limitations, and failure to sustain that burden will result in vacation or reversal of judgment of conviction. West's Ann.Pen.Code, §§ 955, 959, subd. 6.

11. Criminal Law ⚷565

If evidence upon which indictment is based is to warrant a conviction by a jury trial, it must include at least some evidence that the prosecution is not barred by statute of limitations. West's Ann.Pen.Code, § 939.8.

12. Criminal Law ⚷238

A defendant is held to answer without reasonable or probable cause if his commitment is based entirely on incompetent evidence. West's Ann.Pen.Code, §§ 939.6, 939.8.

13. Criminal Law ⚷565

Evidence that two of defendants were registered voters in New York City and that they had declared New York to be their place of residence for many years prior to date of indictment was admissible and sufficient to support allegations in indictment tolling statute of limitations. West's Ann.Pen.Code, §§ 939.6, 939.8; West's Ann.Code Civ.Proc. §§ 1855, subd. 3, 1918, subd. 7.

14. Criminal Law ⚷419(1)

Testimony of a witness that name of one of defendants was found in New York city telephone directories for years 1954 through 1960 was secondary and hearsay evidence and was not admissible to show that such defendant was absent from state for sufficient period to toll the statute of limitations. West's Ann.Code Civ.Proc. §§ 1845, 1937; West's Ann.Pen.Code, §§ 939.6, 939.8.

15. Criminal Law ⚷150

Applicable period of limitations for crime of conspiracy begins to run from date that last overt act was committed when the conspiracy charged is a continuing one and not from the time when the conspiracy either attains its objective or is interrupted by arrest of conspirators. West's Ann.Pen Code, §§ 184, 1104.

16. Criminal Law ⚷565

Evidence supported determination by grand jury that an overt act in furtherance of conspiracy had been committed by one of defendants within three year period preceding filing of indictment.

17. Criminal Law ⚷238

Choice between conflicting inferences is for the grand jury to determine, and if there is some competent evidence to support that determination, a court will not support its judgment for that of the grand jury.

18. Criminal Law ⚿150

A defendant's mere failure to continue previously active participation in a conspiracy is not enough to constitute withdrawal, and will not start the running of the period of limitations as to him, and there must be an affirmative and bona fide rejection or repudiation of the conspiracy, communicated to the co-conspirators, and it is not part of state's prima facie case to negate the possibility of such a withdrawal.

19. Conspiracy ⚿44½

Once a defendant's participation in a conspiracy is shown, it will be presumed to continue unless he is able to prove that he effectively withdrew from the conspiracy before relevant period of limitations began to run.

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Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Los Angeles, Harry Wood, Robert J. Lord and Harry B. Sondheim, Deputy Dist. Attys., for plaintiff and appellant.

John Leo Harris, Los Angeles, Shulman & Shulman, Adley M. Shulman, Beverly Hills, J. E. Simpson, Robert A. Eaton, Los Angeles, J. Edward Fleishell, San Francisco, Loeb & Loeb, Herman F. Selvin, Los Angeles, and Clarence S. Hunt, Long Beach, for defendants and respondents.

⊥717 ⊥SCHAUER, Justice.

The People appeal from an order setting aside an indictment as to defendants Dardi, Seltzer, Blau, Smith, Hopps, and Drezner, and setting aside several counts thereof as to defendants Crosby and Schinasi.

The principal contentions of the People are (1) that the superior court erred in denying leave to amend the indictment before entry of defendants' pleas, and (2) that the record contains competent evidence to support the factual allegation in the indictment that an overt act (number 18) in furtherance of the conspiracy was committed within three years prior to the filing thereof on October 4, 1960. We have reviewed the record and have concluded that these contentions are meritorious.

The indictment is the result of a grand jury investigation into the management of the Equitable Plan Company (hereinafter called "Equitable Plan"), an industrial loan company authorized under the Industrial Loan Law (Fin.Code, div. 7) to obtain funds from the public by issuing "thrift certificates" in the form of savings bank passbooks and to use such funds to make loans or to purchase conditional sale contracts.

In June and July 1957, the Commissioner of Corporations ordered Equitable Plan to discontinue certain unsafe and injurious practices in the conduct of its business (Fin. Code, § 18815) and to make good an extensive impairment of its capital (id., § 18814). On December 20, 1957, the Commissioner formally took possession of the company because of its failure to comply with such orders (id., § 18818). The court-appointed trustee testified that the loss of capital to Equitable Plan's 4,500 depositors, most of whom are elderly persons, will total between six and seven million dollars.

In Count I of the indictment defendants Birrell, Prior, Berkwit, Skoglund, Crosby, Schinasi, Dardi, Seltzer, Blau, Smith, Hopps, and Drezner are charged with the crime of criminal conspiracy to commit crimes, to cheat and defraud by criminal means, and to obtain money by false promises with fraudulent intent not to perform such promises, in violation of section 182, subdivisions 1, 4 and 5 of the Penal Code. Counts II through VII charge acts of grand theft in violation of section 487, subdivision 1, and Count VIII charges viola⊥tion of Corporations Code, section 3020, subdivision (b), through the falsification of corporate records. Not all the defendants are charged with commission of the substantive offenses, as will hereinafter be set forth. ⊥718

Of the twelve named defendants, only eight are parties to this appeal.[1] Each of these eight made timely motions in the superior court to dismiss the indictment. (Pen.Code, § 995.) The court granted the motions of six defendants as to all counts charged, and of two defendants as to Counts II through V.[2] The People appeal from the order entered accordingly, insofar as it sets aside Count I and Counts II through V; no appeal is taken from the dismissal of the remaining counts. The present procedural posture of the case with respect to the motions of respondent defendants is summarized in the following table:

	Counts			
	I	II–V	VI	VII–VIII
Crosby-	denied	granted (appeal)	denied	denied
Schinasi-	denied	granted (appeal)	denied	denied
Dardi-	granted (appeal)	granted (appeal)	granted (no appeal)	not charged
Seltzer-	granted (appeal)	not charged	not charged	granted (no appeal)
Blau-	granted (appeal)	not charged	not charged	granted (no appeal)
Smith-	granted (appeal)	not charged	not charged	not charged
Hopps-	granted (appeal)	not charged	not charged	not charged
Drezner-	granted (appeal)	not charged	not charged	not charged

⊥719 ⊥[1, 2] *Sufficiency of the Evidence.* In arguing the question of the sufficiency of the evidence, counsel for the several defendants (in ultimate effect) give inadequate recognition to the fact that it is an indictment, not a judgment of conviction, that is here challenged. In these proceedings all parties must be guided by our settled rule that "An indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it." (Bompensiero v. Superior Court (1955) 44 Cal.2d 178, 183–184 [3], 281 P.2d 250.) As hereinafter more fully discussed, there must be legal, competent evidence as the basis of that "rational ground." While the record before us is not a model of clarity, the complexity of the financial transactions and manipulations involved may well explain such a presentation. At the grand jury hearings a total of 32 witnesses testified and some 330 exhibits were introduced. From the competent items of evidence thus presented, which need not be set out here in detail, the grand jury could reasonably have inferred (1) that in October 1953 defendants Birrell, Prior, Crosby, Schinasi, Dardi, and Smith conspired to buy Equitable Plan with $263,000 of its own money; (2) that these defendants, together with defendant Hopps, conspired during the ensuing six to eight months to appropriate to their own use some $700,000 in cash reserves of Equitable Plan by purchasing (from Hopps) and then cancelling an alleged policy of credit insurance, and by making alleged loans of $450,000 to corporations controlled by Birrell; (3) that defendants Drezner, Seltzer, and Blau subsequently took active part in the conspiracy and between 1954 and 1956 carried out a plan of making further alleged loans to Birrell-controlled corporations in the amount of three to four million dollars, which loans have proved to be virtually uncollectible; and (4) that in early 1957 defendant Berkwit joined the conspiracy and by means of the purchase of certain alleged "choses in action" (i. e., rights to receive rentals on oil drilling equipment leased to Birrell-controlled companies) consummated a wash transaction designed to simulate payment of some $600,000 owed to Equitable Plan by corporations owned or controlled by the various defendants. Tested by the Bompensiero standard, there is thus sufficient competent evidence to hold the defendants to answer to the counts here in issue.

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[1] In July 1959 an indictment charging defendant Birrell with 69 counts of grand larceny was filed in New York, and Birrell fled to Brazil; defendant Prior (Birrell's sister) is also beyond the jurisdiction of the Superior Court of the State of California; the People have abandoned their appeal as to defendant Skoglund; and the motion of defendant Berkwit to set aside the indictment as to him was denied in its entirety.

[2] The latter two (Crosby and Schinasi), together with Berkwit, sought writs of prohibition. Their petitions were denied by the District Court of Appeal without opinion.

[3] *Proposed Amendment of Count II.* During argument on the motions to dismiss ⌊720 the People orally moved to amend⌊Count II of the indictment by interlineation. Count II charges Crosby, Schinasi, Dardi, and three defendants not here involved, with the theft of $212,445.88 from Equitable Plan on October 28, 1953. The proposed amendment would have changed the amount allegedly stolen to $250,000 and the date of the theft to October 26, 1953. The superior court denied the motion on the ground that to allow the amendment would be the equivalent of changing the offense charged, in violation of Penal Code section 1009.[3] The People contend that the ruling was in error, in that the amendment merely sought to correct an obvious clerical mistake.

The contention is well taken. As they now read, Counts II and III both purport to charge the same defendants with committing grand theft from Equitable Plan on the same day (October 28, 1953) and in precisely the same amount ($212,445.88). The evidence, however, shows only one transaction in that amount occurring on that day: the payment of the *second* of four alleged premiums on credit insurance taken out by the new management of Equitable Plan (including several of the respondent defendants) during the fall and winter of 1953–1954. *The first premium was paid by a check for $250,000 on October 26, 1953, as alleged in overt act number 3.* The third premium was paid by a check for $150,000 on December 1, 1953; Count IV charges grand theft in that amount and on that date. And the fourth premium was paid by a check for $27,343.95 on January

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[3] Section 1009 provides in relevant part: "An indictment, accusation or information may be amended by the district attorney, and an amended complaint may be filed by the prosecuting attorney in any inferior court, without leave of court at any time before the defendant pleads or a demurrer to the original pleading is sustained. The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings, or if the defect in an indictment or information be one that cannot be remedied by amendment, may order the case submitted to the same or another grand jury, or a new information to be filed. The defendant shall be required to plead to such amendment or amended pleading forthwith, or, at the time fixed for pleading, if he has not yet pleaded and the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted. An indictment or accusation cannot be amended so as to change the offense charged * * *."

4, 1954; Count V charges grand theft in that amount and on that date. In the premises it is evident that the grand jury intended to charge one count of grand theft for each premium payment made; and that the duplication of dates and amounts in Counts II and III, when ⊥721 viewed in the light of the failure to charge as grand theft the first of the four payments, was the result of a simple clerical or typographical mistake in drawing up the multiple counts of the indictment. The timely correction of such a mistake does not "change the offense charged" and hence is permissible. (See, e. g., United States v. Denny (7th Cir. 1947) 165 F.2d 668, 670 [6], cert. den. 333 U.S. 844, 68 S.Ct. 662, 92 L.Ed. 1127 [typographical error in charging defendant's name]; United States v. Choy Kum (N.D. Cal.1950) 91 F.Supp. 769 [1] [mistaken citation of statute allegedly violated]; People v. Jim Ti (1867) 32 Cal. 60, 64 [mistake in alleging defendant's name];[4] People v. Kelly (1856) 6 Cal. 210, 212–214 [same]; People v. Blair (1961) 195 Cal.App.2d 1, 7 [1], 15 Cal.Rptr. 533 [same]; People v. Wilder (1955) 135 Cal.App.2d 742, 749 [8], 287 P.2d 854 [mistaken allegation of date of commission of offense]; People v. Stone (1949) 89 Cal.App.2d 853, 859–860 [1], 202 P.2d 333 [same]; People v. Bocchio (1926) 80 Cal.App. 138, 141 [1], 251 P. 672 [mistaken allegation of value of property obtained by false pretenses]; People v. Carroll (1919) 39 Cal.App. 654, 656–657, 180 P. 49 [mistaken allegation of another name for that of defendant]; cf. People v. Courtney (1933) 132 Cal.App. 198, 201 [1], 22 P.2d 741 [mistake in charging two identical counts].)

The record shows that at the time of the motion to amend no defendant had yet pleaded to the indictment,[5] nor had any demurrer thereto been sustained. In such circumstances Penal Code section 1009 (ante, fn. 3) expressly authorizes the district attorney to amend the indictment as a matter of right, subject only to the requirement that it not be amended so as to change the offense charged. It was therefore error to deny the People's motion to amend the indictment in this respect.

[4] *Proposed Amendment of Allegation of Facts Tolling the Statute of Limitations.* The last paragraph of the indictment contains an allegation to the effect that certain defendants, of whom Crosby, Schinasi, Seltzer, and Blau are parties to this appeal, were absent from California from February 25, 1957, to the date of the indictment (October 4, 1960). It is ⊥722 conceded by the People that such allegation is insufficient to toll the statute of limitations on Counts II through V (Pen.Code, § 800), in that more than three years elapsed between the last act of grand theft therein charged (January 4, 1954) and the alleged date of defendants' departure from the state (February 25, 1957). At the time of the above discussed motion to amend Count II the People also moved to strike this last paragraph of the indictment and to substitute therefor a written amendment alleging, as to the defendants here involved, that Crosby, Schinasi, and Dardi were absent from California from October 26, 1953, to the date of the indictment, except for occasional visits of short duration totaling less than sixty days.[6] The motion was denied, and the People challenge this ruling as erroneous.

In support of the superior court's action defendants argue that the statute of limitations is jurisdictional, and that an indictment which shows on its face that the prosecution is barred by limitation "fails to state a public offense." (People v. McGee (1934) 1 Cal.2d 611, 613 [1], 36 P.2d 378; see also People v. Holtzendorff (1960) 177 Cal. App.2d 788, 792 [2], 2 Cal.Rptr. 676; In re Davis (1936) 13 Cal.App.2d 109, 111 [2], 56 P.2d 302.) The correctness of the foregoing proposition may be conceded, but it does not mean that—as defendants conclude—the indictment in the case at bench cannot be amended.

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[4] The latter amendment is also authorized by Penal Code section 953, which reads: "When a defendant is charged by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his being charged by the name mentioned in the accusatory pleading."

[5] Defendant Berkwit, who is not charged in Counts II or III, had entered and then withdrawn a plea of not guilty prior to the subject motion.

[6] The date of Blau's alleged departure from the state (February 25, 1957) remained unchanged, and allegation of Seltzer's absence was omitted.

[5, 6] An indictment which when filed shows on its face that it is barred by the statute of limitations "fails to state a public offense" only in the sense that, *if not amended,* it will be subject to being set aside on motion pursuant to Penal Code section 995 (cf. People v. Holtzendorff (1960), supra, 177 Cal.App.2d 788, 792 [1]–797 [7], 2 Cal.Rptr. 676), and a conviction based thereon will be subject to attack, either directly (People v. McGee (1934), supra, 1 Cal.2d 611, 613 [2], 36 P.2d 378 [motion to vacate judgment]) or collaterally (In re Davis (1936), supra, 13 Cal.2d 109, 111 [1–2], 56 P.2d 302 [habeas corpus]). But in enacting Penal Code section 1009 the Legislature has manifested its clear intent that the remedy of amendment be available to save an indictment from "any defect or insufficiency," provided that the offense which the grand jury sought to charge is itself not changed. Since 1927 it has been enough if the indictment is cast "in any words sufficient to give the ⊥723 accused notice of the offense of which he is accused" (Pen.Code § 952); the particular details of the offense will be furnished to him by the transcript of the testimony on which the indictment is founded (People v. Anderson (1961) 55 Cal.2d 655, 657–658 [2], 12 Cal. Rptr. 500). If the required notice is given, the omission of an allegation charging a technically "essential" element of the offense may, pursuant to section 1009, be corrected by timely amendment. Thus, in Leonard v. Superior Court (1935) 4 Cal.2d 215, 219 [4], 48 P.2d 687, this court stated "That the offense of perjury was imperfectly charged in the original indictment may be assumed, * * * but that is precisely what section 1008 [now § 1009] of the Penal Code was designed to meet, and the only requirement is that however imperfectly pleaded, some offense be pleaded, which in substance may not be changed by amendment." Here there is no doubt that the indictment is sufficient to give each defendant "notice of the offense of which he is accused"; the determinative question, once again, is whether the proposed amendment is such as to "change the offense charged" within the meaning of section 1009 of the Penal Code.

[7] It has been held in a variety of contexts that an amendment adding an omitted allegation of a substantive element of the offense sought to be charged does not "change the offense." (See, e. g., Leonard v. Superior Court (1935), supra, 4 Cal.2d 215, 218 [3]–219 [4], 48 P.2d 687 [perjury]; People v. Seitz (1930) 209 Cal. 199, 202–203 [1], 286 P. 697 [fraudulent insurance claim]; People v. Agnew (1947) 77 Cal.App.2d 748, 757 [9–10], 176 P.2d 724 [perjury]; People v. Bellamy (1926) 79 Cal.App. 160, 162 [2], 248 P. 1042 [pimping].) Thus, in Chrisman v. Superior Court (1922) 59 Cal.App. 305, 308–309 [2], 210 P. 632, it was said that "Though it may be that the failure of the defendant to fulfill his promise to cancel the order [for payment of money] and deliver the same to Adriani *was an essential allegation to the charge of obtaining money by false pretenses,* it is apparent that the addition of such allegation by amendment to the indictment *did not change the offense charged."* (Italics added.) *A fortiori,* an amendment merely adding or extending allegations tolling the statute of limitations would not change the offense charged, for "although the right to maintain the action is an essential element in the final power to pronounce judgment, that element constitutes no part of the crime itself." (People v. McGill (1935) 10 Cal.App.2d 155, ⊥724 159 [2], 51 P.2d 433.) No California case involving these precise facts has been found, but a materially similar situation was presented in People v. Joseph (1937) 21 Cal. App.2d 336, 338 [1], 69 P.2d 465, where it was held that an amendment adding an omitted allegation of venue did not "change the offense charged" within the meaning of section 1009. The same rule should obtain in the case at bench.[7]

Order Setting Aside Counts II through V as to Crosby, Schinasi, and Dardi. From the foregoing, however, it does not necessarily follow that the superior court erred in setting aside Counts II through V as to each of these three defendants. The People urge that the record of the grand jury proceedings need not show evidentiary support for allegations in the indictment tolling the statute of limitations. There is no authority for such a position, and ample reason appears for rejecting it.

[8, 9] As we first observed in Greenberg v. Superior Court (1942) 19 Cal.2d 319, 321 [1], 121 P.2d 713, "the necessity of basing an indictment upon evidence is implicit in section 921 [now § 939.8] of the Penal Code which provides: 'The grand jury ought to find [now, "shall find"] an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury.'" Accordingly, an indictment or count thereof which is wholly without evidential support cannot stand. (Greenberg v. Superior Court (1942), supra, 19 Cal.2d 319, 121 P.2d 713; Cotton v. Superior Court (1961) 56 Cal.2d 459, 463–465 [5], 15 Cal.Rptr. 65, 364 P.2d 241; Saugstad v. Superior Court (1960) 183 Cal.App.2d 277, 282–283 [1b], 287 [6], 6 Cal.Rptr. 580; Davis v. Superior Court (1959) 175 Cal.App.2d 8, 22 [7a]–26 [7c], 345 P.2d 513.) An accusatory pleading must allege facts showing that the prosecution is not barred by the statute of limitations (People v. McGee (1934), supra, 1 Cal.2d 611, 613 [1], 36 P.2d 378; People v. Asavis (1938) 27 Cal. App.2d 685, 687 [1], 81 P.2d 595; In re Davis (1936), supra, 13 Cal.App.2d 109, 111 [1], 56 P.2d 302; People v. McGill (1935), supra, 10 Cal.App.2d 155, 159 [2], 51 P.2d 433), and if a period of time in excess of that permitted by the statute has elapsed since the commission of the offense, further 725 facts must be alleged to show absence of the defendant from the state for a sufficient period to toll the statute under Penal Code section 802 (People v. McGee (1934), supra, 1 Cal.2d 611, 613–614 [2], 36 P.2d 378; People v. Miller (1859) 12 Cal. 291, 295; In re McGee (1938) 29 Cal.App.2d 648, 650 [2], 85 P.2d 135; People v. McGill (1935), supra, 10 Cal.App.2d 155, 159 [2], 51 P.2d 433; see generally cases collected in Note, 99 A.L.R. 153, 154–155).

[10, 11] At the trial the People need not prove that the offense was committed on the exact date alleged, "except where the time is a material ingredient in the offense." (Pen.Code, § 955; see also § 959, subd. 6.) Yet as the bar of the statute is a jurisdictional defect rather than simply an affirmative defense which must be raised by special plea (such as double jeopardy), the burden is on the People of establishing that the offense was committed within the applicable period of limitations. (People v. Boyden (1953) 116 Cal.App.2d 278, 287 [7], 253 P.2d 773; People v. Amy (1950) 100 Cal.App.2d 126, 127 [2], 223 P.2d 69; People v. Cunningham (1950) 99 Cal.App.2d 296, 298–299 [1–2], 221 P.2d 283; cf. People v. Newell (1923) 192 Cal. 659, 669–670 [8], 221 P. 622.) Failure to sustain that burden will result in vacation or reversal of the judgment of conviction. (People v. McGee (1934), supra, 1 Cal.2d 611, 613 [1]–614 [2], 36 P 2d 378; People v. James (1943) 59 Cal.App.2d 121, 122 [3]–123 [4], 138 P.2d 30; People v. Hoffman (1933) 132 Cal.App. 60, 62–63 [1], 22 P.2d 229.) It follows that if the evidence upon which the indictment is based is to "warrant a conviction by a trial jury" (Pen.Code, § 939.8), it must include at least some evidence that the prosecution is not barred by the statute of limitations.

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[7] Defendants' reliance on Ex Parte Bain (1887) 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 and on dicta in Mitchell v. Superior Court (1926) 76 Cal.App. 734, 737–738 [4], 245 P. 1109; People v. Webber (1919) 44 Cal.App. 120, 126 [2], 186 P. 406, and People v. Anthony (1912) 20 Cal.App. 586, 589–590, 129 P. 968, is misplaced, as such decisions "were expressions of the courts upon statutes long since in desuetude." (People v. Agnew (1947), supra, 77 Cal.App.2d 748, 757 [10], 176 P.2d 724.)

[12] That evidence, moreover, must be legal, competent evidence. It is settled that in the case of an information a defendant is held to answer without reasonable or probable cause "if his commitment is based entirely on incompetent evidence" (Rogers v. Superior Court (1955) 46 Cal.2d 3, 7 [1], 291 P.2d 929; accord, Bielicki v. Superior Court (1962) 57 Cal.2d 602, 605 [1], 21 Cal.Rptr. 552, 371 P.2d 288, and cases there cited). Although this court has not had occasion to speak to the question of whether the same rule should apply to an indictment, the District Court of Appeal has answered in the affirmative in a number of recent decisions. (People v. Olf (1961) 195 Cal.App.2d 97, 101 [1], 15 Cal.Rptr. 390; People v. Byars (1961) 188 Cal.App.2d 794, 795 [1]–796 [3], 10 Cal. Rptr. 677; Davis v. Superior Court (1959), ⊥726 ⊥supra, 175 Cal.App.2d 8, 22 [7a]–26 [7c], 345 P.2d 513; McFarland v. Superior Court (1948) 88 Cal.App.2d 153, 159 [6], 198 P.2d 318; Dong Haw v. Superior Court (1947) 81 Cal.App.2d 153, 158 [2]–159 [3], 183 P.2d 724.) Support for this view is found not only in our reasoning in the Rogers case (at pp. 7 [2]–8 [7] of 46 Cal.2d, at pp. 931 [2–4]–932 [10] of 291 P.2d), but also in the express language of Penal Code section 939.6 (formerly § 919), which provides: "In the investigation of a charge, the grand jury shall receive no other evidence than such as is given by witnesses produced and sworn before the grand jury, furnished by legal documentary evidence, or the deposition of a witness in the cases mentioned in subdivision 3 of Section 686. The grand jury shall receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." The issue therefore is whether there is some legal, competent evidence in the record of the grand jury proceedings to support the allegations (in the proposed amendment) charging that Crosby, Schinasi, and Dardi were absent from the state from October 26, 1953, to October 4, 1960.

[13] *Crosby and Schinasi.* Special investigators of the California Division of Corporations testified that Crosby and Schinasi were registered voters in New York City during the period here in question, and certified summaries of entries on the New York City Register of Voters were identified and introduced showing that they had declared New York to be their place of residence for many years prior to the date of the indictment. This evidence is admissible (Code Civ.Proc. §§ 1855, subd. 3, and 1918, subd. 7), and is sufficient at this stage to support the subject allegations.

[14] *Dardi.* No such evidence appears, however, as to Dardi. The People point to several instances where witnesses refer to this defendant in one connection or another, but in each case the testimony is either inadmissible hearsay or proves nothing with respect to Dardi's alleged absence from California. In particular, the People emphasize testimony of special investigator Hale to the effect that, while he found no record that Dardi had ever been a registered voter in New York, he did find the name "Virgil Dardi" listed in New York City telephone directories for the years 1954 through 1960. The directories were not produced, the only evidence of their contents being the just related testimony. Such secondary evidence, however, is not shown to be admissible under any provision of Code of Civil Procedure section 1855, and hence is violative of the best evidence rule (Code Civ.Proc. § 1937); and when⊥offered ⊥727

to prove the truth of the implication that the "Virgil Dardi" listed in the directories was this defendant, the testimony is violative also of the hearsay rule (Code Civ. Proc. § 1845). The People's reliance on People v. Eppinger (1894) 105 Cal. 36, 41, 38 P. 538; People v. Terrill (1901) 133 Cal. 120, 128, 65 P. 303 and People v. McWilliams (1931) 117 Cal.App. 732, 736 [3], 4 P. 2d 601, is to no avail, as in those cases either the (city) directories were actually introduced, or no objection was made thereto on the present grounds.

It thus appears that Dardi's motion to set aside Counts II through V as to him was properly granted (although, for the reasons hereinafter stated, it was error to grant Dardi's motion to set aside Count I of the indictment as to him). The same motions of Crosby and Schinasi, however, should have been denied: the record contains competent evidence to connect each with the commission of the crimes charged and to support the allegation (in the proposed amendment) that each was absent from the state for a sufficient period to toll the statute of limitations.

[15] *Order Setting Aside Count I as to Dardi, Seltzer, Blau, Smith, Hopps, and Drezner.* The superior court ruled that the applicable period of limitations began to run on Count I (conspiracy) from the date that the last overt act alleged was committed by one of the conspirators. Only two overt acts, numbered 17 and 18, are alleged to have occurred in that period, and the court found no competent evidence to support the allegation of either. The People attack these rulings.

To begin with, the People point out that in Count I it is alleged "That continuously throughout the period of time from about October 1, 1953, until December 20, 1957, * * * the said defendants * * * willfully, unlawfully, feloniously and knowingly conspired" to commit the various crimes charged. The People then argue that the criminal agreement, not any overt act committed in pursuance thereof, is the gist of the offense of conspiracy; that the period of limitations therefore begins to run from the "end" of that agreement (meaning, presumably, the moment when the conspiracy either attains its objective or is interrupted by the arrest of the conspirators) rather than from the date of the last overt act alleged; and that in the present case the indictment charged such an agreement "continuing" to a date (December 20, 1957) within the period of limitations.

The argument is untenable. In this state the Legislature has declared that "No agreement amounts to a conspiracy" unless an overt act be done to effect the object thereof (Pen.Code, § 184), and the pleading and proof of such an act is "necessary to constitute the offense" (id., § 1104). As the overt act marks the commission of the crime and fastens criminal liability upon the conspirators (People v. Van Eyk (1961) 56 Cal.2d 471, 478 [6], 15 Cal.Rptr. 150, 364 P.2d 326; People v. Robinson (1954) 43 Cal.2d 132, 138 [7], 271 P.2d 865; People v. Buffum (1953) 40 Cal.2d 709, 715 [1], 256 P.2d 317), the period of limitations must be deemed to begin running at that time; and where, as here, the conspiracy as charged is a continuing one, the period begins to run with the commission of the last overt act alleged. This rule is clearly implied in our statement in Bompensiero v. Superior Court (1955) 44 Cal.2d 178, 184–185 [6], 281 P.2d 250, that in order to prevent a conspiracy count from being barred by the statute of limitations "Proof that one of the overt acts in furtherance of the conspiracy occurred after the time before which the statute of limitations would be a bar is sufficient * * *." The same implication appears in People v. Hess (1951) 104 Cal.App.2d 642, 678 [27], 234 P.2d 65, and in People v. Gordon (1945) 71 Cal.App. 2d 606, 628–629 [16], 163 P.2d 110; and in People v. Mason (1960) 184 Cal.App.2d 317, 368 [34a]–369 [34b], 7 Cal.Rptr. 627, a jury instruction was approved expressly embodying this rule. It is, moreover, the rule uniformly applied in the federal courts (Grunewald v. United States (1957) 353 U.S. 391, 396–397, 77 S.Ct. 963, 1 L.Ed.2d

931; Fiswick v. United States (1946) 329 U.S. 211, 216, 67 S.Ct. 224, 91 L.Ed. 196); and it is the prevailing rule in our sister states (see cases collected in Note, 62 A.L.R.2d 1369, 1371–1375).

Seeking to avoid the effect of this rule the People cite People v. Buono (1961) 191 Cal.App.2d 203, 233 [23a]–235 [23b], 12 Cal.Rptr. 604; People v. Wells (1960) 187 Cal.App.2d 324, 329 [12]–331 [14a], 9 Cal. Rptr. 384 and People v. Brown (1955) 131 Cal.App.2d 643, 656 [5a]–657 [5b], 281 P.2d 319, for the proposition that under California law a conspiracy may be deemed to continue after its immediate objective has been accomplished, so as to include within its scope concerted efforts of the conspirators to escape or to conceal commission of the crime. It is urged that here the efforts at concealment were not simply to avoid detection of past thefts, but also to enable the conspirators to commit future thefts undetected. The cited cases, however, hold only that the ⌊729 acts or declarations of one conspirator during such a period of escape or concealment may be binding on each of his co-conspirators. Even in that situation it will be necessary for the prosecution to plead and prove that an overt act in furtherance of the conspiracy as thus "extended" was committed by a conspirator during the period not barred by limitation.

[16] As noted above, the overt acts numbered 17 and 18 are the only ones alleged to have occurred within the three year period preceding the filing of the indictment on October 4, 1960. As to overt act 17, the evidence shows that it took place "around October 1st," apparently in 1957, and hence did not fall within the period not barred. The People impliedly concede as much, and rely rather on overt act 18. The latter is alleged in the indictment in these terms: "In pursuance of such conspiracy, and to effect the object of the same, the said defendant, Eliot E. Berkwit, did withdraw and cause to be withdrawn from the funds of Equitable Plan Company the sum of approximately seventeen thousand dollars ($17,000.00) from October 2, 1957 to December 20, 1957." Berkwit had entered the scene in February 1957, and apparently had taken control of Equitable Plan through purchase of a majority of its stock by Finance (or Fiscal) Bureau, Inc., a corporation which he had set up for that purpose. As evidence tending to support the allegation of overt act 18, the People point to the following testimony of William Keenan, an accountant with Equitable Plan since March 1956:

> "Q BY MR. DI SANTIS [deputy district attorney]: I ask you whether or not you have ever had occasion to review the accounts of Finance and Fiscal Bureau, Inc. on the books of Equitable Plan Company? A Yes, I have.
>
> "Q Mr. Keenan, did the Equitable Plan Company from October, 1957 to December of 1957 pay out any funds to Finance Bureau, Inc.? A Yes, they did.
>
> "Q How much was that? A The total amount during that period was seventeen thousand seven hundred twenty-eight dollars and thirty-one cents net.
>
> "Q Mr. Keenan, did you handle some of the books of Finance Bureau, Inc. from time to time? A Originally, yes, I did.
>
> "Q *To your knowledge* did Mr. Berkwit obtain the sums which you have indicated there? A Yes, he did.
>
> "Q He received it by way of salary, Mr. Keenan? A Well, the disbursements on this seventeen thousand seven hundred⌊730 twenty-eight dollars thirty-one cents as I recall was mostly for salary for Mr. Berkwit." (Italics added.)

[17] From the just quoted testimony the grand jury could reasonably have inferred that the witness had first-hand knowledge of the events constituting overt act 18. Defendants argue that, on the contrary, Keenan's language could be taken to mean that he had no first-hand knowledge

of any payment to Berkwit and was merely summarizing what he had seen in the books and accounts of Equitable Plan. Defendants further suggest that Keenan's testimony with respect to dates is ambiguous, in that his affirmative answer to the question of whether Equitable Plan paid out funds to Finance Bureau "from October, 1957 to December of 1957" is equally consistent with payment of the entire seventeen thousand dollars in the first four days of October alone (and hence beyond the period of limitations). The choice between conflicting factual inferences, however, is (so far as is material in the matter now at bench) for the grand jury to determine. If, as here, there is some competent evidence to support that determination, a court will not substitute its judgment for that of the grand jury. (Lorenson v. Superior Court (1950) 35 Cal.2d 49, 55 [1], 216 P.2d 859.)

Finally, the grand jury could have inferred that the payment of Berkwit's salary and expenses by Equitable plan (via Berkwit's corporate creation, Finance Bureau) was an act done in furtherance of the purposes of the conspiracy, as it tended to enable the defendants to carry on the looting of Equitable Plan while purportedly bringing in a new management and relinquishing their control of the company.

[18, 19] It follows that the superior court erred in ruling that prosecution on the conspiracy count (Count I) is barred by the statute of limitations. Several defendants (Dardi, Seltzer, Blau, and Hopps) assert that they withdrew from the conspiracy at an early stage, and argue that the period of limitations began running as to them at the time of their withdrawal and hence expired prior to the filing of the indictment. A defendant's mere failure to continue previously active participation in a conspiracy, however, is not enough to constitute withdrawal; there must be an affirmative and bona fide rejection or repudiation of the conspiracy, communicated to the co-conspirators. (Hyde v. United States (1912) 225 U.S. 347, 369, 32 S.Ct. 793, 56 L.Ed. 1114; United States v. Witt (2d Cir. 1954) 215 F.2d 580, 584 [5], and cases there cited; People v. Moran (1958) 166 Cal.App.2d 410, 415–416 [9], 333 P.2d 243; ⊥731 Loser v. Superior Court (1947) 78 Cal.App.2d 30, 32 [1–2], 177 P.2d 320; People v. Corkery (1933) 134 Cal.App. 294, 297–299 [2], 25 P.2d 257; see generally Note, 62 A.L.R.2d 1369, 1384–1385.) It is not part of the People's prima facie case to negate the possibility of such a withdrawal. Once the defendant's participation in the conspiracy is shown, it will be presumed to continue unless he is able to prove—as a matter of defense—that he effectively withdrew from the conspiracy before the relevant period of limitations began to run. (Pinkerton v. United States (1946) 328 U.S. 640, 646, 66 S.Ct. 1180, 90 L.Ed. 1489; Local 167 of International Brotherhood of Teamsters etc. v. United States (1934) 291 U.S. 293, 297–298, 54 S.Ct. 396, 78 L.Ed 804; United States v. Witt (2d Cir. 1954), supra, 215 F.2d 580, 584 [5]; United States v. Markman (2d Cir. 1952) 193 F.2d 574, 576 [5]; United States v. Benjamin (2d Cir. 1941) 120 F.2d 521, 523 [5]; People v. Moran (1958), supra, 166 Cal.App.2d 410, 415–416 [9], 333 P.2d 243; People v. Chait (1945) 69 Cal.App.2d 503, 514 [5], 159 P.2d 445, and cases there cited.) Thus in United States v. Compagna (2d Cir. 1944) 146 F.2d 524, 527 [4], cert. den. 324 U.S. 867, 65 S.Ct. 912, 89 L.Ed. 1422, the court (per Learned Hand, J.) upheld "the well established doctrine that anyone, once shown to have been a member of a conspiracy which lasts until the beginning of the statutory period, must satisfy the jury by affirmative proof that he disconnected himself from it before that period began." When the prosecution is initiated by means of indictment such proof cannot ordinarily be offered until the trial, as is true of other affirmative defenses or matters in abatement which the defendant may wish to interpose. Here, defendants will have that opportunity at the proper time. At the present stage of the proceedings, probable cause is shown by the fact that from the competent evidence introduced the grand jury could reasonably have inferred the existence of the conspiracy charged and the participation therein of each of the named defendants.

The order appealed from is affirmed insofar as it sets aside Counts II, III, IV, and V, with respect to defendant Dardi; in all other respects the order is reversed.

GIBSON, C. J., and TRAYNOR, McCOMB, PETERS, and TOBRINER, JJ., concur.

Rehearing denied; WHITE, J., sitting pro tem.

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58 Cal.2d 675, 375 P.2d 851

⊥675 ⊥**CITY OF LOS ANGELES, Plaintiff and Respondent,**

v.

CLINTON MERCHANDISING CORPORATION, Defendant and Appellant.

L. A. 26255.

Supreme Court of California.

Nov. 9, 1962.

Action involving assessment by city of merchandising corporation's license tax. The city had assessed the corporation as a person selling at wholesale and had interpreted term "gross receipts" as covering all amounts corporation handled rather than gross amount it received for services rendered. The Superior Court, Los Angeles County, Virgil M. Ariola, J., sustained the assessments, and the corporation appealed. The Supreme Court, Tobriner, J., held that five to six per cent service deduction made by merchandising corporation from sales by stores to which it supplied merchandise and for which it acted as central managing, accounting, and disbursing office were "gross receipts" within municipal code license tax provision defining gross receipts as total amount received for any act, service, or employment, and corporation was not required to pay tax based on that deduction plus repayments by stores of monies paid by corporation for stores' payroll, advertising, and distributed merchandise.

Affirmed in part; reversed in part. Opinion 20 Cal.Rptr. 207 vacated.

1. Licenses ⚷15.1(3)

Merchandising corporation was "wholesaler," not "broker," within municipal code provisions governing license taxes, where corporation used its own funds to purchase merchandise, stored merchandise in its warehouses, inventoried it as its own, took title to it, distributed it to various stores at cost, and transferred title to the stores.

See publication Words and Phrases for other judicial constructions and definitions.

2. Licenses ⚷15.1(5)

Five to six per cent service deduction made by merchandising corporation from sales by stores to which it supplied merchandise and for which it acted as central managing, accounting, and disbursing office were "gross receipts" within municipal code license tax provision defining gross receipts as total amount charged or received for any act, service, or employment, and corporation was not required to pay tax based on that deduction plus repayments by stores of monies paid by corporation for stores' payroll, advertising, and distributed merchandise.

See publication Words and Phrases for other judicial constructions and definitions.

3. Licenses ⚷15.1(5)

"Gross receipts" under municipal code license tax provision defining such receipts as total amount charged or received for performance of any act, service, or employment includes sums received for use and benefit of payer of license tax and excludes receipts which are held for account of another.

◆

Shearer & Fields, Bertram Fields and Bernard Shearer, Beverly Hills, for defendant and appellant.

Roger Arnebergh, City Atty., Bourke Jones, James A. Doherty, Asst. City Attys., and Robert C. Summers, Deputy City Atty., for plaintiff and respondent.

⊥677 ⊥TOBRINER, Justice.

This case involves the narrow question of whether the City of Los Angeles in assessing defendant's license taxes properly interpreted the term "gross receipts" to cover all of the amounts defendant handled rather than the gross amount it received for the services it rendered. The case presents the further question of whether the city properly assessed defendant as a "person * * * selling * * * goods * * at wholesale." For the reasons hereinafter set out we believe the city properly assessed the tax in the second, but not in the first, instance.

Defendant appeals from a judgment sustaining the assessments in both respects for the years 1955 through 1958. The city measured the assessments by "gross receipts" under three separate sections of the Los Angeles Municipal Code: (1) $40.20 under section 21.167, based on gross receipts from defendant's retail sales of merchandise to its employees; (2) $8,840.18 under section 21.166, based on gross receipts from defendant's wholesale merchandising; and (3) $3,392.84 under section 21.190, based on gross receipts for services rendered by defendant exclusive of sales' activities. Defendant does not contest the retail sales assessment (§ 21.167) but does challenge the propriety of the other two assessments.

As the stipulation of the parties discloses, defendant Clinton Merchandising Corporation is an affiliate of various sales corporations (hereinafter referred to as stores) engaged in the retail men's clothing business. It acts as the central managing, accounting and disbursing office for these stores. It collects all of their receipts and pays all of their obligations. It advances money when necessary to pay the obligations of any store which has receipts insufficient to cover its obligations. It renders various advisory services to the stores, including assistance in their advertising programs.

Defendant negotiates in the east for the purchase of all merchandise to be sold by the stores. It buys such merchandise with its own funds. In some cases the manufacturers ship the merchandise directly to the stores; in most cases they ship it to defendant's warehouse. Here it is stored and later distributed at cost to the stores. Defendant carries on its books as its own inventory all merchandise remaining in its warehouse at the end of an accounting period. Defendant makes occasional sales from such merchandise both at wholesale and retail to its own employees. As we have stated, the tax imposed ⊥678 on gross receipts from these sales, pursuant to section 21.167, is not disputed by defendant.

Defendant sets up a procedure for the financing of the stores and for the payment of its fees. Thus defendant allocates to a particular store, and enters on its books as "advances," all monies paid by it for the store's payroll, advertising and distributed merchandise. Defendant itself collects the store's receipts; it enters these as "repayment of advances." Other cost items, such as television advertising, defendant adjusts among the stores on a pro rata basis, measured by the ratio of the store's sales to the total sales of all stores in the area. As compensation for its services defendant deducts and retains a percentage fee, varying between five and six per cent, of the store's sales. From this amount defendant pays its own costs of operation.

Pursuant to section 21.166, the city assessed its tax upon the basis of receipts from wholesale sales; defendant, however, contends it has not operated as a wholesaler but as a broker and therefore should have been taxed only under the more lenient section 21.79. Under section 21.190, defendant paid a tax based upon the retained percentage of five or six per cent, which it treated as its gross receipts. The city, however, contends that the total amount of defendant's receipts, including the repayment of advances, are its gross receipts.

We therefore deal with two problems posed by the sections. The first turns essentially upon the status of the payee; the second, upon the amount of the tax. As to the first issue, we believe that the trial court properly held that defendant engaged in the business of selling goods at wholesale and that the city, accordingly, correctly taxed it under section 21.166. As to the second problem, we have concluded that the defendant should not have been taxed upon the basis that its gross receipts embraced the entire amount which it collected from its affiliate stores rather than the amount which it received in payment for its services. To this extent the judgment under section 21.190 cannot stand.

[1] Turning to the first issue, we find that the operation of defendant coincides with that of a wholesaler as contemplated by section 21.166.[1] Subdivision (a) of that ⊥679 section en⊥compasses "[E]very person selling any goods" etc.; subdivision (b)[2] defines a wholesale sale as a "sale of goods * * * for the purpose of resale in the regular course of business"; section 21.00, subdivision (a)[3] specifies "gross receipts" as the total amount "received for the performance of any act, service or employment * * * in connection with the sale of goods * * *"; section 21.00, subdivision (g)[4] provides that "[S]ale shall be deemed to include * * * the making of any transfer of title. * * *" Here defendant uses its own funds to purchase the merchandise. It stores the shipped merchandise in its warehouses. It inventories the merchandise as its own. It takes title to the merchandise. Upon distribution of the merchandise to the particular store, defendant transfers title to that store. The recipient receives possession of the merchandise and title to it for the purpose of resale. The operation thus fulfills the statutory qualifications for that of a wholesaler.

Defendant's various attempts to convert its defined status into other classifications by describing aspects of the operation in unusual descriptive terminology must fail. Thus it claims that it charges the store which receives the merchandise for "advances" and takes as "repayment of advances" that portion of the receipts which is attributable to such merchandise. The use of unique nomenclature to describe the tran⊥saction, the wrapping of it in the des- ⊥680 ignation of "advance," does not alter the nature of it. Nor does the distribution of the merchandise "at cost," rather than upon a profit-making mark-up, change the situation. Defendant's different labels do not effectuate new or different transactions.

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[1] Section 21.166 of the Los Angeles Municipal Code reads in part as follows: "(a) Every person * * * selling any goods, wares or merchandise *at wholesale*, and not otherwise specifically taxed by other provisions of this Article, shall pay for each calendar year or portion thereof the sum of $8.00 for the first $20,000 or less of gross receipts, and, in addition thereto, the sum of 40 cents per year for each additional $1,000 of gross receipts or fractional part thereof in excess of $20,000. * * *" (Emphasis added.)

[2] Section 21.166(b) reads: "For the purpose of this section, a *wholesale* or *sale at wholesale* means a sale of goods, wares or merchandise for the purpose of resale in the regular course of business." (Emphasis added.)

[3] Section 21.00, subdivision (a) of the code defines gross receipts as "The total amount of the sale price of all sales, the total amount charged or received for the performance of any act, service or employment of whatever nature it may be, *whether such service, act or employment is done as a part of or in connection with the sale of goods, wares, merchandise or not*, for which a charge is made or credit allowed, including all receipts, cash, credits and property of any kind or nature, any amount for which credit is allowed by the seller to the purchaser without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest paid or payable, losses or any other expense whatsoever;. * * *" (Emphasis added.)

[4] Section 21.00, subdivision (g) provides that a "[s]ale * * * shall be deemed to include * * * the making of any transfer of title, in any manner or by any means whatsoever, to tangible personal property for a price, and to the serving, supplying or furnishing, for a price, of any tangible personal property fabricated or made at the special order of consumers who do or who do not furnish directly or indirectly the specifications therefor."

Defendant's attempt to designate its status as that of a broker under section 21.79 likewise fails. Defendant's transactions in arranging for the purchase and delivery of merchandise possess none of the incidents of brokerage. Thus defendant's acquisition of title and storage of the goods in its warehouse may be for a "short period of time" but its exact duration depends upon the time when the stores need the goods. While section 21.79, pertaining to the licensing of commission merchants or brokers, provides that persons in that classification may take title to goods during transit and may store them for a "short period of time" without losing such business classification, the fact that the section states that a person who takes title does not *lose* the classification by short-lived storage does not mean he *becomes* a broker *because* of such temporary storage. Further, defendant on its own account sells the stored merchandise; defendant carries such merchandise on its books as its own inventory. None of these practices characterizes the operation of a broker. Moreover, defendant did not seek or obtain a license as a broker. We conclude that defendant's status as a wholesaler renders it subject to the tax imposed by section 21.166.

[2] Our analysis of the second issue of the case, as we have stated, compels us to reject the trial court's conclusion that the entire amount of money collected by defendant from its affiliate stores for stipulated services, other than sales activities in the supplying of merchandise, constituted gross income under section 21.190.[5] The ruling apparently rests on the premise that all of the receipts pertained directly to the business activities in which defendant engaged and thus constitute the measure of the imposed tax.

Section 21.190 bases the tax upon the gross receipts of defendant for the services it rendered as a management corporation. ⊥681 The section taxed any person "engaged in any trade, calling, occupation, vocation, profession or other means of livelihood," measured by its "gross receipts." As defined by the pertinent portion of section 21.00, "gross receipts" are the *"total amount charged or received for the performance of any act, service or employment* of whatever nature." (Emphasis added.) The gross amount which defendant received in the form of its five-six per cent service deduction constitutes under the definition its gross receipts. While defendant's net receipts would equal the amount it received less its own operating costs of business, defendant properly paid taxes based upon the whole amount of its receipts for such services. The section, however, did not equate gross receipts with the totality of all monies handled by the taxpayer, an irrelevant figure which blanketed all of the taxpayer's activities.

The amounts defendant received in reimbursement for expenses paid by it for the stores, such as a store's payroll, rent, utilities, advertising, are not taxable as defendant's gross receipts. If monies which defendant collects on behalf of the stores represent its gross receipts, without deduction for the sums which it has paid or advanced for expenses of the affiliate stores, all monies received by an agent for his principal would comprise gross receipts of the agent. Yet defendant acts merely as an agent for handling money for the stores, paying out and receiving back sums advanced to the stores for their own operating expenses. Defendant's situation compares to that of an attorney who, upon the authorization of the client that the attorney reimburse himself, advances monies for costs of his client and is repaid from funds received on behalf of the client. A store's reimbursement of defendant for the store's own expenses is no more chargeable as "gross receipts" than the client's repayment of his attorney's advances.

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[5] Section 21.190 reads in part as follows: "(a) Every person engaged in any trade, calling, occupation, vocation, profession or other means of livelihood, as an independent contractor and not as an employee of another, and not specifically licensed by other provisions of this Article, shall pay a license fee in the sum of $12.00 per calendar year or fractional part thereof for the first $12,000 or less of gross receipts, and in addition thereto, the sum of $1.00 per year for each additional $1,000 or fractional part thereof, of gross receipts in excess of $12,000."

We do not believe plaintiff may successfully rely upon Rexall Drug Company v. Peterson (1952) 113 Cal.App.2d 528, 248 P.2d 433, a case in which the court sustained a license tax imposed under this same section upon the parent company as a service corporation to its subsidiaries. That case only involved Rexall's claim that it was not subject to *any* tax under section 21.190 by reason of the services it performed for its subsidiary drugstores. The opinion described the operation (113 Cal.App.2d at p. 529, 248 P.2d at p. 433): "Rexall administers the whole business enterprise, maintains a head office in Los Angeles, 682 and furnishes accounting, financial, personnel, legal, executive managerial, and directive services to its subsidiaries. For these services Rexall charges each subsidiary its proportionate cost thereof. No profit is charged." The opinion does not disclose the manner in which Rexall performed its services, how it obtained its income, or the portion thereof on which it was taxed. The court thus does not pass upon the question before us: whether the tax should be payable on a basis over and above the amount received for the services rendered or should embrace all monies collected for and on behalf of, or from, the affiliate companies. The decision holds only that Rexall could not sustain its position that it owed no tax at all.

[3] We believe that the ordinance includes as "gross receipts" those sums received for the use and benefit of the taxpayer and excludes those receipts which are held for the account of another. The definition of "gross receipts" (§ 21.00) as applied to income for rendered services prohibits the taxpayer's deduction for his own "labor or service costs, interest paid or payable, losses or any other expense whatsoever." If the draftsmen further intended that no deduction should be made for monies received for the account of another, they would have so stated. The section's denial of the right to exclude any "expense whatsoever" does not indicate an intent to deny exclusion of money recouped after payment of the expenses of another.

The judgment is affirmed insofar as it sustains the license tax imposed on defendant under section 21.166 but reversed as to the tax imposed under section 21.190.

GIBSON, C. J., TRAYNOR, SCHAUER, McCOMB and PETERS, JJ., and WHITE, J. pro tem., concur.

209 Cal.App.2d 519

⊥519 ⊥**Gerald CHAZAN, Plaintiff, Cross-Defendant and Respondent,**

v.

Louis MOST, Defendant, Cross-Complainant and Appellant;

Raymond L. Straeter, Cross-Defendant and Respondent.

Civ. 25970.

District Court of Appeal, Second District, Division 3, California.

Nov. 13, 1962.

Action for an accounting between equal partners in business of fire insurance adjusting. From an adverse judgment of the Superior Court, Los Angeles County, Leon T. David, J., the defendant appealed. The District Court of Appeal, Files, J., held that defendant-partner, who wound up affairs of dissolved partnership, was under a duty to render an account when the winding-up was completed and that interest was properly allowed to the plaintiff-partner from the date when the balance should have been ascertained and paid over, but that certain errors in computation should be corrected in favor of defendant.

Judgment affirmed as modified.

1. Account ⇨20(1)

Court is not required to make a reference in an action for an accounting.

2. Account ⇨22

Trial court has not fully performed its duty in an accounting suit if it merely states the balance due.

3. Partnership ⇨343

Defendant-partner had duty to account for partnership funds to plaintiff-partner, who demanded the accounting, and defendant could not complain that the account as determined by court was not sufficiently detailed when defendant had furnished only incomplete figures.

4. Partnership ⇨336(3)

Evidence disclosed that defendant-partner was allowed all expenses which he could substantiate for the period during which he was winding up affairs of partnership.

5. Partnership ⇨307

Under statute providing that no partner is entitled to remuneration for acting in partnership business, except that a "surviving partner" is entitled to reasonable compensation for his services in winding up partnership affairs, the quoted phrase refers to a partner who survives after the death of the other and not to a partner following dissolution of the partnership. West's Ann.Corp.Code, § 15018(f).

See publication Words and Phrases for other judicial constructions and definitions.

6. Partnership ⇨336(3)

Where there was no evidence from which court could arrive at a dollar value to be placed on services rendered by defendant after dissolution of partnership and there were no pleadings nor pre-trial statement disclosing any contention by defendant that he was entitled to compensation, conclusion was justified that accounting was to be made on basis of equal participation by the two partners, without any compensation to either for services. West's Ann.Corp.Code, § 15018(f).

7. Partnership ⇨308

Defendant-partner, who wound up affairs of dissolved partnership, was under a duty to render an account when the winding up was completed, and interest was properly allowed to plaintiff-partner from date when balance should have been ascertained and paid over.

8. Partnership ⇨308

Where accounting and distribution of partnership assets are delayed through fault of partner having possession, interest may be allowed from date when balance should have been ascertained and paid over.

9. Partnership ⇨308

Where an amount due partnership was not received until some time after partnership affairs were wound up, plaintiff-partner was not entitled to interest on his share prior to time that defendant-partner had collected it.

10. Partnership 🔑**310**

Wrongful use of similar stationery and business cards by plaintiff following dissolution of partnership did not entitle defendant to exemplary damages on his cross-complaint filed in an action for an accounting when there was no finding that the plaintiff was guilty of oppression, fraud, or malice. West's Ann.Civ.Code, § 3294.

11. Partnership 🔑**346**

Where only errors in judgment were matters of computation which defendant-partner should have called to attention of trial court, defendant-appellant was obligated to pay costs of appeal.

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Louis Most, Beverly Hills, appellant, in pro. per.

Most & Davis, Los Angeles, for respondents.

⌊520 ⌊FILES, Justice.

Plaintiff Gerald Chazan and defendant Louis Most were equal partners in the business of fire insurance adjusting from December 1957 until June 26, 1958, when the partnership was dissolved at Chazan's request. Chazan brought this action for an accounting. Most cross-complained against Chazan and Raymond L. Straeter, who had been an employee of the partnership, asking compensatory and exemplary damages for unfair competition. Straeter counterclaimed against Most for money due for services rendered to the partnership business.*

After a trial without a jury the court found that Most had possession and control of the assets and had not rendered any accounting; that the gross receipts were $12,496.07 and the expenses $11,254.64, resulting in a profit of $1,241.43, of which Chazan's share was $620.71; that Chazan had paid a partnership debt in the amount of $2,500 which he was entitled to have reimbursed, making a total of $3,120.71 due to Chazan; that Most was entitled to recover $10 from Chazan and $10 from Straeter on the cross-complaint; and that Straeter was entitled to $423.20 for his services. Judgment was entered for the net amounts due to Chazan and Straeter. Most has appealed from the judgment.

The evidence showed that Most handled all of the financial affairs of the partnership. Most was an attorney, and his law office was used as the headquarters of the fire adjusting business. No partnership books of account were kept. At the ⌊trial ⌊521 Most submitted three summaries of expenses incurred to July 30, 1958. Each list conflicted with the others in some respects. He admitted that his list of claimed partnership expenses included the full amount of the office rent, telephone and utilities for this period without making any segregation of expenses attributable to his law practice. Most testified that he had records showing what expenses he had charged to his law practice in his income tax returns. He was requested to produce these records, but he declined to do so. In the absence of any books of account or sufficient records from which an accurate account could be constructed, the trial judge made what he felt to be a fair allocation of expenses based upon the evidence before him. The finding as to the amount of the partnership expenses is supported by substantial evidence.

The findings of fact speak only of income, expense and profits, rather than assets, which are the subject of a partnership liquidation. However, it does not appear that this business had any assets except cash and accounts receivable, which were ultimately converted into cash. Hence an accounting of cash receipts and expenditures showing a profit in a stated amount supports the conclusion that, as of the date of the judgment, Most was chargeable with partnership cash in an amount equal to the profits plus Chazan's contribution of $2,500.

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* We do not concern ourselves with whether this was a proper counterclaim. The parties made no point of it either in the trial court or on appeal.

Most points out that the trial court made an error of computation when it found that the gross receipts of the partnership were $12,496.07. This figure was the total shown on a list prepared by Most showing fees which he had collected. The column of figures on the exhibit actually adds up to $10,817.03. One of the items in the column was $16.96. Apparently this item was struck on the adding machine as $1,696.00, thereby causing an error of $1,679.04 in the total. The record leaves no doubt that this erroneous total was the basis of the court's finding. This error may be cured by a modification of the judgment, reducing Chazan's recovery by $839.52, which is one-half of $1,679.04.

[1-3] Most asks that the judgment be reversed because the trial judge determined the profits of the partnership without appointing a referee to take the account. There is no requirement that the trial court make a reference in an action for an accounting. (Walsh v. Jack Rubin & Sons, Inc., 182 Cal.App.2d 652, 6 Cal.Rptr. 346.) The cases do hold, as Most contends, that a trial court has not fully performed ⊥522 its duty in an accounting suit if it merely states the balance due. (See Whann v. Doell, 192 Cal. 680, 684, 221 P. 899; Garwick v. Gordon, 121 Cal.App.2d 247, 251, 263 P.2d 125; Davis v. California Motors, 73 Cal.App.2d 241, 246, 166 P.2d 52.) Defendant Most overlooks the fact that he is the one whose duty it was to account for the partnership funds, and it was plaintiff Chazan who demanded the accounting. Chazan is not now complaining that the account, as determined by the trial court, is not sufficiently detailed. The only way anyone could have stated the account in ⊥523 this case was to draw inferences from the testimony and from the incomplete figures which Most supplied, and make some reasonable allocations. Most did not request the trial court to make its findings of fact any more specific than they were. This court cannot say that Most was prejudiced by the form of the accounting which appears in the findings of the trial court.

[4] Most complains that the trial court failed to allow him anything for his expenses or his services in winding up after the dissolution which occurred on June 26, 1958. Most submitted statements of claimed expenses and the trial court used these figures to arrive at the expenses which were allowed. Each list of expenses purported to cover a specified period, the latest ending July 30, 1958. Most testified that he estimated that of the $6,457.35 taken in as fees between June 23, 1958, and July 29, 1959, at least half would have been used up in expenses. The trial court was not required to accept that opinion which was not supported either by facts or convincing reasons.

Furthermore, the lists of expenditures submitted by Most under the heading "Expenses January 1, 1958 to July 30, 1958" contained items paid after that period. The cancelled checks which Most submitted to support his list of expenses for the period prior to dissolution included many checks written months after the dissolution. For example, on the list of expenses claimed for the period prior to July 30, 1958, one of the items was "Appraisers and Inventory Service $1,395.43." In support of this figure defendant submitted an envelope containing sixteen cancelled checks, totaling $1,395.43. One of these checks was dated August 12, 1958, and another was dated November 10, 1958. The trial court gave Most credit for these expenses paid after dissolution. The judgment actually gives Most credit for all of the expenses (both before and after dissolution) which he supported by cancelled checks, excepting only certain office expenses which the court divided between the partnership and Most's individual law business.

Upon the evidence before it, the trial court was justified in concluding that the expenses which it allowed Most included all of the expenses which he could substantiate for the winding-up period.

The record is vague as to what services Most rendered after dissolution. Chazan testified that their procedure in adjusting fire losses had been for him to prepare the necessary documents and for Most to handle the negotiations. This would mean that under the agreed method of operation some of Most's duties on each case would necessarily be performed after Chazan had performed all of the services expected of him. There was no evidence from which the court could arrive at a dollar value to be placed on the services rendered by Most after dissolution. It also appears from the record that after dissolution Most carried on his own individual fire adjusting business at the same office and under the same name as was used by the partnership.

[5] The partnership agreement made no provision for compensation. The parties clearly intended to be governed by Corporations Code, section 15018, subdivision (f), which provides: "No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs."

[6] There is no merit in Most's contention that he is a "surviving partner." That term refers to the partner who survives after the death of the other. This statutory exception to the rule against compensation was enacted because the death of a partner necessarily leaves the entire burden of winding up upon the survivor, a situation which does not ordinarily occur if both partners are alive and competent. (See Jacobson v. Wikholm, 29 Cal.2d 24, 172 P.2d 878.) On this record we need not explore the circumstances under which a court might, on equitable grounds, award compensation to one of two living partners who has performed more than his share of the work in winding up and liquidation. (See Osment v. McElrath, 68 Cal. 466, 9 P. 731; Ross v. Burr, 69 Cal.App. 286, 230 P. 986; 68 C.J.S. Partnership § 395; 40 Am.Jur., Partnership, § 284.) Neither the pleadings nor the pretrial statement discloses any contention by Most that he was entitled to compensation. The evidence justified the trial court's conclusion that the accounting was to be made on the basis of ⊥524 equal participation by the two partners, without other compensation to either for services.

[7, 8] Most claims the court erred in awarding the plaintiff interest from December 1, 1958, the date when the court found the winding-up to have been completed. He relies on such cases as Freese v. Smith, 114 Cal.App.2d 283, 250 P.2d 261, holding that interest is ordinarily not allowed during the winding up period. In the present case interest is justified by the fact that defendant was under a duty to render an account when the winding-up was completed, and he failed to do so. The court's finding that the winding-up was complete by December 1, 1958, appears to be supported by substantial evidence. The only activity which the record shows after that date was the receipt of $150 on July 29, 1959. Defendant has offered no excuse for not accounting on or before December 1, 1958. The fact that the amount due was then unliquidated was due solely to defendant's failure to keep proper books of account and to make a proper accounting to his partner. The law does not permit a defendant thus to profit by his own default. Where the accounting and distribution of partnership assets are delayed through the fault of the partner having possession, interest may be allowed from the date when the balance should have been ascertained and paid over. (Luchs v. Ormsby, 171 Cal.App.2d 377, 387, 340 P.2d 702.)

[9] The records show that the last $150 to come into the partnership was not received until July 29, 1959. Interest should not have been allowed on Chazan's share of this money prior to the time when Most collected it. The judgment should be modified to correct this.

[10] Most also contends it was error for the court to fail to award him exemplary damages after finding the cross-defendants Chazan and Straeter guilty of unfair competition. The evidence showed and the court found that in July of 1958 the cross-defendants went into the fire adjusting business under a new business name without informing Most; and they adopted and used stationery and business cards similar to those used by Associated Fire Adjusters, which was the name used by the partnership prior to dissolution and by Most afterwards. The court found that by reason of this, Most was damaged in the sum of $10 by Chazan and $10 by Straeter.

The cross-complaint also alleged that cross-defendants had competed unfairly in some other respects, but the trial court ⊥525 ⊥found that those allegations were not true. It thus appears that in the trial court's view of the evidence, the use of similar stationery and business cards was wrongful, but the cross-complainant sustained only nominal damage. The court made no finding that cross-defendants were guilty of oppression, fraud, or malice, which would have supported an award of exemplary damages (Civ.Code, § 3294) and, in effect, found the contrary when it declared that cross-complainant was not entitled to exemplary damages. The record justifies this result. Under the circumstances the absence of a specific factual finding is not prejudicial.

[11] Inasmuch as the only errors in the judgment are matters of computation which the appellant should have called to the attention of the trial court, it is only fair that the appellant pay the costs of this appeal.

The judgment is modified as follows: The amount which plaintiff Chazan shall recover from defendant Most is reduced by $839.52, making the principal amount due $2,271.19. Of this sum, $2,196.19 shall bear interest at 7 per cent per annum from December 1, 1958, to the date of judgment, while the remaining $75 shall bear interest from July 29, 1959, to the date of judgment, making a total of $375.06 interest to be included in the judgment. As so modified the judgment is affirmed with costs to respondents.

SHINN, P. J., and FORD, J., concur.

209 Cal.App.2d 442

⊥**The PEOPLE of the State of California, Plaintiff and Respondent,** ⊥442

v.

Daniel Lynch VIDAL, Defendant and Appellant.

Cr. 8234.

District Court of Appeal, Second District, Division 1, California.

Nov. 9, 1962.

Rehearing Denied Dec. 4, 1962.

Hearing Denied Jan. 3, 1963.

The defendant was convicted in the Superior Court of Los Angeles County, David Coleman, J., of second degree murder, and defendant appealed from the judgment and order denying the motion for new trial. The District Court of Appeal, Wood, P. J., held that the evidence supported second degree murder conviction of defendant, who allegedly admitted stabbing decedent and stating that he would finish decedent, and who did not call for any aid for decedent.

Affirmed.

1. Criminal Law ⚷741(1), 742(1)

Credibility of witnesses and weight of their testimony were for jury.

2. Homicide ⚷254

Evidence supported second degree murder conviction of defendant, who allegedly admitted stabbing decedent and stating that he would finish decedent, and who did not call for any aid for decedent.

3. Criminal Law ⚷701

Counsel of record for a defendant has right to control proceedings on behalf of his client.

4. Criminal Law 🔑641(1)

Evidence showed that defendant, who claimed that deputy public defender was not interested in assisting but tried to get defendant to plead guilty and did not consider request to subpoena witnesses for defense, had been adequately represented by counsel.

Daniel Lynch Vidal, appellant, in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Louis L. Selby, Deputy Atty. Gen., for respondent.

⊥443 WOOD, Presiding Justice.

In a jury trial, defendant was convicted of second degree murder. He admitted an allegation of the information that he had been convicted previously of assault with intent to commit murder. He appeals from the judgment, sentence, and order denying his motion for a new trial.

Appellant contends that the evidence was insufficient to support the conviction; and that his counsel (deputy public defender) did not properly represent him at the trial.

During the evening of September 23, 1961, defendant Vidal, aged 21 years, and Bobby Chambers (decedent), aged 31 years, had been riding in Vidal's automobile to various places including a liquor store and their homes, and they had been drinking wine. About 9 p. m. of that day they went to the home of Salvador Reyes, the stepfather of defendant, at 2047 East 76th Street in Los Angeles, where they and Reyes drank the remainder of a bottle of wine which defendant and Chambers had taken there. Then they asked Reyes whether he had anything there to drink. After Reyes took three bottles of beer from the refrigerator, the other two men scrambled and argued over two half dollars which were on a table. Chambers succeeded in getting that money. Reyes testified that defendant then went to his automobile, came back with a butcher knife ⊥444 and put it on Reyes' throat; Reyes thought that defendant was playing, and after a while defendant removed the knife and put it inside his belt; after the three of them drank the three bottles of beer, Reyes sent the two men to the liquor store to get more beer—telling them to use the dollar which was on the table; they returned about ten minutes later with two quarts of beer; after drinking that beer, the two men went through the bedroom to the lavatory; when they returned to the living room, the defendant said that Chambers had taken $7.00 from under the mattress in the Reyes' bedroom; Reyes said that was all the money he had to live on until the next month; he asked Chambers to give the money back; Chambers, who was ready to return the money, had his wallet in his hands and was looking into it, when "all of a sudden Vidal jumped up and stabbed him right in the stomach"; Chambers said nothing, stood up, took the knife out of his stomach, and walked outside with the knife in his hand; defendant stood "quiet for five minutes like he was scared," and then said, "I am going to finish him"; defendant went into the kitchen, and then went outside the house; about five minutes later, the defendant came back and said he could not find him; then defendant went to the liquor store to get another beer; when he returned with the beer, several police officers were on the street; defendant went away to get Mr. Friddle (uncle of Chambers); Reyes (witness) went to bed, and later police officers took him to the police station; defendant lived at Reyes' house approximately eight years, but about three years ago Reyes kicked him out of the house—Reyes had to get rid of him.

Mr. Friddle, an uncle of Chambers, who operates a lawnmower repair shop on the premises where he resides (Compton Avenue in Los Angeles), testified: On said September 23, about 2 p. m., he saw the defendant Vidal at the shop. About 11 p. m. of that day the defendant came to Friddle's bedroom window and said that he had something to tell him. After Friddle let him come into the house, they sat at a table and talked approximately ten minutes. In that conversation the defendant said he and Chambers were at Friddle's house about 6 p. m., of that day (while Friddle was away), and then they "drove around" and finally went to Reyes' house on 76th Street; that they and Reyes had been drinking; that Chambers stole $7.00 from Reyes, and that defendant got "so worked up about it" that he took the butcher knife and stuck Chambers in the stomach with it; that Chambers got up, walked out, and left the premises; that defendant had walked "around for ⌊445 two or three blocks" and could not find Chambers, and he (defendant) wanted Friddle to go with him and see if they could find Chambers. After that conversation, Friddle telephoned his sister (Chambers' mother) and told her that Chambers had met with an accident. Defendant took Friddle to the sister's house, and then defendant went on "ahead" in his automobile to the Reyes address (a distance of approximately two miles), and Friddle and the sister went in her automobile to that address. When Friddle arrived there, about 11:30 p. m., several police cars and several persons were there. The body of Chambers, with a coat over the head, was in a yard about four doors east of Reyes' residence. At that time Friddle saw defendant standing about 40 feet away at the back of the crowd, and pointed him out to a police officer who arrested him immediately.

Friddle testified further that, in the conversation at his house before going to the scene of the stabbing, the defendant said that he had had a feeling all evening that he wanted to stab somebody, and he hoped they would send him back to Soledad because he was "afraid to stay out here"; that he did not know what he was going to do; that he had taken the butcher knife from Friddle's silverware and had stuck it into Chambers' stomach "just as hard as he could"; that Chambers had taken $7.00 which was all that Reyes had to live on until next month—and defendant just stabbed him.

On cross-examination, Friddle said that Chambers had been drinking at the lawnmower shop from 2 to 4 o'clock that afternoon; defendant Vidal had lived at Friddle's house and worked in his shop until recently when defendant married and went away, but Friddle was not angry at him because he had married; Friddle had had possession of defendant's automobile and the pink slip (registration slip) therefor, and had sold the automobile for $87 and kept the money because defendant owed him as much as the automobile was worth.

Officer Bennett testified that on said September 23, about 11:40 p. m., he went to the vicinity of 2047 East 76th Place (vicinity of Reyes' address) and saw Chambers' dead body lying on the front walk at a house three or four houses from Reyes' address; he also saw the butcher knife (Exhibit 5) which was in the grass at the rear of the body; he had a conversation with Friddle who "pointed out" defendant, who was at the rear of a group of bystanders; defendant was walking away rapidly when the officer overtook and arrested him.

Officer Thornton testified that he arrived at the scene about ⌊446 12 o'clock on said night and saw Chambers' body on the front walk and saw the knife (Exhibit 5) at the rear of the body; he went into the Reyes house, saw blood spots (on the floor of the living room) in front of a chair, and saw broken glass and liquid on a coffee table.

Dr. Moore, a doctor of medicine, testified that he performed an autopsy on the body of Chambers on September 24, 1961; the cause of death was hemorrhage from stabbing in the abdomen; the wound was 1¼ inches long and about 7 inches deep; the mesentery arteries had been severed, and the spine had been entered; there was alcohol in the blood but not enough to be fatal.

Defendant testified in substance as follows: On said September 23, about 6 p. m., while he was in his parked automobile in front of Friddle's house, Chambers came to the automobile, talked with him, and entered the automobile. They went to a liquor store, and then to the homes of Chambers and defendant where they drank wine.

About 9 p. m. they went to Reyes' house and continued drinking wine. While Reyes was getting three bottles of beer from the refrigerator, Chambers took two half dollars which were on a coffee table. When they asked Reyes for money with which to buy more beer, he asked why they did not buy it with the money that had been taken from the coffee table. Then defendant and Chambers went to a store, bought two quarts of beer, and returned to Reyes' house. While the three of them were drinking the beer, Chambers went into the bedroom. Later, defendant went into the bedroom and Chambers showed him some money which he said he had found. They returned to the living room and began drinking beer. Reyes went into the bedroom and then demanded that Chambers give him the $7.00 which he had taken from under the mattress. Chamber got up and started toward the door, but Reyes pulled him by the arm and set him down in a chair. Reyes sat close to and facing Chambers, while talking to him. Defendant was sitting on the coffee table. The next thing defendant saw was that Chambers stood up, walked toward the door, and left the room. Defendant saw blood on Chambers' shirt and a knife in his hand. Defendant stood there a few minutes, asked Reyes what happened, but received no answer. Then he (defendant) went out of the house to see what was wrong. He went to the automobile which was parked in the alley, and then went to the front of the house and looked up and down the street, but did not see Chambers. He returned to the inside of the house and told Reyes he could not find Chambers. Then he drove his automobile to Friddle's ⊥447 house, where he knocked on the window, and Friddle let him enter the house. He told Friddle that Chambers had been hurt and he could not find him. He asked Friddle to go with him and help find Chambers. He also told Friddle that Chambers and Reyes had been arguing over $7.00. Defendant and Friddle went to the home of Chambers' mother, about two blocks away. Then defendant went alone to the street where Reyes lived, while Friddle and Chambers' mother went there in the mother's automobile. When defendant arrived on the street he saw police officers and a crowd there. He entered Reyes' house, told him what he had seen outside, and said he was going outside to see whether it was Chambers. He went outside and was told that someone had been stabbed and was dead. He was arrested while he was going back to tell Reyes what had happened.

Defendant denied: that he had told Friddle that he had stabbed Chambers; that he had said anything to Friddle about Chambers' being stabbed, or about shoving the knife hard, or about hoping to be sent back to Soledad, or about having an impulse to stab someone.

Defendant testified further that Friddle did not like him, because they had had difficulties in the past, but that recently he had been going to his house again and there was always something to drink there; he had worked for Friddle, repairing lawnmowers for room, board, and some money; he owed money to Friddle for the automobile, but he had signed the pink slip over to him when he borrowed $30 from him, but he did not give Friddle permission to sell the automobile which was worth more than $89 for which he sold it; he had incurred Friddle's dislike when he married and moved away from Friddle's house about seven months previously.

On cross-examination, defendant testified: He was drinking before he saw Chambers in front of the shop on the evening of September 23. When he was arrested he had 11 cents in his pocket. He had not had a job for seven months preceding his arrest. He had known Chambers since February 1961. He did not scramble for the money which was on the table in Reyes' house—that Chambers took the money (two half dollars). He did not go to the automobile and get a knife. He did not put a knife across Reyes' throat. He did go into the bedroom when Chambers signaled to him, and he saw the money ($7.00). He did not know that Reyes kept money under the mattress. Reyes went into the bedroom and came back yelling at Chambers and asking him to hand over his $7.00. He ⊥448 did not see Chambers when he was cut. Defendant was shocked when he saw blood on Chambers' shirt and saw a knife in his hand, but he did not say anything nor call a doctor nor an ambulance. He went to Friddle's house to try to get help. When he returned to the Reyes street he saw Friddle who was with a police officer. Someone in the crowd told him that Chambers was dead, but he (defendant) did not tell the officers that Chambers was his friend or that he was in the room when he was stabbed. He was leaving the scene when he was arrested. He had been convicted, in June 1959, of assault with intent to commit murder.

[1, 2] With reference to appellant's contention as to insufficiency of the evidence, he argues to the effect that the testimony of Reyes identifying him as the stabber was false, and that the testimony of Friddle regarding admissions of appellant that he was the stabber was false. He implies, in his argument, (1) that Reyes so testified in order to protect himself from being charged with the crime, and (2) that Friddle so testified because he did not like defendant. The credibility of the witnesses and the weight of their testimony were matters for determination by members of the jury, who were the triers of the facts. (People v. Perez, 19 Cal.App.2d 472, 475, 65 P.2d 1319.) As above stated, Reyes, who was present at the scene of the crime, testified that defendant stabbed Chambers, and that defendant said he was going to finish Chambers. Defendant did not call for medical aid or any aid for Chambers. Friddle testified that defendant told him that he had stabbed Chambers, and that defendant had had a feeling all evening that he wanted to stab someone. When defendant returned to the street scene, where the officers and crowd of bystanders were, he stood at the rear of the crowd and did not tell the officers that he was present when Chambers was stabbed. When he heard that Chambers was dead, he walked rapidly away. There was substantial evidence in support of the verdict.

With respect to appellant's contention that his counsel, a deputy public defender, did not properly represent him, he asserts that the deputy was not interested in assisting him but tried to get him to plead guilty; that he was inclined to believe that the deputy was biased and prejudiced against him and was incompetent; that the deputy did not consider his request to subpoena witnesses for the defense; that he, the defendant, had the right to decide how he wanted his case presented, so long as it was proper procedure. He asked the ⊥449 judge to relieve him from representation by the deputy, and in making that request he said that the deputy was interested only in having him plead guilty. He asserts further that the judge erred in stating that defendant was being properly represented, because the judge was not present at the interviews and could not know whether the defense was prepared properly. Defendant states that the witnesses he desired to subpoena were "character witnesses against" Reyes and Friddle and their testimony would have helped in determining the credibility of those prosecution witnesses.

[3, 4] Counsel of record for a defendant has the right to control the proceedings on behalf of his client. (People v. Merkouris, 46 Cal.2d 540, 554, 297 P.2d 999.) It might well be that counsel for defendant was of the opinion that the proposed testimony of witnesses who were not subpoenaed would be more detrimental than beneficial to his client's cause. The record does not indicate that the deputy public defender was disinterested in assisting the defendant, but on the contrary the record indicates that the deputy ably represented the defendant. Rules with respect to determining whether a defendant in a criminal case has been represented adequately are stated in People v. Wein, 50 Cal.2d 383, 410, 326 P.2d 457 and People v. Ford, 200 A.C.A. 930, 938, 19 Cal.Rptr. 758. In

the present case, the defendant was represented adequately and properly.

The evidence was sufficient to support the conviction.

"The judgment and sentence are synonymous." (People v. Ross, 206 A.C.A. 630, 631, 24 Cal.Rptr. 1, 2.)[1]

The judgment and the order denying the motion for a new trial are affirmed.

FOURT and LILLIE, JJ., concur.

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209 Cal.App.2d 275

⊥275 ⊥**Richard E. CAMP, Plaintiff and Appellant,**

v.

Anthony ORTEGA, Defendant and Respondent.

Civ. 20082.

District Court of Appeal, First District, Division 1, California.

Nov. 7, 1962.

Hearing Denied Jan. 3, 1963.

Action for conversion of property. From a judgment of the Superior Court, San Francisco County, Walter Carpeneti, J., in favor of the plaintiff, the plaintiff appealed on the question of amount of damages. The District Court of Appeal, Sullivan, J., held that lien represented by a chattel mortgage on converted property was improperly deducted from the reasonable value of the property when the mortgagee was a person other than the defendant.

Judgment affirmed as modified.

1. Evidence 🔑594

Subject to a number of exceptions, the unimpeached and uncontradicted testimony of witness, not inherently improbable, cannot be arbitrarily disregarded and should be accepted as true by the trier of fact.

2. Evidence 🔑594

Trier of fact, as exclusive judge of credit and weight to be given to testimony of a witness, may reject such testimony even though uncontradicted and unimpeached when he does not act arbitrarily but does so upon sound and relevant considerations.

3. Appeal and Error 🔑994(3)

Finding or conclusion of trial court denying credence to testimony of a witness cannot be controlled by reviewing court unless it appears that there are no matters or circumstances which at all impair its accuracy.

4. Trover and Conversion 🔑40(6)

Evidence sustained finding that certain described tools, recordings, photographic office and miscellaneous equipment converted by defendant had a reasonable value of $8,000 and not a value of in excess of $25,000 as claimed by the plaintiff.

5. Trover and Conversion 🔑44

Lien represented by a chattel mortgage on converted property was improperly deducted from reasonable value of property when mortgagee was a person other than defendant. West's Ann.Civ.Code §§ 3336, 3337.

6. Trover and Conversion 🔑44

In an action for conversion, plaintiff, although owning but a limited or qualified interest in the property, may, as against a stranger who has no ownership therein, recover full value of property converted. West's Ann.Civ.Code, §§ 3336, 3337.

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Harry C. Rogers, San Francisco, for appellant.

Robert H. Blumenthal, San Francisco, for respondent.

⊥SULLIVAN, Justice. ⊥277

In this action for damages for conversion plaintiff appeals from a judgment, after a nonjury trial, in his favor and against the defendant Anthony Ortega. The issues on appeal are confined to the amount of damages awarded.

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[1] 1. 206 A.C.A. 630, 631.

Plaintiff was a motion picture cameraman, recording engineer and electronics technician. In February 1959 he formed with one Hecht a partnership known as the Hecht-Camp Productions. Hecht and the plaintiff then leased from the defendant Ortega certain premises on Jones Street in San Francisco. After a few months there was a disagreement between them, Hecht left and the plaintiff continued the business alone with hope of finding a new associate. In view of the present issues, the subsequent events need not be set forth in detail. It is sufficient to note that in the latter part of August and just when plaintiff thought that he had secured a new associate, the defendant locked the plaintiff out of the leased premises and claimed all of the property contained therein as his own. Included among such property was personal equipment of the plaintiff which is the subject of the present action. Plaintiff's demands for the return of this were met with refusal. Shortly thereafter defendant formed a partnership with Hecht in order to continue the business.

The trial court found and concluded that on or about August 24, 1959, the plaintiff owned and possessed certain specifically described tools, recordings, photographic, office and miscellaneous equipment of a reasonable value of $8,000; that such equipment was subject to the lien of a chattel mortgage in the sum of $4,600 held by a person other than the defendant; that on or about August 24, 1959, the defendant unlawfully and wrongfully took the described property and converted it to his own use; that the defendant refused to return it; that the plaintiff was indebted to the defendant in the sum of $275 for rent; and that the plaintiff was entitled to judgment in the sum of $3,125. Judgment was rendered accordingly.[1]

Plaintiff makes two contentions on appeal: (1) That the ⌊278 finding that the reasonable value of the converted property was $8,000 is not supported by the evidence, the uncontradicted evidence showing such value to be in excess of $25,000; and (2) the court erred in deducting from the reasonable value of the property, the amount of the lien of the chattel mortgage thereon. We discuss these in the above order.

The converted property as listed in the findings of the court consists of 102 items. Evidence of its value, introduced by plaintiff, falls into three categories: the plaintiff's own testimony, expert opinion evidence of the witness Jack Rochlin, and valuations shown in a cinema supply catalog. The defendant introduced no evidence of value.

The plaintiff testified as to the value of each of the 102 items on the list. Such testimony on its face produced a total value for all in the sum of $28,642. He was cross-examined at length and in detail. It is apparent to us that the purpose of this cross-examination was not only to show that the plaintiff's statements as to value were exaggerated and inaccurate but to directly attack the plaintiff's credibility by showing that under the circumstances he could not have acquired property of such great value. From our reading of the record, including the character as well as the content of the plaintiff's answers, it is fair to say that plaintiff's claims of valuable property could have well taken on a new appearance when examined by the trier of fact under the spotlight of such interrogation.

We note some of the salient points. On direct examination, plaintiff testified item by item as to the value he placed thereon. At the outset of the cross-examination on this subject, it became apparent that plaintiff had acquired his property over a period of time. He was thereupon asked how much he had spent for it during the three-year period immediately preceding August

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[1] It is obvious that the amount of the judgment represents the reasonable value of the property less the amount of the chattel mortgage lien plus the unpaid rent.

1959, the date of the alleged conversion. His answer was that he had spent $6,000 to $10,000 "with trades." However it also appeared that during this three-year period the plaintiff had operated at a loss. When asked to explain the source of the $10,000, he claimed that he obtained it from an inheritance. In the light of these financial circumstances, a subsequent inquiry as to the source of funds necessary to defray living expenses brought the answer that plaintiff had actually received some of the equipment as gifts and had survived the financial crisis which the above answers import by the expedient of loans of several thousand dollars from friends. We of course have no way of reproducing here plaintiff's appearance during these and other inquiries and the ⊥279 manner in which he responded to them, all of which was before the trier of fact.

The testing of plaintiff's claims as to the valuable character of his property was then applied to the period from 1949 or 1950 to 1956. Although at first claiming that he could not state how much he had spent during these years, he later testified that "twenty to thirty thousand dollars' worth was obtained through trade and cash." Subsequent inquiries were directed to the question whether his income during such period would permit expenditures of such magnitude. Plaintiff's first replies on this point were to the effect that he couldn't remember. He was ordered to produce copies of his income tax returns and such copies of federal individual returns for nine calendar years from 1950 through 1958 were admitted in evidence. These documents were admitted in evidence over plaintiff's objection on the sole ground of their materiality. They showed that although plaintiff had but one exemption, his own, he paid no tax at all in five of the years and inconsequential amounts in the remaining four.

The cross-examination sought verification of value in other ways. Inquiries were made to verify cost. As to some items, plaintiff responded that he had no written verification since he paid for the equipment in instances in sizeable amounts with currency. No receipts were produced, plaintiff claiming that he did not know where they were, that some were in storage and that some, as he believed, were on the Jones Street premises. Nor did plaintiff produce records showing the value of the property in controversy for personal property taxation. His testimony as to the amounts of personal property taxes he paid over the years would appear to be vague and inconclusive. A so-called "floater policy" of insurance issued in May 1959 was introduced in evidence during the direct examination of plaintiff. Plaintiff's property which was scheduled for the policy appears to have a total value of $13,500, was considered by the trial judge to have a total scheduled value of $15,000. Plaintiff testified that only part of his equipment was covered by such insurance issued to Hecht-Camp Productions and that the policy had been taken out prior to the time he had brought his equipment on the premises.

The schedules of depreciation in plaintiff's tax returns, copies of which were in evidence, were also brought to the court's attention. In the return for 1958, the year before the conversion of the property, the schedule lists "Lathe & presses" acquired in 1951 at a cost of $775 and "Misc. equipment" ⊥280 acquired in 1952 at a cost of $500. The above amounts appear in all of the other returns except 1954 when apparently no depreciation was taken. Plaintiff claimed that this schedule on his 1952 return, which described his business as "General precision repairs," did not represent all his personal property, since his business then was designing and building photographic equipment and that he was merely accumulating equipment for his contemplated motion picture business. However, his 1958 tax return showed his occupation to be "Cameraman & instrument repairman." The trial court considered the value of the property as shown on the income tax returns to be $500.

The second category of plaintiff's evidence on value consisted of the opinion evidence of Jack Rochlin who had been engaged in the business of selling new and used photographic equipment and supplies for approximately 15 years. Such experience included recording equipment. Rochlin testified as to the value of 19 of the 102 items of converted property, his testimony producing on this record an aggregate value for such items of from $13,039 to $13,289. He had seen the equipment in the basement of the Jones Street premises two days before he was called as a witness. He testified that he "found a lot of photographic equipment and miscellaneous equipment piled in a heap," that "[i]t was very difficult to actually see the exact piece of equipment * * *" and that "it was very difficult to observe the actual condition * * *." In instances, the witness, when giving his opinion as to value, assumed that the item was in good condition and upon cross-examination, admitted that all of his estimates as to value were based on the assumption that all of the equipment was in good working condition. Despite the fact that he had given statements of value, the witness testified on cross-examination that he himself would not offer to buy a certain camera unless he thoroughly examined it, that assuming it was in "perfect working condition" he would probably offer $400 to $600 (although he had given a value of $1,000 on direct examination) and that he would not bid on the photographic equipment which he had seen "unless I thoroughly examined each piece."

The third category of evidence on value consisted of prices taken from a 1960 S.O.S. Cinema Supply Corp. catalog. Both plaintiff and his witness Rochlin testified that such catalogs were customarily referred to for pricing purposes and generally reflected prevailing prices in the area. The catalog, 281 admitted in evidence over defendant's objection, was used to price 17 of the 102 items and produced on the record an aggregate value therefor in the sum of $15,103.15.

During the cross-examination of plaintiff, the defendant introduced in evidence a certain $5,000 promissory note executed by the plaintiff and his associate Hecht in favor of the Crocker-Anglo National Bank as evidence of a loan, together with a chattel mortgage securing the same. The chattel mortgage covered plaintiff's property now in controversy, as well as other property. Defendant appears to have made use of this evidence for two purposes: First, to show that plaintiff did not have a full ownership of the converted property; and secondly, on the question of value, to show that the property did not have the high value claimed by plaintiff, since the bank refused to make the loan on the security alone but required and apparently received a guaranty thereof from Hecht's father-in-law.

In his opening brief plaintiff has tabulated the foregoing three categories of evidence on value and by formulating various combinations of the values for each item, proposes that such evidence shows a "high" value of $31,348.50 and a "low" value of $25,690.05. Plaintiff's argument may be reduced to the following: that the evidence on value is without conflict; that his own evidence giving a total value of $28,642 is confirmed by the other two categories of evidence; that he should be awarded a new trial on the issue of damages or this court should modify the judgment in his favor by increasing it to $25,690.05 (less offset) to reflect at least the alleged uncontradicted "low" value of the property. In summary, plaintiff's position is that the trial court had no right to find a value of $8,000 or any value less than $25,690.05. This position is untenable.

[1] As a general rule, the unimpeached and uncontradicted testimony of a witness, not inherently improbable, cannot be arbitrarily disregarded and should be accepted as true by the trier of fact. (Gomez v. Cecena (1940) 15 Cal.2d 363, 366, 101 P.2d

477; Mantonya v. Bratlie (1948) 33 Cal.2d 120, 127, 199 P.2d 677; Joseph v. Drew (1950) 36 Cal.2d 575, 579, 225 P.2d 504; Estate of Warner (1914) 167 Cal. 686, 690, 140 P. 583; Krause v. Apodaca (1960) 186 Cal.App.2d 413, 417, 9 Cal.Rptr. 10; Wirz v. Wirz (1950) 96 Cal.App.2d 171, 176, 214 P.2d 839, 15 A.L.R.2d 1129; see generally 19 Cal.Jur.2d, Evidence, § 475, pp. 238–240 and ⊥282 cases collected therein.) The above rule, however, is subject to many exceptions firmly established in the decisions.

In Davis v. Judson (1910) 159 Cal. 121, 128, 113 P. 147, 150, they were stated as follows: "The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his posititve testimony as to a particular fact * * *."

Mr. Justice Field, speaking for the Supreme Court of the United States in Quock Ting v. United States (1891) 140 U.S. 417, 420–421, 11 S.Ct. 733, 851, 35 L.Ed. 501, used the following language: "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

In the leading and frequently cited case of La Jolla Casa deManana v. Hopkins (1950) 98 Cal.App.2d 339, 345–346, 219 P.2d 871, 876, the exceptions are pointed out as follows: "[A] trial judge has an inherent right to disregard the testimony of any witness, or the effect of any prima facie showing based theron, when he is satisfied that the witness is not telling the truth or his testimony is inherently improbable due to its inaccuracy, due to uncertainty, lapse of time, or interest or bias of the witness. All of these things may be properly considered in determining the weight to be given the testimony of a witness although there be no adverse testimony adduced. The trial judge is the arbiter of the credibility of the witnesses. A witness may be contradicted by the facts he states ⊥283 as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner of testifying may give rise to doubts of his sincerity and create the impression that he is giving a wrong coloring to material facts."

[2, 3] It has therefore been established by the above and a long line of decisions that the trier of fact, as the exclusive judge of the credit and weight to be given to the testimony of a witness, may reject such testimony even though uncontradicted and unimpeached when he does not act arbitrarily but does so upon sound and relevant considerations such as those enumerated above. (Huth v. Katz (1947) 30 Cal.2d 605, 609–609, 184 P.2d 521, 523; Hicks v. Reis (1943) 21 Cal.2d 654, 659–660, 134 P.2d 788; Wind v. Herbert (1960) 186 Cal.App.2d 276, 286, 8 Cal.Rptr. 817; Blye v. Affonso (1960) 185 Cal.App.2d 241, 242–243, 8 Cal. Rptr. 155; Kraut v. Cornell (1959) 175 Cal. App.2d 528, 531–532, 346 P.2d 438; Sharpe v. Brotzman (1956) 145 Cal.App.2d 354, 360–361, 302 P.2d 668; Perske v. Perske (1954) 125 Cal.App.2d 795, 801–802, 271 P.

2d 528; Aycrigg v. United States (D.C.N.D.Cal.1954) 136 F.Supp. 244, 246–248.) As it is said in Huth v. Katz, supra: "The trial court, however, was not required to believe that their testimony was true and accurate in every particular. In passing on the credibility of witnesses and the weight to be given their testimony, the trier of fact is entitled to consider their interest in the result of the case, their motives, the manner in which they testify, and the contradictions appearing in the evidence. [Citations.]" (30 Cal.2d pp. 608–609, 184 P.2d p. 523.) The finding or conclusion of the trial court denying credence to such testimony cannot be controlled by this court "unless it appears that there are *no matters or circumstances which at all impair its accuracy.*" (Davis v. Judson, supra, 159 Cal. at p. 128, 113 P. at p. 151; emphasis added.)

The foregoing principles apply to testimony regarding value. In Langley v. Pacific Gas & Elec. Co. (1953) 41 Cal.2d 655, 262 P.2d 846, the plaintiff sued for damages for breach of contract to furnish electric power to his fish hatchery as a result of which a large number of his trout died. It was held to be reversible error for the trial court to instruct the jury that if they found for plaintiff they could not award the plaintiff any less than sixteen cents per fish. "The amount of damages sustained by plaintiff was placed in issue by the answer to the complaint. The instruction removed
284 that issue from the consideration of the jury. Although plaintiff's testimony was the only evidence concerning the value of the fish, the jury was the sole judge of his credibility and should have been left free to disbelieve him. Blank v. Coffin, 20 Cal.2d 457, 461 [126 P.2d 868]. On cross-examination it was shown that plaintiff was not experienced in the business of raising fish." (41 Cal.2d at p. 663, 262 P.2d at p. 851.) In Zimmer v. Kilborn (1913) 165 Cal. 523, 525, 132 P. 1026, an action for legal services, the plaintiff, being dissatisfied with a judgment for $500 appealed therefrom claiming that all expert witnesses produced by him testified to the value of the services in amounts in excess of $500 and that the defendant offered no evidence to contradict such testimony. In affirming the judgment, the Supreme Court held that such circumstances "did not prevent the jurors from considering the matter in the light of their own experience nor cut them off from the right to return a verdict in favor of plaintiff for a sum less than that mentioned by any witness if, in their discretion, they believed the amount returned by their verdict a sufficient compensation for the work performed." (165 Cal. at p. 525, 132 P. at p. 1026.)[2] (See generally Aycrigg v. United States, supra, 136 F.Supp. 244, 246–249.)

Considerations justifying the application of the foregoing principles are found in the evidence bearing upon value, which has been summarized by us above. The circumstances involved in the plaintiff's own testimony would warrant the court in disbelieving it, at least in part. The court could have considered the facts upon which plaintiff sought to explain how he acquired the equipment, and reasonably inferred that, if it were in fact of the great value claimed by plaintiff, it could not have been acquired in the manner and under the circumstances which plaintiff's testimony proffered. From this, the court could have concluded that the equipment was not as valuable as it was claimed to be and that plaintiff's statements on direct examination were exaggerated, and probably in instances false. The court could have also considered that the plaintiff who seeks money damages, had an obvious and indeed substantial interest in the result of the litigation. Finally there remains the manner in which the plaintiff testified. While the record before us does not reproduce this, it nevertheless reflects answers 285
of the plaintiff which in instances appear

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[2] Not involved in Zimmer, a jury tried case, is the rule that trial and appellate courts possess the power and ability to make an appraisal and adjudication of the value of legal services. (Kirk v. Culley (1927) 202 Cal. 501, 510, 261 P. 994.)

to us indefinite, uncertain and even evasive. The trial judge had the opportunity to observe the living, speaking witness and properly weigh his answers. Thus, all of the above circumstances could have impaired the accuracy, affected the weight, and impeached the credit of the testimony which plaintiff claims here was "uncontradicted."

The other two categories of testimony were, in our view, properly evaluated according to the same test. It is clear from the statements of Rochlin himself that his *expertise* was predicated upon an unstable basis to start with, since by his own admission he had not examined the condition of the items which he appraised. It was made more insecure by the plaintiff's explanations dealing with the acquisition of the property and thus affecting its age, prior use, and current working condition. The record is susceptible of the inference that as to many items, Rochlin was therefore not testifying to the actual value of the converted property. With respect to the values taken from the catalog, it would certainly be reasonable for the court to consider them with marked reservations, since under the circumstances it could not be said that the condition of the item in the catalog corresponded with that of the item converted, especially where the condition of the latter is at best but indistinctly shown by the evidence.

[4] It was therefore properly within the province of the trial court to give credit and weight to the above evidence in the light of the foregoing considerations and while disbelieving that the property was worth the full value claimed, to find nevertheless that it had some value. The finding of $8,000 reasonable value therefore has evidentiary support. Plaintiff claims that the court exercised this prerogative in an arbitrary and artificial manner by, in effect, splitting the difference between the value of the equipment appearing on the insurance policy and the value appearing on the income tax returns, arguing that this basis of the court's decision is disclosed by the following language in the court's memorandum opinion: "As between the value on the insurance policy ($15,000.00) and on the income tax returns ($500.00) the court finds the value to be $8,000.00, * * *"[3] Plaintiff's argument must fail. The trial court's opinion cannot be thus used to impeach and annul the court's findings. (Oldis v. |286 La Societe Francaise (1955) 130 Cal.App.2d 461, 472–476, 279 P.2d 184; City of Daly City v. Smith (1952) 110 Cal. App.2d 524, 529, 243 P.2d 46; DeCou v. Howell (1923) 190 Cal. 741, 751, 214 P. 444.)

[5] We turn to plaintiff's second contention on appeal which challenges the deduction by the trial court from the reasonable value of the converted property of the lien liability of $4,600 represented by a chattel mortgage on the property. The court found that this lien and chattel mortgage was held by a person other than the defendant. The record does not show, and indeed no claim has ever been made, that the defendant ever applied, or was called upon to apply, the converted property to the satisfaction of the mortgage.

[6] In an action for damages for conversion, it is the rule that the plaintiff, although owning but a limited or qualified interest in the property, may, as against a stranger who has no ownership therein, recover the full value of the property converted. (Treadwell v. Davis (1868) 34 Cal. 601, 606 (pledgee)[4]; Thompson v. Toland (1874) 48 Cal. 99, 114 (on rehearing), 117–118 (pledgee); California Cured Fruit Assn. v. Ainsworth (1901) 134 Cal. 461, 462–463, 66 P. 586 (limited percentage interest in growing crops); Driver v. Acquisto (1956) 145 Cal.App.2d 304, 309–311, 302 P.2d 387 (conditional vendee); Igauye v. Howard (1952) 114 Cal.App.2d 122, 127,

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[3] This would produce a figure of $7,250. But even this appears to be inaccurate, since the insurance value, after excluding property not plaintiff's appears to be $13.500, thus producing a "split" figure of $6.500.

[4] Overruled on other points by Reed v. Bernal (1871) 40 Cal. 628, 630–633.

249 P.2d 558 (lessee owning furniture not fully paid for); Watson v. Stockton Morris Plan Co. (1939) 34 Cal.App.2d 393, 400, 93 P.2d 855 (pledgee); Booth v. People's Finance & Thrift Co. (1932) 124 Cal.App. 131, 136–137, 12 P.2d 50 (conditional vendee); Abramowitz v. Bank of America (1955) 131 Cal.App.2d 892, 898, 281 P.2d 380 (conditional vendee); 48 Cal.Jur.2d, Trover and Conversion, § 48 at pp. 598–599; 53 Am.Jur., Trover and Conversion, §§ 121–123 at pp. 907–908.) The rationale of the above rule permitting recovery of the full value is that the owner of the limited or qualified interest is still liable over to the person owning the superior or remainder interest. (See authorities immediately above; see also Goldberg v. List (1938) 11 Cal.2d 389, 393–394, 79 P.2d 1087, 116 A.L.R. 900.) Although no cases have been cited or disclosed by our independent research involving a plaintiff who is a chattel mortgagor, we are of the opinion that the rationale of the above rule and the rule itself⊥287 are just as applicable to such species of limited or qualified ownership as to cases involving conditional vendees or pledgees.

At this point we consider a number of arguments advanced by the respondent against the application of the above rule of measure of damages.

First, defendant contends that support can be found for the deduction of the lien liability of $4,600 in the case of Goldberg v. List, supra, 11 Cal.2d 389, 79 P.2d 1087. In Goldberg a conditional vendee under several sales contracts brought an action for conversion against certain persons who were strangers to the contracts and had no ownership in the property. At the time of the conversion the plaintiff was in default under the contracts. Subsequently, the defendants who had converted the property, upon the demand of the conditional vendors, turned the property over to the latter. Judgment was rendered for the defendants upon a finding that in view of the above circumstances the plaintiff had suffered no damage. The plaintiff on appeal maintained that in view of the provisions of sections 3336 and 3337 of the Civil Code[5] the return of the property to the conditional vendor was immaterial and thus ineffective to minimize damages. The Supreme Court rejected this contention holding that section 3337 did not preclude proof of the return of the property in mitigation of damage and that while the conditional vendee did not give an *express* consent to such application of the property, his consent was *implied* in the very form of the contract itself, stating "[i]n any event, we are of the opinion that section 3337 can only be held to apply to a situation where the property was voluntarily applied by the party guilty of conversion to the benefit of the injured party, and can have no application to a situation such as here where the application was compelled by a legal duty." (11 Cal.2d at p. 393, 79 P.2d at p. 1090.) Since the appeal was on the judgment roll alone, the court then assumed in support of the judgment, that the⊥288 contracts contained no provision for the continued liability on the part of the conditional vendee after the retaking of the property by the conditional vendor and there being no liability, concluded that the reason allowing the owner of a limited interest to recover the full value of the property was not present under the particular circumstances and that the rule of full recovery should not then be applied.

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[5] Section 3336 provides in relevant part: "The detriment caused by the wrongful conversion of personal property is presumed to be:

"First—The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; * * *"

Section 3337 provides: "The presumption declared by the last section cannot be repelled, in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent."

Defendant herein misconceives the holding of Goldberg. It is essentially one of mitigation of damages. It is applicable only where the defendant-converter in response to the legally enforceable demand of a third person holding a superior ownership applies the property to the benefit of the plaintiff and thus extinguishes any liability over of the plaintiff to such third person. In the instant case there has been no application whatsoever of the converted property to the benefit of the plaintiff. The conditions for mitigating damages have not been satisfied. The rule announced in Goldberg, accordingly, cannot control.

Next, defendant claims that the Goldberg case should be made applicable since "the property converted will be applied to the benefit of the plaintiff mortgagor as a matter of law upon default in accordance with the provisions of Section 726 of the Code of Civil Procedure." The fact that the chattel mortgagee may foreclose does not mean that he will. The record fails to disclose that such foreclosure is imminent. Such circumstances will not make the Goldberg rule operative. It comes into play after the actual application of the converted property to the plaintiff's benefit with the resultant extinguishment of the plaintiff's liability.

Defendant argues that section 3336 which we have set forth in the preceding footnote declares, according to defendant, "that the measure of damages * * * is *presumed* to be either the full value of the property, or alternatively an amount sufficient to indemnify the party injured" and that therefore "it would reasonably seem that the true measure of damages is nevertheless the *actual* detriment or *actual* damages * * *." (Original emphasis.) This argument then proceeds upon the gratuitous assumption that the so-called *actual* damages would be something less than the full value of the property and the rule of damages set forth by us above would be suspended as it was in Goldberg. The argument has no merit. None of the authorities announcing the rule of measure of damages for the owner of a limited or qualified interest hold or even suggest that the alternative provision ⊥289 found in section 3336 would, if applied, require a different measure of damages from that set forth above. The exception to the general rule, which exception is found in Goldberg, is not based on the alternative language of section 3336 at all, but on other considerations discussed by us above.

Finally, defendant complains that if the $4,600 lien liability is not deducted and the general rule of measure of damages is applied herein, the plaintiff might be unjustly enriched and the defendant might be subjected to the burden of paying the $4,600 twice. Defendant envisages the following situation: Defendant would have converted property worth $8,000 but subject to a $4,600 lien; plaintiff would have $8,000 presumably received in satisfaction of the judgment, including the $4,600 to defray his liability over. In the event of a default in the payment of the obligation secured, defendant would have to pay the $4,600 (the second time) or lose the property, while plaintiff would have a windfall of $4,600. On the other hand, so runs the argument, under the judgment as rendered by the trial court, plaintiff would be protected since there would be ample security to cover the unpaid balance. However defendant minimizes, if he considers at all, that in the latter situation the fact that the security might depreciate in value, become valueless, lost or stolen, might subject plaintiff to a deficiency judgment. It is not necessary to evaluate these competing risks. The plain answer to the problem posed is that the defendant is the wrongdoer and having brought about the above situation should bear the resultant risks and disadvantages.

We therefore hold that the trial court erred in deducting from the reasonable value of the converted property, the lien liability in the sum of $4,600.

The judgment is modified by adding thereto the sum of $4,600 and as thus modified is affirmed. Each party shall bear his own costs on appeal.

BRAY, P. J., and MOLINARI, J., concur.

Hearing denied; PETERS, J., dissenting.

209 Cal.App.2d 484

484 **The PEOPLE of the State of California, Plaintiff and Respondent,**

v.

Willis ABNER, Defendant and Appellant.

Cr. 4152.

District Court of Appeal, First District, Division 1, California.

Nov. 13, 1962.

Defendant was convicted in the Superior Court, San Francisco County, Harry J. Neubarth, J., of 11 crimes including burglary, robbery and rape, and he appealed. The District Court of Appeal, Bray, P. J., held that testimony of expert witness that fingerprints taken from scene of various alleged crimes were defendant's fingerprints was not rendered inadmissible even though officer on cross-examination professed an inability to remember 12 points of similarity on which he originally made his identification of the fingerprints, since such inability merely related to weight to be given his testimony by the trier of fact.

Judgment affirmed.

1. Criminal Law 🔑1170½(5)
Witnesses 🔑266

The right of cross-examination is fundamental; it is not a matter of privilege but of absolute right; its denial or undue restriction may be reversible error.

2. Criminal Law 🔑696(3)

If a party cannot cross-examine a witness because of the witness' refusal to answer the trial court may strike out the direct examination, although how much of the direct testimony should be stricken is discretionary.

3. Criminal Law 🔑741(1)

Degree of weight and credibility to be attached to evidence is a matter for the trier of fact. West's Ann.Code Civ.Proc. § 1847.

4. Criminal Law 🔑566

Under proper circumstances fingerprints are alone sufficient to identify a defendant as the criminal since they are the strongest evidence of identity.

5. Criminal Law 🔑1159(4)

A reviewing court may not reject testimony of a witness who has been believed by the trier of fact unless it is a physical impossibility that it be true, or its falsity is apparent without resorting to inferences or deductions.

6. Criminal Law 🔑494

Testimony of an expert witness that fingerprints taken from scene of various alleged crimes were defendant's fingerprints was not rendered inadmissible even though officer on cross-examination professed an inability to remember 12 points of similarity on which he originally made his identification of the fingerprints, since such inability merely related to weight to be given his testimony by the trier of fact.

7. Criminal Law 🔑566

Testimony of an identifying witness does not have to be free from doubt, and he may testify that in his belief, opinion or judgment the accused is the person who perpetrated the crime, and the want of positiveness goes only to the weight of the testimony.

8. Burglary 🔑41(6)
Criminal Law 🔑566
Robbery 🔑24(3)

Identity testimony of victims and expert's identification of defendant's fingerprints found at scene was sufficient to sustain convictions for burglary, robbery, assault with intent to commit rape, and oral copulation. West's Ann.Pen.Code, §§ 211, 220, 288a, 459.

Albert E. Polonsky, San Francisco, for defendant.

Stanley Mosk, Atty. Gen., of California, John S. McInerny, Eric Collins, Deputies Atty. Gen., San Francisco, for respondent.

⊥486 ⊥BRAY, Presiding Justice.

Defendant appeals from judgment, after trial without a jury, convicting him of 11 crimes.[1]

QUESTIONS PRESENTED.

1. Did the fingerprint expert's inability to enumerate 12 points of similarity between defendant's admitted fingerprints and those found at the scenes of the crimes deny defendant the right of fair cross-examination?

2. Sufficiency of the identification of defendant and alleged improbability of testimony of a witness.

RECORD.

It is defendant's contention that the fingerprint expert's testimony must be disregarded and that without it the evidence connecting defendant with the crimes is either nonexistent, too weak or inherently incredible.

Following is the evidence as to each particular count:

Count 1—Violation of section 261, Penal Code (rape).

Count 2—Violation of section 459, Penal Code (burglary).

Count 3—Violation of section 211, Penal Code (robbery).

On April 14, 1961, at about 9:25 p. m., Miss Katherine Bald who then lived at 345B Chestnut Street, San Francisco, was leaped upon in her darkened apartment by a person whom she thought was a Negro male. During the course of the ensuing struggle, he tried to stuff a cloth in her mouth, bit her finger and ear. He also menaced her with a pistol, the forward part of the barrel and the front sight of which she ⊥487 saw. A Mauser pistol belonging to defendant was shown to Miss Bald at the trial and she said it resembled the one she had been menaced with.

The attacker then threw her onto a couch and committed an act of rape. He also took $180 which was in the apartment, using force.

Sergeant McInerney of the San Francisco Police Department lifted a latent palm print from the window sill of the apartment. Later, Assistant Inspector Ihle, a fingerprint expert, identified the print as that of the defendant.

Count 4—Violation of section 220, Penal Code (assault with intent to commit rape).

Count 5—Violation of section 459, Penal Code (burglary).

Count 6—Violation of section 211, Penal Code (robbery).

On May 2, 1961, Miss Georgia Gillis who then lived in an apartment at 1129 Hyde Street, San Francisco, entered her bedroom at about 11:00 p. m. A man in her bedroom pulled her to the floor, choked her, and forced her to remove her pajama bottoms; he also attempted to stuff a handkerchief into her month which she spat out. He pulled her to her feet, took her into the kitchen, and forced her to give him $7 or $8 from her wallet. He again forced her to the floor and unzipped his trousers, and said something indicating he was going to perform an act of sexual intercourse. Miss Gillis then screamed and the attacker ran away. At the trial she identified the defendant, saying, "I think that he's over there * * * The one in the green jacket." Her only direct recollection of the man as he was in the apartment was that he wore a T-shirt.

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[1] Defendant was charged with committing 13 crimes. Count 12 of the indictment charging defendant with violation of section 459, Penal Code (burglary) was dismissed by the prosecutor. Defendant was acquitted of count 13, violation of section 664, Penal Code (attempt to commit burglary).

Inspector Ihle, the fingerprint expert, developed a latent print on the inside of a rear door of the apartment which he later identified as that of the defendant.

Count 7—Violation of section 459, Penal Code (burglary).

On May 15, 1961, Miss Ann Zweck, 1219 Taylor Street, San Francisco, left her apartment at about 7:30 p. m. and returned about 10:30 p. m. The night lock had been put on and $250 was missing. She had no knowledge of any other facts concerning the burglary.

Sergeant McInerney lifted a latent palm print from the window sill of the apartment which Inspector Ihle later identified as that of the defendant.

Count 8—Violation of section 288a, Penal Code (oral copulation).

Count 9—Violation of section 459, Penal Code (burglary).

Count 10—Violation of section 211, Penal Code (robbery).

⌊488 ⌊On May 24, 1961, Miss Marion Cook, then living at 10 Edgardo Place, San Francisco, let herself into her apartment at about 10:15 p. m. There was a man in her bedroom. He went behind her, put his hand over her mouth and said, "Don't scream. I won't hurt you. All I want is your money." They struggled and he forced her to give him $15 she was carrying in her purse. Taking her gloves from her purse, he gagged her and bound her hands behind her back with a bathrobe tie. Having her on the floor, he took off her undergarments and performed several acts of oral copulation. She identified, without equivocation, the defendant as her assailant.

Officer Tresmontan of the San Francisco Police Department lifted latent prints from a wastebasket, which Miss Cook had seen the defendant handle, and several wine bottles in the apartment. Some of the prints were smudged but others were identified by Inspector Ihle as those of the defendant.

Count 11—Violation of section 459, Penal Code (burglary).

Mr. John Jardin, resident of 384 Chestnut Street, San Francisco, went to bed on May 27, 1961, at about 10:00 p. m. He had left his wallet containing $145 in the breast pocket of his shirt by his bed. When he woke up the next morning at about 8:30 a. m., the wallet was in his coat pocket and the money was gone.

Officer Wigington of the San Francisco Police Department lifted latent fingerprints from the lower left inside of the window sill. The prints were later identified by Inspector Ihle as those of the defendant.

On June 21, 1961, Officer Bastiani of the San Francisco Police Department stopped defendant at 525 Broadway, San Francisco, as he corresponded with the general description of the wanted assailant. The defendant came willingly and permitted his fingerprints to be taken. Defendant said he had been staying with a friend and gave Bastiani permission to recover his clothing and property. Included in this property was a gun.

Inspector Duveneck of the San Francisco Police Department took the defendant to all of the addresses involved and the defendant denied ever having been at any of them.

Defendant did not testify.

1. WAS DEFENDANT'S CROSS-EXAMINATION OF THE FINGERPRINT EXPERT UNDULY RESTRICTED?

On direct examination, Inspector Ihle was first asked his qualifications, which were training in the police department and the making of over 300,000 comparisons in a period of⌊approximately 11 years. The ⌊489
inspector stated that he had testified numerous times in the local, state and federal courts. Then the witness explained the basis for fingerprint comparisons and pointed out that in his opinion 12 points of similarity were adequate to show a positive identification.

The witness was then asked his opinion as to whose fingerprints were lifted from the various locations in issue. He stated that the prints were those of the defendant, basing his opinion on a finding of at least 12 points of similarity between those prints and the master prints.

On cross-examination the witness was asked to state the points of similarity he found. He answered that he could not do so because he had not made any notes at the time he had examined the prints. This procedure was repeated 4 or 5 times. He stated that in examining fingerprints he "never made notes pointing out the exact points. As I go through and examine each point as it appears, or each characteristic as it appears, I am more interested in the ridge counts between them, and I examine the entire print in such a manner so that it is thoroughly gone through, but I don't actually put down 'Point No. 1,' 'Point No. 2,' 'Point No. 3,' or any notes such as that." The witness also stated that no enlargements of the photographs of the prints had been made. It should be noted that defense counsel neither asked for a continuance to press his cross-examinations with the use of enlargements, nor did he move that the expert's evidence be stricken.

On this appeal, with respect to counts 1, 2, 3, 7, and 11 of the indictment, defendant contends that because the expert was unable to remember the points of similarity under the Henry System of fingerprint comparison, his cross-examination was unduly restricted and left the decision of guilt or innocence in the hands of the expert. Therefore, defendant contends, the expert's evidence should be disregarded, and, in such event, there is not sufficient other evidence to support a conviction because the complaining witness in counts 1, 2, and 3 could not identify the defendant as her assailant.

[1, 2] The right of cross-examination is fundamental; it is not a matter of privilege but of absolute right. (People v. Flores (1936), 15 Cal.App.2d 385, 401, 59 P.2d 517.) Its denial or undue restriction may be reversible error. (People v. Redwine (1958), 166 Cal.App.2d 371, 333 P.2d 188.) And where a party cannot cross-examine a witness because of the witness' *refusal* to answer the trial court may strike out the direct examination. (People v. McGowan (1926), ⊥80 Cal.App. 293, 251 P. ⊥490 643; and see Witkin, Cal. Evidence, § 624, p. 672.) The trial judge has some discretion in determining how much of the direct testimony should be stricken. (People v. Robinson (1961), 196 Cal.App.2d 384, 391, 16 Cal.Rptr. 484.)

It is to be noted that the above cases deal with a *refusal* to answer, which is not the case here. Defendant makes no attempt to rely on them. Rather, the main thrust of his argument seems to be on the question of what weight should be given the expert's testimony in view of his inability to testify as to the 12 points of similarity. Defendant urges that the approach taken in Priestly v. Superior Court (1958), 50 Cal.2d 812, 330 P.2d 39, is applicable here. In that case the court held that the identity of an informer, whose communications were relied on to establish probable cause, must be disclosed; otherwise, the testifying officer would become the sole judge of what is probable cause to make a search. By analogy, defendant argues that the expert's testimony here fails to disclose the basis of his opinion and is not entitled to any weight because of the lack of enumeration of the points of similarity. Priestly, however, is not analogous since it involved a refusal to disclose the informer's identity, and further it does not really involve a question as to the weight to be given an *officer's* testimony, but the weight to be given the *information* obtained from an unknown informer. (50 Cal.2d at p. 818, 330 P.2d 39.) The expert's testimony here related to information he had obtained firsthand upon an examination of the fingerprints, and not upon a furtive disclosure by an unknown, and possibly unreliable, informer. It should also be noted that in Priestly the court said that the officer's testimony would be stricken only on proper motion (50 Cal.2d at p. 819, 330 P.2d 39). Even if the rule is applicable, defendant here made no such motion.

[3–6] The degree of weight and credibility to be attached to evidence is a matter for the trier of fact. (Code Civ.Proc. § 1847; People v. Huston (1943), 21 Cal.2d 690, 693, 134 P.2d 758; People v. Gunn (1959), 170 Cal.App.2d 234, 239, 338 P.2d 592.) The effect of expert opinion evidence in criminal cases is provided for by statute. (Pen.Code, § 1127b.) Under the proper circumstances fingerprints are alone sufficient to identify a defendant as the criminal since they are the strongest evidence of identity. (People v. Riser (1956), 47 Cal.2d 566, 589, 305 P.2d 1; People v. Beem (1961), 192 Cal.App.2d 207, 211, 13 Cal.Rptr. 238.) A reviewing court may not reject testimony of a witness who has been ⊥491 ⊥believed by the trier of fact unless it is a physical impossibility that it be true, or its falsity is apparent without resorting to inferences or deductions. (People v. Huston, supra, 21 Cal.2d 690, 693, 134 P.2d 758; People v. Whitehurst (1952), 112 Cal.App.2d 140, 144, 245 P.2d 509.) No such impossibility or falsity exists here, nor can it be reasonably said that the right of cross-examination was restricted (by the police department, as defendant insists), nor did the trial partake of a "Star Chamber" proceeding. The officer's inability to remember the 12 points of similarity did not make his testimony of positive identification inadmissible. Such fact merely related to the weight to be given his testimony by the trial judge.

An examination of the record shows that defendant cross-examined the expert at length, made no objection to the fact that the expert said that he could not remember the 12 points of similarity, did not ask that the witness be required to study the fingerprints again and return for further cross-examination, made no request for a continuance to meet the situation, and did not move to strike the witness' testimony.

2. SUFFICIENCY OF THE IDENTITY TESTIMONY.

[7, 8] With respect to counts 4, 5, and 6, defendant suggests that the identity testimony given by Miss Gillis is weak and without the fingerprint expert's testimony is insufficient to support the conviction. However, if any weakness existed in her identification of defendant, the expert's identification of defendant's fingerprints found at her apartment fully supports the court's finding.

The witness said, "I think that he's over there * * * Sitting over there * * * The one in the green jacket * * * I had a very quick glance at him, but he was very similar." "If the testimony of the identifying witnesses is worthy of credence and convinces the jury, the latter's finding is final unless the trial judge should with his intimate knowledge of the witness' behavior upset the verdict. [Citations.] It is not essential that the witness be free from doubt as to one's identity. He may testify that in his belief, opinion or judgment the accused is the person who perpetrated the crime. The want of positiveness [if that existed here] goes only to the weight of the testimony." (People v. Cahan (1956), 141 Cal.App.2d 891, 897, 297 P.2d 715, 719, quoting from People v. Harris (1948), 87 Cal.App.2d 818, 823, 198 P.2d 60; see also ⊥Witkin, Cal. Evidence, § 171, ⊥492 p. 192.) This completely answers defendant's contention.

With respect to counts 8, 9, and 10, defendant asserts that Miss Cook's testimony of the event is "inherently impossible." The witness made a positive identification of the defendant. Her story, as set forth above, does not seem incredible or impossible. As to all the counts, it must be remembered that defendant did not testify.

The judgment is affirmed.

SULLIVAN and MOLINARI, JJ., concur.

209 Cal.App.2d 248

⊥248 ⊥**Ralph AHLGREN et al., Plaintiffs and Appellants,**

v.

John E. CARR, as Director of Finance, etc., et al., Defendants and Respondents.

Civ. 10323.

District Court of Appeal, Third District, California.

Nov. 5, 1962.

Hearing Denied Jan. 3, 1963.

Action by taxpayers and citizens of the state to enjoin certain state officials from taking action which would result in allegedly illegal expenditures of state funds. The Superior Court, Sacramento County, Jay L. Henry, J., entered judgment dismissing the action and an appeal was taken. The District Court of Appeal, Schottky, J., held that Budget Act limiting price to be paid for textbooks to not more than 10% over cost of highest price competitive textbooks submitted on basis of leasing plates to the state meant that leased-plate costs submitted were to be base on which 10% differential was to be computed, and where contracts awarded did not exceed submitted leased-plate prices by over 10%, contracts for purchase of textbooks for schools on such basis were not in violation of the Budget Act.

Judgment affirmed.

Opinion, 24 Cal.Rptr. 172, vacated.

1. States 🔑168½

Taxpayers and citizens of the state, as such, had standing to maintain an action to enjoin allegedly improper expenditures of public funds by a state official.

2. States 🔑191(2)

An action by taxpayers to enjoin alleged illegal expenditure of public moneys by state officials was not an action against the state itself, and was not prohibited as such based on immunity of the state from a suit to which it had not assented.

3. Schools and School Districts 🔑80(1)

Budget Act limiting price to be paid for textbooks to not more than 10% over cost of highest price competitive textbooks submitted on basis of leasing plates to the state meant that leased-plate costs submitted were to be base on which 10% differential was to be computed, and where contracts awarded did not exceed submitted leased-plate prices by over 10%, contracts for purchase of textbooks for schools on such basis were not in violation of the Budget Act. St.1961, pp. 20, 110.

4. Evidence 🔑1

The District Court of Appeal has the same power to take judicial notice as a trial court.

5. Evidence 🔑23(1)

Judicial notice could be taken of existence of records of the state board of education. West's Ann.Code Civ.Proc. § 1875, subd. 4.

◆

Landis & Martin, Sacramento, for appellants.

Stanley Mosk, Atty. Gen., by Richard L. Mayers, Deputy Atty. Gen., Sacramento, for respondents.

⊥SCHOTTKY, Justice. ⊥249

This is an appeal from a judgment of dismissal entered after respondents' demurrer was sustained without leave to amend.

We granted a rehearing in this case in order that we might finally resolve the important issues presented. We gave the parties the opportunity to present any documents to this court which they desired judicially noticed. They were afforded an opportunity to present any information which might bear on ⊥250 the propriety of judicial notice, the facts of the matter to be noticed, and to fully reargue the matter before this court.

Plaintiffs, as taxpayers and citizens of the state of California, brought this action to enjoin John E. Carr, as Director of Finance of the State of California, and Alan Cranston, as Controller of the State of California, from taking action which would result in alleged illegal expenditures of state funds. The action involves the legality of the action of the Director of Finance in approving contracts between the state and certain textbook publishers for the purchase of textbooks for the schools and the legality of the disbursements of funds by the Controller in payment of the purchase price of the books.

On March 10, 1960, the Board of Education of the State of California approved the purchase of certain textbooks at a total cost of over fourteen million dollars. Thereafter, the Legislature appropriated a sum to purchase such books but provided in item 361 of the Budget Act as follows: "[N]one of this appropriation shall be available to finance contracts in respect to the new textbooks adoptions set forth on page 956 of the Governor's Budget for the 1960–1961 fiscal year in which the unit price for any textbook or the total price for any series of textbooks submitted on a finished book basis exceeds by more than 10 percent, respectively, the average of the three highest unit prices for a competitive textbook or the average of the three highest total prices for a competitive series of textbooks submitted on the basis of leasing plates to the State."

The foregoing provision was adopted on the recommendation of a Legislative Conference Committee which reported to the Legislature as follows:

> "[R]ecommended the inclusion in Item 361 of respective language designed to insure that textbooks purchased by the State shall be available at reasonable and competitive prices. It is not intended to interfere with the State Board of Education's discretion to adopt and select textbooks.
>
> "The language contained in Item 361 will permit the State Board to contract for the purchase of finished textbooks or the printing and binding of books using leased plates so long as the contract price for finished textbooks does not exceed by more than 10 percent the cost of the highest priced competitive textbooks submitted on the basis of leasing plates to the State.
>
> "The Legislature has not been furnished comparative cost data which would show an adequate basis for the substantial |251 difference in price between the amount budgeted for state textbooks under policies followed heretofore and the amount needed for the purchase of finished textbooks. This makes necessary the imposition of a reasonable ceiling on prices to conserve the financial interests of the State and to prevent improvidence, and the language of Item 361 is designed to serve this purpose."

After this legislation was enacted the State Board of Education approved proposed contracts for the purchase of finished textbooks. Two contracts were submitted to the Director of Finance for his approval. This action was filed on August 1, 1960. The basic theory of the complaint was that the contracts as written exceeded the legislative limitation on such contracts. The complaint contained two causes of action. The first cause of action was to enjoin the officials as has been previously indicated. The second alleged that the adoption of the books as textbooks for use in the public schools did not comply with the law and that the contracts based on such adoptions did not comply with the law and that the contracts based on such adoptions were illegal.

The demurrer as to each count filed by the Attorney General on behalf of John Carr and Alan Cranston was on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The demurrer raised the following points:

1. The standing of the plaintiffs to sue;

2. Whether the action was one against the officers in their official capacity or against the state itself, to which the state had not consented;

3. Whether the second cause of action stated sufficient facts to constitute a cause of action; and

4. Whether facts of which this court may take judicial notice demonstrate conclusively that the three contracts challenged by plaintiffs were lawful and complied with the provisions of item 361 of the Budget Act of 1960–1961, St.1961, pp. 20, 110.

The learned trial judge in his "Memorandum Opinion" stated that the crucial question in the case was whether or not a taxpayer as such had the right to maintain an action to enjoin allegedly improper expenditures of public funds by a state official. The court concluded that "the better rule and the one to which California in my judgment is committed, is that 'a taxpayer has no standing as such to have the officers of the State enjoined from wasting public funds.' (Mitchell v. Stephens, 285 F. 756 (S.D.Cal.), * * *." The court then ⌊252 stated that "In view of my holding as indicated above, I do not think it necessary to discuss other points made by the parties."

The question whether a taxpayer has a sufficient interest to maintain an action against state officers to enjoin allegedly improper expenditures has never been directly decided in California though actions have been brought by taxpayers and have proceeded through the trial and appellate courts without that question being raised. (See Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312; Wheeler v. Herbert, 152 Cal. 224, 92 P. 353; Holloway v. Purcell, 35 Cal.2d 220, 222, 217 P.2d 665.)

While there seems to be a conflict of authority as to whether a taxpayer has the right to enjoin an illegal expenditure by a state official, we believe that the great weight of authority suggests the rule that the taxpayer does have such right.

In a very complete and informative annotation it is stated in 58 American Law Reports 588, at page 589: "In a majority of the jurisdictions in which the question of the right of a taxpayer and citizen to enjoin a waste or unlawful expenditure of state funds has been raised, that right has been upheld." And at page 599: "* * * [T]he real basis of the rule permitting suit by the individual taxpayer is the necessity of prompt action to prevent irremediable public injury; this reason applies equally as well where state funds are being misappropriated, and if jurisdiction can be sustained in one case it should be in the other, just as the majority of courts hold that it can be. The municipal or county taxpayer is allowed to maintain the suit, not because of an individual interest differing from other taxpayers, but because as such taxpayer he is so interested in the municipal funds that he may ask the court to protect them from misuse or misappropriation; the taxpayer bears the same relation to the state funds as to the municipal funds, except in degree, a point which should not enter into the question."

And in 52 American jurisprudence it is stated at page 4: "[A]s a general rule, when the question of the right of a taxpayer and citizen to enjoin a waste or unlawful expenditure of state funds has been raised, that right has been upheld."

In 3 Davis, Administrative Law Treatise, section 22.09, at page 245, the author points out that a 1929 collection of cases showed nineteen states which at that time held that state taxpayers could challenge state expenditures and only four that denied such right. Davis observed however that at the present ⌊253 time "probably at least thirty-two states uphold the standing of state taxpayers, and in not a single state is the law clear that state taxpayers have no standing to challenge state expenditures. This means that since 1929, about thirteen states have for the first time upheld such standing, and that each of the four states which previously had denied such standing has developed law which either upholds such standing or makes standing unclear."

The rationale of the overwhelming acceptance of the principle of the right of a state taxpayer to maintain a suit to enjoin the illegal expenditure of state funds is set forth in a law review comment in 50 Harvard Law Review 1276, 1283, as follows: "The taxpayers' suit must then be understood as not only a means of vindicating individual rights but as a governmental device to safeguard the legal restrictions on state and local governments, which, if not subjected to the careful scrutiny of individual taxpayers, might well become dead letters. The importance of the latter factor is indicated by the enactment of statutes allowing such suits in those jurisdictions in which judicial interpretation of ordinary legal principles had denied the taxpayer's status to sue. The overwhelming acceptance of such suits is in keeping with the distrust of executive and administrative self-restraint in the use of the spending power and with the readiness to allow the courts to assume the role of arbiter in the governmental scheme."

In the very recent case of Gogerty v. Coachella Valley Junior College Dist., 57 A.C. 774, 21 Cal.Rptr. 806, 371 P.2d 582, which was an action by a taxpayer to have the selection and acquisition of a school site declared void and that defendant district be permanently enjoined from acquiring or developing the site with public funds, our Supreme Court reversed a judgment predicated upon the sustaining of a demurrer to plaintiff's fourth amended complaint without leave to amend. The court said at page 777, 21 Cal.Rptr. at page 808, 371 P.2d at page 584: "A taxpayer may sue a governmental body in a representative capacity in cases involving fraud, collusion, ultra vires, or failure on the part of the governmental body to perform a duty specifically enjoined. (Silver v. City of Los Angeles, 57 A.C. 13, 15 [1], 17 Cal.Rptr. 379, 366 P.2d 651; Nickerson v. San Bernardino, 179 Cal. 518, 522 et seq., 177 P. 465; Dunn v. Long Beach L. & W. Co., 114 Cal. 605, 609, 46 P. 607; Schaefer v. Berinstein, 140 Cal. App.2d 278, 289 [12], 295 P.2d 113; Pratt v. Security Trust & Savings Bank, 15 Cal 254 App.2d 630, 636 [1], 59 P.2d 862; 18 McQuillin, Municipal Corporations (3d ed 1950) § 52.07, p. 23; cf. 124 A.L.R.(1940) pp. 1238–1240.)"

The case of Mitchell v. Stephens, supra, (285 F. 756) which was relied on by the trial court and by respondents is clearly distinguishable from the case at bench. In that case a California taxpayer sought to recover on behalf of the state the loss resulting from the sale of certain bonds in violation of a constitutional amendment. Even though the court conceded that the sale was ultra vires and void, it nevertheless held that plaintiff as a California taxpayer, as distinguished from a taxpayer of a city or county, had no standing "to bring a suit in attempted and asserted enforcement of a claim or demand inuring to the state itself, * * *."

In the instant case the action is not brought to enforce a claim inuring to the state itself but is one in which the taxpayer seeks to enjoin alleged illegal expenditures by state officials.

Likewise, the case of Elliott v. Superior Court, 180 Cal.App.2d 894, 5 Cal.Rptr. 116, cited by respondents is distinguishable from the case at bench. In that case this court held that a taxpayer could not maintain an action for damages for the benefit of the state against defendants because of allegedly unlawful practices in the operation of a gas field. This court stated that the matter had been called to the attention of the proper state officials and they refused to join in the action and that in the absence of a proper showing of fraud or bad faith in refusing to join in the action it could not circumvent their decision.

[1] Having concluded that the great weight of authority supports the right of a taxpayer to bring an action to enjoin the alleged illegal expenditure of public moneys by a state official, we believe the trial court erred in holding that a taxpayer had no right to maintain the instant action.

[2] The second question is whether the action is one against the officers of the state in their official capacity or against the state itself to which the state had not assented. The answer is aptly stated in Rein v. Johnson, 149 Neb. 67, 30 N.W.2d 548, 551–552:

> "Generally, the applicable rule is that an action against state officers, attacking the constitutionality of a statute of the state and seeking to enjoin its

> enforcement by such officers, or otherwise obtain relief from an alleged invalid act or abuse of ⌊255 authority by them is not ordinarily a suit against the state, and is not prohibited as such under the general principles governing the immunity of the state from suit. That is true because acts of state officers not legally authorized, or which exceed or abuse the authority conferred upon them, are judicially regarded as their own acts and not acts of the state. 49 Am.Jur., States, Territories, and Dependencies, § 94, p. 307, § 95, p. 310; 59 C.J., States, § 465, p. 310; 43 C.J.S., Injunctions, § 109, p. 626; 32 C.J., Injunctions, § 389, p. 247.
>
> "As stated in Burke v. Snively, 208 Ill. 328, 70 N.E. 327, 328: 'In equity the money in the state treasury is the money of the people of the state, and suits by a taxpayer to restrain the misappropriation by public officers of such money to an unauthorized purpose are not suits against the state.'
>
> "Also, as stated in White Eagle Oil & Refining Co. v. Gunderson, 48 S.D. 608, 205 N.W. 614, 617, 43 A.L.R. 397, quoting with approval from Mullen & Rouke v. Dwight et al., Regents of Education, 42 S.D. 171, 173 N.W. 645: 'Likewise, state officials may be restrained or prohibited by appropriate action or procedure, in any court having jurisdiction, from performing unlawful acts as such officials, without the consent of the state, as such procedure is not deemed a suit against the state.' "

Respondents' next point in support of their demurrer is that "IN ANY EVENT, THE DOCUMENTS IN THE FILES OF THE STATE BOARD OF EDUCATION, WHICH WERE FURNISHED TO THE TRIAL COURT, ARE SUBJECT TO JUDICIAL NOTICE. THEY DEMONSTRATE THAT THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION."

Appellants' complaint is based upon the allegation that the textbook contracts violate the provisions of the 1960 Budget Act and that the payments to the publishers under these contracts are illegal expenditures. In Paragraph XII of the first cause of action plaintiffs allege facts setting forth eight specific grounds that the Director of Finance violated the Budget Act of 1960 in approving the textbook contracts. The issue presented by this pleading is whether or not these acts violated the Budget Act of 1960.

Respondents request this court to take judicial notice of certain facts stated in a number of exhibits filed in the trial court with the demurrer, and they assert that they demonstrate conclusively that the contracts are lawful and comply with the Budget Act.

⌊256 Before discussing the question of judicial notice, it is necessary to determine what the Legislature meant when it enacted item 361 of the Budget Act of 1960–1961. The clue to the meaning of limitation is found in the report of the Legislative Conference Committee. This report indicates that the committee was concerned with the difference in the cost to the state of books furnished on a leased-plate basis and those furnished on a finished basis. The report also shows that the committee had not been furnished comparative cost figures to explain the substantial difference. Finally, it shows the purpose of the limitation, namely, the imposition of a reasonable price limitation to conserve the financial interest of the state and to prevent improvidence.

It first is clear the Legislature was only attempting to set a price limitation on the amount that could be spent for textbooks. It could not do more in this regard. (State Board of Education v. Levit, 52 Cal.2d 441, 343 P.2d 8.) The limitation is that the price to be paid not exceed by more than 10 per cent the cost of the highest priced competitive textbooks submitted on the basis of leasing plates to the state.

From the complaint on file it is evident that a bid had been submitted as to the cost of printing textbooks on a leased-plate basis. The complaint challenges the computation of certain items of cost. It does not state that the contracts as accepted were not within the 10 per cent limitation. Implied in the report accompanying item 361 of the Budget Act is the fact that the Legislature had certain costs before it. The legislative committee stated that comparative cost data was not before it to show an adequate basis for the difference in price between the amount budgeted for state textbooks under policies followed heretofore and the amount needed for finished textbooks. If the committee had costs of state printed textbooks before it, then it is clear that the budget provision was enacted with the state printed textbook cost as the standard. Exhibit VII prepared by the State Board of Education which is the estimated cost of furnishing reading textbooks submitted for state adoption states in part: "Data on estimated cost of manufacturing those books on which publishers submitted bids on the basis of furnishing reproduction materials and payment by the State of royalty for the right to publish and distribute were supplied to the Department of Education by the State Printer. The estimated costs of manufacturing were based on manufacturing, from July, 1960 through August, 1961, with equipment presently in the State ⊥257 Printing Plant. In preparing the estimates, the State Printer used present costs of labor and material plus a 5 per cent allowance for possible increases (in contrast with a 10 per cent allowance used in previous estimates). The estimates include a 6 per cent allowance for spoilage (in contrast with a 10 per cent allowance for this item in previous estimates."

This report contains cost breakdowns of the printing of textbooks by the State Printer. With this knowledge, the meaning of item 361 becomes clear. There were no comparative cost breakdowns for the finished books purchased from the publisher though the price of finished books was shown. The Legislature had a computation as to the cost of leased-plate books. Since there were no comparative cost figures, the Legislature could not ascertain if the price differential were reasonable. It could only impose a reasonable limitation in the manner in which it did by requiring that the cost of finished books not exceed by over 10 per cent the cost submitted to it of state printed books.

It is clear that the Legislature's thought was that the price of the finished books was too high, and it restricted the prices that could be paid for each series of finished books.

[3] It is asserted by the plaintiffs in this action that this document was before the Legislature. Having conceded this point, no cause of action can be stated in the complaint. Whether the State Printer can revise his costs becomes immaterial. Whether certain items were improperly included as costs makes no difference. The Legislature could not have meant that the question of costs was to be recomputed over and over again. If so, one would get on a merry-go-round with no clue as to when the carousel should stop or how one would get off. The Legislature could only have meant that the leased-plate costs as submitted were to be the base on which the 10 per cent differential was to be computed.

It is only if the contracts as awarded exceeded the submitted prices by over 10 per cent that a cause of action could be stated. No such contention has been made. Accordingly, the ruling on the demurrer was correct.

[4, 5] Even if Exhibit VII were not before this court, this court could take judicial notice that such report had been prepared. This court has the same power to take judicial notice as a trial court. (Witkin, Cal. Evidence, Judicial Notice, sec. 42, p. 56.) Subdivision 4 of section 1875 of the Code of Civil Procedure states that courts take judicial notice of the existence of the records of the State Board of Education. ⊥258 (Watson v. Los Altos School Dist., 149 Cal.App.2d 768, 308 P.2d 872.)

No other points require discussion.

In view of the foregoing, the judgment is affirmed.

PEEK, P. J., and PIERCE, J., concur.

Hearing denied; PEEK, J., not participating.

209 Cal.App.2d 478

⌊478 ⌊**Mary Kathleen STUART, Plaintiff and Appellant,**

v.

George W. STUART, Defendant and Respondent.

Civ. 7052.

District Court of Appeal, Fourth District, California.

Nov. 9, 1962.

Divorced husband made a motion to modify child custody provisions of divorce decree to change custody of children from divorced wife to him. The Superior Court of San Bernardino County, J. Steve Williams, J. pro tem., rendered an order modifying the child custody provisions, and the divorced wife appealed. The District Court of Appeal, Shepard, J., held that fact that the divorced wife, unknown to husband, was pregnant by another man at time of interlocutory divorce decree was such change of condition as to justify modification of the child custody provisions of the divorce decree.

Order affirmed.

1. Divorce 🔑303(2)

Fact that, unknown to husband, wife was pregnant by another man at time of entry of interlocutory divorce decree awarding custody of children to wife was such a change of circumstances as to justify change of custody of children from wife to husband. West's Ann.Civ.Code, § 138.

2. Divorce 🔑303(3)

Where divorced wife represented to court that she would not object to proposed interview of children by court in passing on motion of divorced husband to modify child custody provisions of divorce decree, and she knew time and place of interview but did not appear, conduct of wife amounted to consent to interview, and wife waived objection to competency of statements of children at interview. West's Ann.Civ. Code, § 138.

3. Divorce 🔑303(2)

Decision as to whether children of divorced parents had understanding sufficient to express intelligent preference concerning their custody and how much, if any, weight should be given to their statements was necessarily left to trial judge's discretion on motion to change child custody provisions of divorce decree, and trial judge's exercise of discretion should be based on his knowledge of whole case background and observation of children and their reactions in light of that knowledge. West's Ann. Civ.Code, § 138.

4. Divorce 🔑303(2)

On motion to change child custody provisions of divorce decree, question of best interests of child necessarily involves prior conduct, especially that which has occurred since last custody order. West's Ann.Civ. Code, § 138.

5. Divorce 🔑303(1)

Trial judge did not abuse his discretion in modifying child custody provisions of divorce decree to give custody of children to husband. West's Ann.Civ.Code, § 138.

◆

King & King, by James L. King, San Bernardino, for appellant.

George W. Stuart, respondent in pro. per.

⌊SHEPARD, Justice. ⌊479

This is an appeal from an order modifying the child custody provisions of a divorce decree so as to change custody from plaintiff to defendant.

⌊FACTS ⌊480

Plaintiff was born in 1930. Defendant was born in the year 1928. Fuhrmeister, hereinafter referred to, was born in 1938. Plaintiff and defendant were married July 4, 1952. Defendant was then and still is a member of the United States Marine Corps. There was born to this marriage on May 24, 1953 a daughter and on September 8, 1954 a son. Defendant went on overseas duty. Plaintiff separated from her husband December 12, 1959. Thereafter, plaintiff began keeping company with one Fuhrmeister. Whether or not this was the date defendant shipped overseas is not shown by the record. She filed a complaint for divorce on a general allegation of mental cruelty on December 15, 1959. In March 1960 the parties signed a property settlement agreement providing custody of the children to plaintiff with certain visitation provisions for defendant and support payments for the children. Later in 1960 plaintiff became pregnant by Fuhrmeister. On August 26, 1960 the complaint was heard as an uncontested matter and a decree was granted, following in detail the provisions of the property settlement agreement. On October 3, 1960, the interlocutory decree was filed nunc pro tunc as of August 26, 1960. In December 1960 plaintiff and Fuhrmeister set up regular housekeeping as husband and wife. As far as the children then knew, this was a legitimate marriage relationship. On May 7, 1961, plaintiff gave birth to a child by Fuhrmeister. Presumptively, this placed the normal conception time in July 1960, there being no suggestion of premature birth.

On August 18, 1961, defendant caused an order to show cause to be served on plaintiff asking for change of custody of the children from plaintiff to defendant. The hearing was set for August 28, 1961. On that day plaintiff caused the final decree of divorce to be entered. The hearing was continued. On September 2, 1961, defendant married his present wife. The exact date of plaintiff's marriage to Fuhrmeister is not shown by the record but she stated it was immediately after entry of the final decree. The court, on stipulation of the parties, referred the matter to the probation officer for investigation and report and after the written report was rendered a hearing was had on December 21, 1961 and the report was received for consideration by the court. The probation report indicates an opinion by the probation officer that the children were being well cared for by the plaintiff and that both parents are fit custodians. No affirmative recommendation is contained ⊥481 in the report. No other evidence was then received and the matter was ordered submitted. Defendant immediately suggested that the court might discuss the matter of custody privately with the children. There was no formal stipulation to this but counsel for plaintiff, in response to the suggestion, said, "Well, of course, I am not going to object, but I hope that the court will keep in mind that these children are only 7 and 8 years of age and since they will be with the father the week before they are brought in here, they could be very easily influenced to say most anything."

To this the judge replied that he would take that into consideration. In the presence and hearing of all parties and counsel he then set the time for the interview with the children at 11:00 a. m. on December 29, 1961. No objection of any kind was made to the fact of interview or the time. No request was made for a different time. No request was made for a recordation of the interview or a statement from the court thereon. At the time set for the interview neither the plaintiff nor her attorney appeared. On the afternoon of December 29, 1961, the court made its order changing custody from the plaintiff to the defendant and terminating the support payment. Plaintiff appeals.

SUFFICIENCY OF EVIDENCE

Plaintiff first contends that the order of the court is not supported by the evidence and cites such authorities as Civil Code, Section 138, Taber v. Taber, 209 Cal. 755, 290 P. 36; Moon v. Moon, 62 Cal.App.2d 185, 144 P.2d 596; Peterson v. Peterson, 64 Cal.App.2d 631, 149 P.2d 206; Kelly v. Kelly, 75 Cal.App.2d 408, 171 P.2d 95; In re Elliott, 115 Cal.App.2d 536, 254 P.2d 135, and Sorrels v. Sorrels, 105 Cal.App.2d 465, 234 P.2d 103, in support of that contention. The legislative and judicial policy of this state is made clear by these authorities and many others containing similar expression. We need, however, go no further than those cited by plaintiff.

Said section 138 in effect provides that the primary consideration is the welfare of the child and that if the child is old enough to form an intelligent preference the court may consider that preference; that neither parent is entitled to custody as of right, but that all other things being equal, custody of children of tender years should be in the mother.

The judicial policy on hearing and deciding of custody matters is sufficiently stated in the quotation from the Taber case, pages 756–757, 290 P. page 37 where it is said that

> "In determining whether other things are equal within the meaning of ⊥482 the above Code Section, the trial court is necessarily allowed a wide latitude in the exercise of its discretion. In the first instance it is for the trial court to determine, after considering all the evidence, how the best interests of the child will be preserved. The question is to be determined solely from the standpoint of the child, and the feelings and desires of the contesting parties are not to be considered, except insofar as they affect the best interests of the child. It is only when a clear case of abuse of discretion is made out that this court will interfere with the determination of this question on appeal. The rule has been so stated many times."

This rule is reiterated in different language in all of the cases cited by plaintiff.

[1] What changes, then, have occurred since the entry of the interlocutory decree, that would warrant the court giving consideration to a change of custody? First, we find plaintiff involved in adulterous cohabitation with Fuhrmeister prior to the entry of the interlocutory decree. The record does not show how soon after the date of separation plaintiff started keeping company with Fuhrmeister. Fuhrmeister is eight years younger than plaintiff. The record nowhere shows that at the time of the interlocutory decree the fact of plaintiff's possible pregnancy by a man other than defendant husband, was revealed to the trial court. Thereafter, in December 1960, plaintiff established a home with Fuhrmeister on a husband-and-wife basis. They did not then inform the children of the lack of marriage. The new child was born May 7, 1961. After the final decree was entered plaintiff entered into legal matrimony with Fuhrmeister. Defendant remarried. All of this involved factual change of circumstance which the trial court was entitled to consider on the question of the best welfare of the children. Plaintiff appears to believe that her children would not realize or understand what Fuhrmeister's relationship with her was. We are satisfied that the total changes that occurred after the date of the interlocutory decree were ample to support the order changing custody and that such order was not an abuse of discretion.

INFORMATION FROM CHILDREN

[2] Plaintiff next objects that the court acted on information obtained in a private interview not under oath. She cites no authority. When the proposal was made she affirmatively represented to the court that she would make no objection to the interview and interjected her own cautionary thought to help the judge weigh what was said by the children. She ⊥483 knew the date, hour and place of the interview. She did not ask for a different date; she did not suggest a different procedure and she did not appear at the time set. Under the circumstances what was said amounted to consent on the part of plaintiff to the interview, and that the court weigh what was said as a partial basis for an order. Plaintiff waived objection to competency of the children's statements. (Estate of Da Roza, 82 Cal.App.2d 550, 556, 186 P.2d 725; Tennant v. Civil Service Com., 77 Cal.App.2d 489, 498 [3], 175 P.2d 568; Estate of Sherman, 129 Cal.App.2d 721, 726–727 [1–3], 278 P.2d 42.)

[3] One of the children was then in the second grade of school and the other in the fourth grade. From this factor, plus their age, it would appear that they were ordinarily bright, intelligent children. The decision as to whether they have an understanding sufficient to express an intelligent

preference and how much, if any, weight to give to their statements is necessarily left to the sound discretion of the trial judge, based on his knowledge of the whole case background and his observation of the children and their reactions in the light of that knowledge.

Plaintiff next contends that there was no showing of change of circumstance sufficient to justify modification. Our views under "Sufficiency of Evidence" make clear the reasons why we cannot agree with plaintiff's third contention.

WELFARE OF CHILD; FITNESS OF PARENT

Next, plaintiff contends that there was affirmative evidence of the fitness of the plaintiff and that the children were well cared for by her. Both fitness of the parent and welfare of the child are relative matters. No person with any knowledge of psychology fails to appreciate the tremendous absorption by children of those factors which ultimately make up their adult philosophy of life. Physical welfare is by no means the sole problem involved in child welfare. We cannot even say with complete finality just where physical welfare ranks with mental and moral welfare. Certainly a person whose philosophy of life places no importance on qualities of morality, loyalty and honesty, is not likely to become a happy and useful member of our social order. A sound body is of little value to a warped and twisted mind. These and other imponderables are all a legitimate part of the trial judge's weighing process.

[4, 5] The question of best interests of ⊥484 the child necessarily involves prior conduct, especially that which has occurred since the last custody order. (Sanchez v. Sanchez, 55 Cal.2d 118, 124 [5], 10 Cal.Rptr. 261, 358 P.2d 533.) As was said in Gobar v. Gobar, 175 Cal.App.2d 129, 135 [3], 345 P.2d 480, 484 quoting from other cases,

> " 'It has been held repeatedly that the trial judge having heard the evidence, observed the witnesses, their demeanor, attitude, candor or lack of candor, is best qualified to pass upon and determine the factual issues presented by their testimony * * *' [Citations]. '[T]his is especially true where the custody of minor children is involved. An appellate tribunal is not authorized to retry the issue of custody, nor to substitute its judgment for that of the duly constituted arbiter of the facts.' "

See also Sanchez v. Sanchez, supra, 126 [9], 10 Cal.Rptr. 261, 358 P.2d 533. We are unable to find an abuse of discretion.

The order is affirmed.

GRIFFIN, P. J., and COUGHLIN, J., concur.

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209 Cal.App.2d 324

⊥324 **Paul POSZ, Plaintiff and Respondent,**

v.

Irvin M. BURCHELL et al., Defendants and Appellants.

District Court of Appeal, Fifth District, California.

Nov. 7, 1962.

Action by buyer of boysenberry vines, three-quarters of which died, against nursery man and operators of dairy farms supplying the vines. The Superior Court, Stanislaus County, George Mellis, J., rendered judgment for plaintiff and defendants appealed. The District Court of Appeal, Conley, P. J., held that the evidence justified a verdict against the nursery man on theory of express warranty and against the copartners operating the dairy farm on the theory of negligence but that a damages instruction was incorrectly given.

Judgment reversed as to damages and otherwise affirmed; cause remanded on question of damages only.

1. Pleading 🔑229

Policy of law is to allow great liberality in amendment of pleadings prior to trial and even during trial itself so that questions may be decided on merits.

2. Pleading 🔑236(7)

Court acted within discretion in allowing amendment of second amended complaint on first day of trial, though cause had been pending almost five years, to abandon portion of one cause of action which alleged that two defendants were agents of another defendant in connection with transaction, changing their position with respect to express and implied warranties, where change as to legal responsibility would in no way effect any difference in proof.

3. Appeal and Error 🔑1041(1)

Counsel cannot ask that judgment afterwards obtained be set aside merely because their equilibrium was slightly disturbed by unexpected motion for amendment during trial, but for reversal on any such ground there must be showing that actual unfairness or obvious prejudice has resulted from amendment.

4. Trial 🔑9(1)

Pretrial conference order was effectively amended through amendment of pleadings to extent that any new matter in amendment deemed denied by stipulation of parties would constitute additional issues to be tried though it is advisable that counsel in such situation move for amendment of pretrial conference order so that advantages of conference in clearly defining issues and eliminating unnecessary and time-consuming allegations may be preserved. Cal.Rules of Court, rule 216.

5. Appeal and Error 🔑1136

Where several counts or issues are tried, general verdict will not be disturbed by appellate court if single one of such counts or issues is supported by substantial evidence and is unaffected by error, although another is also submitted without any evidence to support it, with instruction inviting verdict upon it.

6. Sales 🔑441(2, 3)

Evidence supported verdict for breach by nursery man of express warranty that boysenberry vines three-quarters of which died were of merchantable quality and reasonably fit for purpose and established that warranty was relied on by buyer.

7. Partnership 🔑217(3)

Evidence justified jury determination that copartnership defendants were negligent in storage, transportation and delivery to plaintiff of boysenberry vines which copartnership had placed in cold storage prior to delivery and three-quarters of which allegedly failed to grow after delivery.

8. Set-Off and Counterclaim 🔑60

Claim against buyer for balance due on purchase price of vines sold one year and buyer's claim against party seeking such balance due on theory of negligence in connection with storage, transportation and delivery of vines the previous year were separate transactions within meaning of compulsory counterclaim statute and accordingly the negligence claim was not required to be asserted in the action for balance due. West's Ann.Code Civ.Proc. § 439.

9. Sales 🔑446(7)

Instruction that if jury should find that express warranty was made by any of defendants in connection with sale of boysenberry vines to plaintiff it would be duty of jury to inquire whether warranty was breached was proper under evidence and allegations.

10. Appeal and Error 🔑882(12)

Appellants, who themselves had requested an identical instruction, were estopped from claiming error in the giving of instruction.

11. Appeal and Error 🔑216(2,

Suggestion that additional instructions were not given was not available to appellants where they had not requested any additional instructions.

12. Sales 🔑442(11)

Measure of damages with respect to nursery stock is difference in reasonable market value between land as planted to vines actually delivered by producer or seller and land if planted to vines as warranted.

13. Sales ⟹442(11)

Where damage for loss of vines is measured by amount of depreciation in value of land as planted, there is no warrant for allowing further damages for loss of crops which might have been produced in future.

14. Sales ⟹442(11)

Special damages with respect to nursery stock, properly pleaded, such as cost of consolidating growing of vines after discovery of extensive death of plants may be recovered, but cost of vines and expense of originally preparing and planting land are not recoverable as special damages but are covered by general damages for loss of vines measured by amount of depreciation.

15. Damages ⟹67

Interest on borrowed money was not recoverable with respect to claims for negligence and breach of warranty in supply of nursery stock.

16. Appeal and Error ⟹882(12)

Defendants were not estopped to urge error in damages instruction by fact that certain defendants had demurred to complaint which was based on correct theory of damages where all defendants did not join in demurrer and it might have been sustained on other grounds.

◆

Robert O. James, Hughson, Zeff, Halley & Price and E. Dean Price, Modesto, for defendant and appellant Irvin M. Burchell.

Robert O. James, Hughson and James P. Mower, Modesto, for defendants and appellants Muller and Murphy.

McVay, Stone & Reid and Norman S. Reid, Modesto, for plaintiff and respondent.

⊥327 CONLEY, Presiding Justice.

All of the defendants appeal from a judgment against them based on a jury verdict in favor of plaintiff, Paul Posz, in the sum of $32,324.61 growing out of the sale to plaintiff of boysenberry plants, three-quarters of which died. The complaint as amended is based on theories as to all defendants of express warranty, implied warranty and negligence. The verdict and the judgment specify as defendants Irvin M. Burchell, doing business under the name and style of The Burchell Nursery, Irvin M. Burchell, individually and doing business as The Burchell Nursery (both hereinafter ⊥328 referred to as Burchell), Carl W. Muller and George Murphy, individually and doing business under the name and style of Muller & Murphy Berry Farms, a copartnership, and Muller & Murphy Berry Farms, a copartnership (hereafter referred to as Muller & Murphy). The nurseryman, Burchell, who sold the boysenberry vines to the plaintiff, and Muller & Murphy, the growers of the vines, appeal separately from the judgment.

The first cause of action in the second amended complaint alleges that the plaintiff ordered 58,000 boysenberry vines and that defendants both expressly and impliedly warranted them to be of merchantable quality and reasonably fit for the purpose intended and to be in good growing condition when delivered; that during the month of April 1954, approximately 58,000 vines were in fact delivered to plaintiff, for which he paid the sum of $4,930; that the vines when delivered were in an apparently dormant state and that plaintiff had no means of then knowing whether they were as warranted. The pleading continues by alleging that these vines were planted on 40 acres of plaintiff's land and that approximately 40,270 of the vines did not grow because they were not in good growing condition at the time of delivery and were not of merchantable quality or reasonably fit for the purpose for which intended. The plaintiff alleged damage in the sum of $3,422.99 as the purchase price of these vines which did not grow, $102.69 as the California sales tax, $60.47 as the purchase price of cartons in which the vines were packed, $40.27 as storage charges, the sum of $3,626.42 as damages as the direct and proximate result of their failure to grow. Plaintiff also claimed damage in the sum of $5,500 as the cost of preparing the land and the planting of the berry vines, $4,500 as the amount spent in later consolidating the planting of the vines which did grow, the sum of $28,254 as losses in gross production reasonably to be anticipated in the year 1955 and for further losses in crop production in the years 1956 and 1957 of $33,830.

A second cause of action alleged negligence on the part of all defendants because of the "careless, reckless and negligent manner in the planting, growing, caring for, storing, selecting and shipping" of the boysenberry vines to the damage of plaintiff in the sum of $75,710.42.

On the first day of the trial plaintiff asked leave to file amendments to the second amended complaint. The new amendments changed the legal theory behind the first cause ⊥329 of action in a rather important particular, left the second cause of action in substantially its original condition, and added a third cause of action.

The first cause of action of the second amended complaint, as changed by the amendments, eliminated an allegation that Muller & Murphy were agents of Burchell; the pleading as changed alleged that on or about March 5, 1954, plaintiff advised Burchell at his place of business in Stanislaus County that he was contemplating planting in excess of 40 acres of land in Colusa County to boysenberry vines for the purpose of raising, growing and producing boysenberries on a commercial basis; that he further told Burchell that he was personally inexperienced in the growing, harvesting and marketing of boysenberries and that he desired expert advice on the adviseability of entering upon such a venture and that he solicited all information which the nurseryman could furnish on the proper methods of planting, caring for and harvesting boysenberries; that in response to such inquiries Burchell advised plaintiff that he did not personally raise boysenberry vines in the quantities requested but that he would procure all boysenberry vines which plaintiff might desire to buy from another grower and would secure the information plaintiff required concerning the raising and harvesting of boysenberries; that pursuant to this offer plaintiff and defendant Burchell entered into an oral agreement wherein plaintiff promised to buy any and all boysenberry vines which he might thereafter require for his contemplated commercial berry growing operations through the agency of the defendant Burchell and that Burchell would act as plaintiff's agent in procuring a supply of suitable boysenberry vines; that defendant Burchell and plaintiff contacted Muller & Murphy and sought their advice on the proposed boysenberry operation; that Muller & Murphy told plaintiff that conditions were favorable for growing boysenberries commercially on plaintiff's land and further advised plaintiff that they would furnish him with all the young boysenberry vines that he required for said purpose; that Burchell also offered expressly to warrant on his own behalf all boysenberry vines procured from Muller & Murphy and that such warranty would be that they would be in good growing condition at the time of delivery. The pleading continues by alleging that as a result of said "advice, representations, guarantees and warranties" the plaintiff ordered from Muller & Murphy approximately 58,000 boysenberry vines, ⊥330 which defendant agreed to and did sell and deliver to plaintiff in the County of Colusa during the month of April 1954.

> "Pursuant to this agreement, plaintiff promised to and did order the said vines and pay therefor by and through the agency of defendant, IRVIN M. BURCHELL, and said agent gave plaintiff his express warranty in writing that said vines were in good growing condition at the time said vines were delivered to plaintiff pursuant to the said agreement."

The pleading, as amended, alleges damages as set forth in the second amended complaint.

The second cause of action, based on the alleged negligence of all the defendants, is substantially the same as in the second amended complaint already reviewed.

The new third cause of action incorporates by reference much of the first cause of action, as amended, and continues by alleging that in March 1954 plaintiff entered into an oral agreement with defendants:

> "* * * wherein and whereby plaintiff agreed to purchase approximately 58,000 young boysenberry vines from the defendant, IRVIN M. BURCHELL. Pursuant to this agreement, defendants, CARL W. MULLER and GEORGE MURPHY, promised to select the required number of boysenberry vines from their own vineyards and to sell the same to defendant, IRVIN M. BURCHELL, for the purpose of resale to plaintiff. Defendant, IRVIN M. BURCHELL, furthermore agreed to buy the required number of vines from defendants, CARL W. MULLER and GEORGE MURPHY, and to resell the same to plaintiff at an agreed upon price."

The third cause of action continues by alleging that before entering into the oral agreement, above alleged, plaintiff "* * * informed defendants, and each of them, that he desired the specified vines for the purpose of planting them on the land referred to in paragraph I * * * and that he intended to raise, grow and produce boysenberries therefrom on a commercial basis."

> "Said defendants represented, warranted and promised that if plaintiff purchased boysenberry vines which were grown and selected by defendants, CARL W. MULLER and GEORGE MURPHY, and sold to him by defendant, IRVIN M. BURCHELL, that said vines would be in good growing condition when delivered to him in Colusa County, California, and that they would be suitable for the purpose specified by plaintiff. In reliance upon these representations, warranties and promises, ⊥plaintiff entered into the agreement specified in paragraph II above." ⊥331

The third cause of action continues by alleging that in March and April 1954 plaintiff ordered 58,000 boysenberry vines from Burchell and agreed to pay therefor pursuant to the agreement. It is then alleged that the vines were delivered to plaintiff in Colusa County and were grown and selected for sale by the defendants Muller & Murphy. Damages as set forth in the second amended complaint are asked for.

The evidence shows that in June of the year 1953 the plaintiff, Paul Posz, bought about 50 acres of land in Colusa County, a portion of which had been previously planted to barley and prunes. Plaintiff had never personally engaged in farming; advised by a friend, Richard Gimlen, he removed the prune orchard, leveled the land, drilled a well to provide irrigation, and discussed with others the kind of crop he should plant. He talked with Burchell at his nursery in Stanislaus County and told him of his decision to plant boysenberry vines. Burchell in turn referred Mr. Posz to Muller & Murphy, growers of berry vines. They conferred several times with respect to berry production and the acquisition and care of plants. Among the matters talked about by Mr. Posz and Mr. Gimlen on the one hand and Mr. Muller and Mr. Murphy on the other, was the lateness of the season. The growers said that in the Modesto area they considered an absolute deadline for planting to be the end of March; the difference between the seasons from the weather standpoint in central and northern California was discussed, and it was decided that if the vines were planted after the first of April it might be all right for the northern area.

It appears from the record that Muller & Murphy were eager to know if the plants actually were to be ordered, because it would require considerable work on their part to dig as many boysenberry vines as Mr. Posz would require to plant on his land. Mr. Gimlen testified that Muller & Murphy said the plants would be dug and would be placed in cold storage and that such storage was common procedure. Gimlen and the plaintiff both testified that every effort had been made to prepare the ground in advance for the planting of the vines and that on March 27 an order was placed by telephone with defendant Burchell for the vines; The Burchell Nursery wrote up the order on its form entitled "Contract For Sale of Nursery Stock," which contained the following warranty over its signature: "WARRANTY: The seller hereby warrants ⊥332 that all trees and vines delivered under this contract shall be in good growing condition."

The record shows that on the first day of delivery of the vines it started to rain in the afternoon and that Gimlen arranged for the storage of most of these vines in Colusa at the Colusa-Fresno Feed Storage Company; they were planted after about three days. About the middle of March plaintiff had hired a Mr. Burkhart, upon the recommendation of Muller & Murphy, who assisted plaintiff with the preparation of the ground and carried on the supervision of the actual planting. Two subsequent deliveries of vines were made, on April 10 and April 17. An invoice of The Burchell Nursery accompanied each of the three increments of delivered vines, and it had printed thereon the following warranty: "We guarantee all trees and vines to be in good growing condition when delivered."

Plaintiff testified that during the plantings irrigation was going on regularly and that some water was put on the plants each week, they being watered from tanks and trucks; the first pump irrigation was finished approximately two weeks after planting. Many dead vines were in the field after the original planting, and ultimately 75 or 80 per cent of the entire field were found to be dead. These vines were not concentrated in any particular area of the 40 acres, and plaintiff testified that the plants had never shown any life. When the death of so many of the vines became obvious, Messrs. Burchell, Muller and Murphy were called on the telephone, and Mr. Murphy came to the ranch. The living vines were replanted to consolidate them in one section of the acreage; these transplants lived and produced a crop in 1955.

In 1955 plaintiff ordered more berry vines from Muller & Murphy and completed the planting of the entire field. These latter plants did not come from cold storage, plaintiff having insisted that they be dug fresh the day they were picked up and transported. In September of 1955, Muller & Murphy filed an action in the municipal court of the Modesto Judicial District against Posz, seeking therein the recovery of the balance of the purchase price due from Posz to Muller & Murphy on the sale of these replacement vines. Thereafter, Posz paid Muller & Murphy the full amount of the balance due as claimed in the suit, and a dimissal was entered with prejudice.

[1] Both appellants complain bitterly that on the first day of the trial the court permitted an amendment of the second ⊥333 amended complaint. It is somewhat unusual that a major amendment should be requested on the day of the trial itself after the case was pending for almost five years, but this comment is not equivalent to a statement that there was any showing of reversible error by reason of the ruling of the trial court. The policy of our law is to allow great liberality in amendment of pleadings prior to trial and even during the trial itself so that questions litigated between parties may be decided on the merits.

[2] In this case, as we have seen from our review of the second amended complaint, the plaintiff sued all of the defendants on theories that they were liable on warranties, express and implied, and because of their negligence in the handling, storage, transshipment and care of the boysenberry vines. The amendments proposed and accepted by the trial court on the day of the trial did not in essence change the general charges made by the then pending pleading. The major change was an abandonment of that portion of the first cause of action in the second amended complaint which alleged that Muller & Murphy were

agents of Burchell in connection with the transaction. The amendment of the pleadings, therefore, did change the alleged position of Muller & Murphy with respect to the express and implied warranties; if the original allegations had been proven, Muller & Murphy could not have been held liable on contract as agents of a disclosed principal. (Hayman v. Shoemake, 203 A.C.A. 143, 161, 21 Cal.Rptr. 519.) However, it should be kept in mind that this change of position as to legal responsibility would not effect any difference in the proof. The same evidence presumably was adduced upon the trial with the amendments allowed as would have been offered if the amendments had not been made. The change was one of legal theory only. It should be further noted that the allegations of agency contained in the original pleading were denied by Muller & Murphy in their answer so that it was never admitted by them that they were in fact agents of Burchell; in other words, they never contended that they should escape liability on the premise that they were merely agents of a disclosed principal.

Furthermore, it is apparent from the transcript of the proceedings leading up to and following the allowance of the amendment that counsel for the appellants did not vigorously press their request for the privilege of demurring or moving to strike after the court allowed the amendment. It is true that the suggestion was made during the debate on the subject |334 that there should be a chance to demur or move to strike, but after the ruling itself no such request appears in the record. The situation was complicated by the fact that the five-year period for trial had almost passed, and it was not suggested by counsel for the appellants here that they would be willing to waive that limitation if given time to demur or move to strike or to answer. At the instance of the court, and as a condition to allowing the amendment, counsel for the plaintiff stipulated that all matters contained in the amended complaint should be deemed to be denied. Some suggestion is made that no opportunity was given appellants to plead the alleged bar of the statute of limitations to the third cause of action, but the record is silent with respect to any request made by the appellants for leave to add that special defense to their answer. Furthermore, in the opinion of this court, even if such demurrer had been interposed it would not have been sound, because the basic claims made in the second amended complaint were not changed in any important particular; the third cause of action in the second amended complaint as amended was not actually a new claim but only a differing statement of the claims previously contained in the pleading.

[3] Counsel on the firing line in an actual trial must be prepared for surprises, including requests for amendments of pleading. They cannot ask that a judgment afterwards obtained be set aside merely because their equilibrium was slightly disturbed by an unexpected motion. In order to reverse a case on any such ground there must be a showing that actual unfairness or obvious prejudice has resulted from the allowance of such an amendment, and there has been no such showing in this case. The court acted within proper limits of discretion in allowing the amendment.

The pretrial conference order in the case was not itself specifically amended after the amendments were allowed to the second amended complaint. Rule 216 of the California Rules of Court provides in part as follows:

> "When filed, the pretrial conference order becomes a part of the record in the case and, where inconsistent with the pleadings, controls the subsequent course of the case unless modified at or before trial to prevent manifest injustice."

The intermediate appellate courts of this state have held that the foregoing rule does not prevent the trial court from |335 granting permission in a proper case to amend pleadings after the filing of the pretrial conference order, and, further, that the mere amendment of the pleadings in and of itself is to be considered also as an amendment of the pretrial conference order. (Wickman v. Opper, 188 Cal.App.2d 129, 134, 10 Cal.Rptr. 291; Ragusano v. Civic Center Hospital Foundation, 199 Cal.App.2d 586, 590, 19 Cal.Rptr. 118; Jones v. Burgermeister Brewing Corp., 198 Cal.App.2d 198, 203, 18 Cal.Rptr. 311; Atkins v. Atkins, 177 Cal. App.2d 207, 210–211, 2 Cal.Rptr. 104; Rocky Mountain Export Co. v. Colquitt, 179 Cal. App.2d 204, 206–207, 3 Cal.Rptr. 512; Beab, Inc. v. First Western Bank & Trust Co., 204 A.C.A. 747, 752, 22 Cal.Rptr. 583.)

[4] While this leaves the authority of the pretrial conference order in a somewhat unsatisfactory state (see People ex rel. Dept. of Public Works v. Valley Drive-In Theater Corp., 206 A.C.A. 386, 391, 393, 23 Cal.Rptr. 626), we shall follow these precedents and hold that the pretrial conference order in this case was amended through the amendment of the pleadings to the extent that any new matter in the amendments deemed denied by stipulation of the parties would constitute additional issues to be tried. However, in connection with any future last-minute amendments of the pleadings, we suggest that it would be advisable for counsel also to move for an amendment of the pretrial conference order so that the advantages of the pretrial conference in clearly defining the issues and in eliminating unnecessary and time-consuming allegations of fact might be preserved.

[5] Numerous points on appeal are made by each of the two groups of appellants. Some of them are unavailable for the following reason: in this case each of the defendants is charged with liability on three separate theories, express warranty, implied warranty and negligence; the jury brought in a general verdict, and under the rule of Gillespie v. Rawlings, 49 Cal.2d 359, 317 P.2d 601, the inquiry to be made by this court is whether or not there is ample evidence to justify the verdict as to each of the defendants under any one of the three theories. If the answer to this query is affirmative as to all defendants, our task would be ended as to the ascertainment of liability, and we would not have to concern ourselves with whether or not the other theories of liability were satisfactorily proven as to each defendant. This in turn would make numerous claimed errors irrelevant and immaterial. This rule may be stated as follows: Where |336 several counts or issues are tried, a general verdict will not be disturbed by an appellate court if a single one of such counts or issues is supported by substantial evidence and is unaffected by error, although another is also submitted to the jury without any evidence to support it and with instructions inviting a verdict upon it.

In Gillespie v. Rawlings, supra, 49 Cal.2d 359, 317 P.2d 601, the plaintiff was injured while riding in the car of the defendant and she sued on alternative theories: first, that she was a passenger for compensation seeking damages for ordinary negligence, and second, that she was a guest and that the defendant was guilty of wilful misconduct. Both of these theories were submitted to the jury with instructions which invited a verdict for the plaintiff on either; the plaintiff was awarded a verdict. On appeal the Supreme Court held that there was, as a matter of law, no evidence of wilful misconduct. Therefore, the instructions had invited the jury to return a verdict on a ground that did not exist as a matter of law, and as the verdict was general, there was no means of knowing whether it had been properly agreed upon. But the judgment was nevertheless affirmed, because the evidence was deemed sufficient to support a finding that compensation had been given and that the defendant had been negligent. This holding was followed by the opinion of the Supreme Court in the recent case of Tucker v. Landucci, 57 A.C. 808, 809, 813, 22 Cal.Rptr. 10, 13, 371 P.2d 754, 757, where it is said:

> "Under the circumstances of the case at bench, as in Gillespie (p. 369[6] of 49 Cal.2d, p. 601 of 317 P.2d), any error in submitting to the jury the issue of wilful misconduct could not have prejudiced defendant. Consequently no use-

> ful purpose would be served by determining whether, as contended by defendant, such submission actually did constitute error in the light of the evidence presented by the parties."

This rule is in accord with numerous appellate court decisions. Thus, in Moss v. Coca Cola Bottling Co., 103 Cal.App.2d 380, 384, 229 P.2d 802, 805, it is stated:

> "Since we have concluded that there is sufficient evidence to sustain the verdict and judgment for plaintiff on the negligence count, it is unnecessary to discuss the alleged defects in respect of the second count for breach of warranty. As noted above, the jury returned a general verdict for plaintiff."

And Rather v. City & County of San Francisco, 81 Cal.App.2d 625, 636, 184 P.2d 727, 734, holds:

> "It is settled law that 'a general verdict imports findings in favor of the prevailing ⊥337 party on all material issues, and if upon such a verdict one issue alone is sustained by the evidence and is not affected by any error, the want of evidence to sustain the finding on the other issues or any errors committed in regard to them cannot be prejudicial.' 2 Cal.Jur., p. 1029. See, also, 24 Cal.Jur., p. 885."

In an opinion written by Mr. Justice McComb in Shields v. Oxnard Harbor District, 46 Cal.App.2d 477, 491, 116 P.2d 121, 130, it is said:

> "A general verdict imports findings in favor of the prevailing party on all material issues and, if there is substantial evidence to sustain a verdict on one count which is unaffected by error, the fact that there is not sufficient evidence to sustain the necessary findings of fact upon another count to support a verdict, or that there have been errors in connection with such other count, will not justify a reversal of the general verdict. Hume v. Fresno Irr. Dist., 21 Cal.App.2d 348, 356, 69 P.2d 483; King v. Schumacher, 32 Cal.App.2d 172, 179, 89 P.2d 466; see also 2 Cal.Jur. (1921) 1029."

The rationale of this holding may perhaps be traced back to Estate of Hellier, 169 Cal. 77, 83, 145 P. 1008, 1010, where it is said:

> "The contestant, defending against the note, had the right to set up inconsistent defenses and offer evidence in support thereof. Upon demand of the claimant the court might have submitted special issues to the jury, if evidence in support of inconsistent issues had been introduced. But he made no such demand. He was apparently satisfied to take his chances upon a general verdict. The verdict being against him, he cannot now be heard to complain. Where several issues are tried and submitted to the jury, the general verdict must stand, if the evidence upon one issue alone is sufficient to sustain the verdict. Crosett v. Whelan, 44 Cal. 200; In re Sanderson, 74 Cal. 199, 208, 15 Pac. 753; Verdelli v. Gray's Harbor Commission [Commercial] Co., 115 Cal. 517, 525, 47 Pac. 364, 778."

Although this rule has been sharply criticized (Stanbury, California Trial and Appellate Practice, vol. 1, § 622, "The Rule of Gillespie v. Rawlings," pp. 681 et seq.), it is binding upon this court (Auto Equity Sales, Inc. v. Superior Court, 57 A.C. 490, 495–496, 20 Cal.Rptr. 321, 369 P.2d 937), and must be applied to the contentions on appeal in this case. Thus, if we determine that the evidence is sufficient to hold Burchell liable on an express warranty, it makes no difference whether he is or is not also liable on the theory of implied warranty or negligence, and if the evidence is sufficient to hold Muller & Murphy on a theory of negligence, it ⊥338 does not matter whether they are also responsible on a theory of express or implied warranty.

[6] Unquestionably the evidence already referred to is sufficient to justify the verdict against Burchell on a theory of express warranty. Three-quarters of the vines were not in good growing condition,

and this gave rise to a cause of action on the express warranty. Burchell contends on appeal that there is no sufficient evidence of reliance by plaintiff upon this warranty. This contention cannot be upheld. The printed agreement accompanied the vines themselves on the delivery and was accepted by Posz's representative at the same time the vines were received. This express printed warranty was in line with the previous understanding between the parties. It is also in conformity with the usual and normal method of warranting goods sold under varied conditions, and the jury's determination that the warranty was made and accepted cannot be disturbed.

[7] With respect to Muller & Murphy, there was ample evidence to justify a jury's determination that they were negligent in and about the storage, transportation and delivery of the vines. In the first place, they put the vines in cold storage prior to delivery for a number of days on the theory that this would not harm them; that they were not satisfied of the correctness of this conclusion is illustrated by the conducting of experiments with respect to cold storage after the event and by the further fact that they have never subsequently used cold storage for the purpose. Furthermore, the record shows that the nature of the container used in delivery of vines has been completely changed since that year to preserve the moisture content about the vine roots. It was the opinion of a number of witnesses that the plants died because of lack of proper moisture about their roots. This could have happened through improper irrigation by Mr. Posz's staff, but it also could have happened through improper storage and wrapping of the roots and the failure to keep them moist by Muller & Murphy in connection with their handling and delivery. This conclusion is reinforced by the fact that the berry vines planted the following year under basically identical conditions, apart from the alleged negligent acts of Muller & Murphy, grew successfully. Muller & Murphy's contention that they owed no duty to refrain from negligence in the circumstances is wholly without merit. The agreement among all concerned that they were to dig, store and transport the vines to Colusa County clearly provided the duty for the ⌊339 exercise of due care by them. The jury had ample evidence upon which it could legitimately base a finding of negligence and liability on the part of Muller & Murphy.

Under the Gillespie-Rawlings rule, the proof justified a finding of liability as against all of the defendants. Many of the well-briefed points raised by the respective appellants are interesting from the standpoint of abstract law, but as their decision can make no difference in the final outcome of this case we shall not discuss these theoretical matters, but shall restrict ourselves to a discussion of those questions which have a direct bearing on the efficacy of the appeal.

[8] Defendants Muller & Murphy contend that plaintiff's action against them is barred by reason of the failure of plaintiff to file a counterclaim in the municipal court action by which they sought to recover the balance due on the sale of vines in the year following the planting of the original berry plants. They urge that under section 439 of the Code of Civil Procedure, reading as follows: "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor," Posz was barred from bringing the instant action against Muller & Murphy because he did not assert the claim in the earlier suit. The question turns on whether both cases arose out of the same transaction, and the answer is that they did not. Plaintiff's claim for damages against Muller & Murphy on a theory of negligence accrued in the spring of 1954. The sale in the following year of 33,000 vines was the basis for defendant's action in the municipal court proceeding. The trial court correctly held that the two claims were separate

transactions within the meaning of section 439 of the Code of Civil Procedure.

Defendant Burchell urges that plaintiff's instruction number 35 was prejudicially erroneous:

> "In the present case, evidence has been introduced which establishes beyond doubt that many of the boysenberry vines obtained by plaintiff by or through defendants did not grow and did not produce a crop for market. If you find that the defendants, or any of them, warranted that these plants would grow, or would be in growing condition at the time of their delivery to plaintiff, or would be suitable for growing a crop on plaintiff's land, or that they made any other representation or promise which amounted to a warranty to the effect that ⌊340 the vines would grow when planted by plaintiff, then it is your duty to determine whether the failure of the plants sold to plaintiff to grow when planted by him resulted from or constituted a breach of that warranty or warranties, 'or from some other reason or cause.'"

[9] This instruction is to the effect that if the jury should find that an express warranty of the nature outlined was made by any of the defendants, it would be the duty of the jury to inquire whether such warranty was in fact breached. As the complaint charged all of the defendants with liability under an express warranty theory and there was a conflict of evidence as to what the warranty, if any, made by Muller & Murphy was, the instruction was proper. In any event it was not harmful to Burchell. After all, Burchell did, in fact, give an express warranty that the vines were "in good growing condition," and the several alternatives mentioned in the instruction did not markedly depart from the general meaning of such a warranty. It could not be construed, as Burchell suggests, to be an absolute guarantee that all vines so sold should thrive and produce.

Both appellants urge in their briefs that the plaintiff is not entitled to recover, because he did not give to the seller the required notice of breach as prescribed by section 1769 of the Civil Code. However, upon the oral argument of the case counsel for Burchell admitted that a sufficient notice had been given to him and consequently the point must be considered withdrawn by him. Insofar as Muller & Murphy are concerned, the point is immaterial in view of their liability on the ground of negligence.

[10, 11] Muller & Murphy claim that instructions on the subject of negligence were erroneous. They are estopped to urge that the giving of BAJI 101 is incorrect, for the defendants themselves requested an identical instruction (4 Cal.Jur.2d, Appeal and Error, § 469, p. 301; § 557, pp. 422–423). And their suggestion that additional instructions on the subject were not given is not available to them, as they did not request such instructions (3 Cal.Jur.2d, Appeal and Error, § 161, pp. 643–646).

The other points raised by the appellants, with one exception, are disposed of by the rule in the Gillespie-Rawlings case. The exception involves the question of damages.

The court instructed the jury, at the request of plaintiff, in part as follows:

> "If, adhering to the Court's instructions, you should find ⌊341 that plaintiff is entitled to a verdict against defendants, or any one or more of them, it will then be your duty to award plaintiff such amount of damages as will compensate him reasonably for all detriment suffered by him and of which the defendants' breach of warranty or warranties or negligence as found by you was a proximate cause.
>
> "Should your decision be to award damages to the plaintiff, PAUL POSZ, in arriving at the amount of the award, you shall determine each of the items of claimed detriment which I now am about to mention, provided that you find it to have been suffered by him and as a proximate result of defendants' negligence or breach of warranty upon which you base your finding of liability;

> "(1) Each item of direct expense for the year 1954, 'attributable to the boysenberry vines that failed to grow,' and
>
> "(2) Loss of profits or income not to extend beyond 1956 'attributable to the boysenberry vines that failed to grow'; * * *"

[12] This instruction departs completely from the well-established rule in California for the ascertainment of damages in connection with fruit trees or berry vines. The measure of damages with respect to nursery stock is the difference in reasonable market value between the land as planted to the vines actually delivered by the producer or seller and the land if planted to the vines as warranted. (Burge v. Albany Nurseries, Inc., 176 Cal. 313, 319, 168 P. 343; Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 590, 96 P. 319; and Shearer v. Park Nursery Co., 103 Cal. 415, 420, 37 P. 412.) The rule is thus stated in 36 California Jurisprudence 2d, Nurseries and Nursery Stock, section 5, page 576:

> "The proper method of ascertaining the damages, when the discovery of the breach cannot be made until after the nursery stock is planted, is to take the difference between the value of the land as planted with the stock delivered and what the value of the land would have been if planted with stock of the kind warranted." (See also 161 A.L.R., p. 587 et seq.; Montgomery v. Locke, 72 Cal. 75, 77, 13 P. 401; 14 Cal.Jur.2d, Crops, § 45, pp. 617–618.)

[13–15] Where damage for loss of vines is measured by the amount of depreciation in the value of the land as planted, there is no warrant for allowing further damages for loss of crops which might have been produced in the future because the reduced value of the land necessarily includes the future value of lost crops. (Hill v.
⊥342 Morrison, 88 Cal.App. 405, 408,⊥263 P. 573.) Special damages properly pleaded, such as the cost of consolidating the growing vines after the discovery of the extensive death of the plants, may also be recovered. But the cost of the vines and the expense of originally preparing and planting the land are not recoverable as special damages, as these items are covered by the general measure of damages above referred to. Nor would interest on borrowed money be recoverable, as claimed by respondent.

[16] Respondent admits error as to damages, stating in his brief (pp. 149–150): "It must be admitted that the theory of damages contended to be proper by appellants in this instance, is supported by the authorities and that the jury was, in fact, erroneously instructed as to the proper measure of damages to apply." He argues, however, that the error committed by him in proposing the instruction on damages hereinabove quoted and in producing evidence to support it was excusable because the defendant Burchell successfully demurred to his first amended complaint, although that pleading was in fact based in part upon a correct theory of damages. Afterwards, the plaintiff failed to plead or prove damages in accordance with the requirements of law. Are the defendants estopped to urge error by reason of this fact? We think not. In the first place, defendants Muller & Murphy did not join in the demurrer; secondly, the demurrer may have been sustained on other grounds, the reasons for the ruling not being contained in the record; and thirdly, the error of plaintiff in urging a fallacious measure of damages and making improper proof over the repeated objections of appellants cannot be shifted to the opposing parties. A plaintiff owes a duty to present his case in accordance with law, and he can not justify a major mistake on his part by saying he was misled by the erroneous views which one of his opponents held at an earlier stage of the litigation.

The judgment is reversed solely as to damages and is otherwise affirmed; and the cause is remanded to the superior court for retrial as to the question of damages only.

STONE, J., concurs.

BROWN, J., being disqualified, did not participate.

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504 **F. Glade WALL and Dorothy Elizabeth Wall, Plaintiffs, Cross-Defendants and Appellants,**

v.

SHELL OIL COMPANY, a corporation, and Socony Mobil Oil Company, Inc., a corporation, et al., Defendants, Cross-Complainants and Respondents.

Civ. 26052.

District Court of Appeal, Second District, Division 2, California.

Nov. 13, 1962.
Hearing Denied Jan. 8, 1963.

Action between owners of surface subdivisions and owners of various mineral interests wherein the Superior Court of Ventura County, Richard C. Heaton, J. pro tem., determined and declared the various interests of the respective parties. An appeal was taken. The District Court of Appeal, Herndon, J., held that subdivision of surface ownership following initial conveyance of oil and mineral estate in no way diminished rights of grantee, and that if particular surface facility was necessary and convenient to operations of oil and mineral owner, it could be placed anywhere on surface area in which he had right of user, so long as the placement was reasonable under prevailing conditions, and that no surface owner could be heard to assert that particular placement was unreasonable solely because it could have been done elsewhere just as conveniently.

Affirmed.

1. Mines and Minerals 🔑55(1)

Fee owner may transfer oil and mineral rights apart from remaining general estate in land.

2. Mines and Minerals 🔑55(4), 62(1)

Grantee or lessee of mineral rights acquires "profit a prendre" in gross, a right to remove a part of substance of land; it is a present estate and an interest in land.

See publication Words and Phrases for other judicial constructions and definitions.

3. Mines and Minerals 🔑47

Owner of oil and mineral estate has right to enter upon surface and make such use thereof as is reasonably required for enjoyment of his estate. West's Ann.Civ. Code, § 806.

4. Mines and Minerals 🔑55(6)

Where landowner sells portion reserving or excepting oil and mineral rights or where person purchases oil and mineral rights in specific tract, surface area of such lands may be subjected only to such burdens as are reasonably necessary to full enjoyment of mineral estate in such specific lands and surface area may not be burdened by installations or surface fixtures designed to serve oil producing facilities located without the parcels, but owner of surface area in parcel following such sales or transfers may not by any subsequent division of surface area deprive owner of oil and mineral estate of his rights in entire parcel. West's Ann.Civ.Code, § 806.

5. Vendor and Purchaser 🔑210

Each subsequent purchaser of subdivision of surface, taking with notice of prior sale and reservation of oil and mineral rights, takes knowing that his surface ownership may be burdened in part, and perhaps in totality, by reasonable exercise of rights of owner in mineral estate, without regard to whether oil and mineral underlies particular subdivision or whether facilities located thereon serve facilities located without the subdivision, so long as they do not lie beyond original tract.

6. Mines and Minerals 🔑55(2)

Subsequent subdivisions of surface could in no way restrict rights of grantee of oil and mineral rights or his successors in placement of surface facilities to service oil operations relating to that portion of oil and mineral estate underlying each individual subdivision.

7. Licenses 🔑51

Grantee of profit has right to such possession of surface as is necessary and convenient for exercise of profit but he has no general estate in surface.

8. Mines and Minerals 🔑62(1)

The necessary and convenient use of surface in exercise of profit under a mineral lease in fact may preclude any other surface possession.

9. Mines and Minerals 🔑55(2)

Though the right of owner of land subject to prior oil and mineral estate is subordinate thereto, he may yet exercise and develop his rights of ownership to fullest, even in some degree affecting rights of oil and mineral owner, so long as they do not prevent enjoyment of prior rights or unreasonably interfere therewith.

10. Mines and Minerals 🔑73

If particular facility is necessary and convenient to operations of oil and mineral owner, it may be placed anywhere on surface in which he has right of user, notwithstanding surface subdivision subsequent to his lease, so long as placement is reasonable under particular prevailing conditions, and oil and mineral estate owner may not be required to spread his facilities over multiple division tract solely in order that pro rata burden may fall on each subdivision.

11. Mines and Minerals 🔑55(2)

No owner of particular surface subdivision may be heard to assert that particular placement of facility by owner of oil and mineral estate was unreasonable solely because it could have been placed elsewhere just as conveniently.

12. Mines and Minerals 🔑55(5)

Deed to all beds, deposits, lodes, veins and ledges of minerals of every description, and all the petroleum and asphaltum included natural gas.

13. Mines and Minerals 🔑55(5)

Fact that parties to oil and mineral grant may not have mentioned gas by name, either because they were not concerned with its separate existence or because they failed at time to recognize its value did not indicate intent to exclude it from otherwise all encompassing transfer.

◆

Pray, Price & Williams, Long Beach, James C. Hollingsworth, Ventura, Henry F. Walker, Los Angeles, for appellants.

Sheridan, Orr, Barnes, Duval & Benton, Ventura, George R. Pfeiffer, Santa Monica, Arthur G. Bowman, Donald J. Burdine, Los Angeles, for respondents.

⊥507 HERNDON, Justice.

This is an appeal from a judgment whereby the respective rights of the parties in certain lands in ⊥508 Ventura County were determined and declared. Defendants and cross-complainants, respondents herein, were granted injunctive relief. The judgment denied plaintiffs and cross-defendants, appellants herein, damages for, or injunctive relief against, alleged trespasses committed by respondents.

Appellants are the owners of approximately seventeen acres of land in Ventura County, hereinafter referred to as "Parcel A", subject to certain exceptions with reference to the mineral and oil rights therein, which will be discussed more fully in the course of this opinion. Respondents are two oil companies, hereinafter referred to as "Shell" and "Mobil", when necessary to distinguish between them, who own various leasehold rights and estates in the minerals and oil in larger property divisions which include or relate to appellants' Parcel A.

A brief history of the chain of title of the parties to their respective property interests is required as a basis for an understanding of the factual and legal issues here involved. Prior to December 24, 1864, one George G. Briggs was the owner in fee simple absolute of a large tract of land known as the "Rancho Santa Paula y Saticoy." On that date, Briggs deeded to Edward W. Haskell "all the beds, deposits, lodes, veins and ledges of minerals of every description, and all the petroleum and asphaltum situate in upon and within the premises known as the 'Rancho Santa Paula y Saticoy,' * * * together with all such rights and privileges as are necessary to give to the said [Haskell] the full benefit of this conveyance with the exclusive right to explore, dig and sink wells, pits and shafts for the purpose of obtaining, extracting and appropriating said minerals and substances wherever situate in and upon said premises, and with the right to erect houses for workmen and all buildings required for smelting, refining and working the same. * * *"

By various mesne conveyances, all made subsequent to the Briggs-Haskell deed, appellants' ownership of "Parcel A" is derived from George G. Briggs. By similar mesne conveyances, respondents' interests are derived from Edward W. Haskell.

Respondents are the co-owners under certain oil and gas leases of the oil rights in a parcel of land known as "Saticoy Land", which contains ⊥509 approximatley 590 acres, and an adjoining parcel known as "South Land" which contains approximately 1500 acres. Appellants' Parcel A is located entirely within the "Saticoy Land." In addition, respondent Mobil owns a one-half interest in the oil rights in a parcel of land known as "General Petroleum Land", which contains approximately 3800 acres. Both the "Saticoy Land" and "South Land" lie within the boundaries of the "General Petroleum Land" which is part of, and situated within, the exterior boundaries of the still larger area heretofore referred to as the "Rancho Santa Paula y Saticoy."

Counsel for both parties apparently cooperated in developing a "Joint Pre-Trial Statement" which greatly simplified the task of the trial court by settling most of the factual issues and, in effect, reduced the question to one basic legal issue. As expressed by respondents, in the joint pretrial statement, the determinative question is as follows:

"Where the owner in fee simple of a large tract of land (Rancho Santa Paula y Saticoy) conveys to another, by a deed duly recorded, the oil and mineral estate in the entire tract, together with the right to use the surface of the entire tract for the purpose of developing the oil and mineral estate so conveyed, can such owner-grantor or his successors in interest, by subsequent subdivision of the surface of the large tract and by conveyances of the smaller parcels to others, who take with notice of the prior conveyance of the oil and mineral estate, limit or restrict the use to be made of the surface by the prior grantee of the oil and mineral rights in the entire parcel or by the successors in interest of said prior grantee?"

As expressed by appellants, the basic question is this: "[Under such circumstances], must the owner of one subdivision or one area of the surface bear all or a substantial part of the burden of the use of the surface for production, or at least a portion of the total burden which is proportionately greater than his surface bears to the entire surface?"

There were a number of minor issues, but on this appeal they have been substantially reduced and will be taken up individually hereinafter. The factual situation which brought this problem before the court arose from the placement by respondents of seventeen wells on the Saticoy Land, four of which are situated on appellants' Parcel A. All four of these wells are bottomed outside the boundaries of Parcel A, but within the boundaries of Saticoy Land, and three of these wells have producing intervals both within and without the boundaries of Parcel A, and one has no producing interval therein. Also, respondents have placed a road, pipelines and other related facilities upon appellants' Parcel A which serve not only the wells located on Parcel A, but also the others located on the Saticoy Land as a whole.

It was conceded by appellants that their crops and trees ⊥510 had not been damaged by these facilities, which apparently were placed upon a rough and undeveloped section of Parcel A. However, they contended that the very use of the surface of their land to serve wells and other operations beyond the boundaries thereof constituted a trespass.

The trial court decided against this contention and held that, as co-owners of the oil rights in the Saticoy Land, respondents might use any portion thereof to effectuate their rights without regard to any subsequent divisions of the surface ownership.

Since the court also found this was the extent of the use which actually had been made at the time of trial, any question as to appellants' right to recover damages for trespass or to injunctive relief was necessarily resolved against them. However, in declaring the rights of the parties as sought in appellants' complaint and as broadened by respondents' cross-complaint, the court further ruled that the respondents could also use the surface of the Saticoy Land, including Parcel A, to serve their facilities on the South Land, and that respondent Mobil could use all of the General Petroleum Land, including Parcel A, in the enforcement of its rights therein. These determinations constitute appellants' first assignment of error.

[1, 2] It is settled law in California that the owner in fee of real property may transfer the oil and mineral rights in his property apart from his remaining general estate in the land. (Standard Oil Co., etc. v. J. P. Mills Organization, 3 Cal.2d 128, 132, 43 P.2d 797; Carlson v. Lindauer, 119 Cal.App.2d 292, 302, et seq., 259 P.2d 925.) The grantee or lessee of such interest acquires a profit *a prendre* in gross, a right to remove a part of the substance of the land. This profit *a prendre* vests in the transferee a present estate, an interest in land. (Callahan v. Martin, 3 Cal.2d 110, 122, 43 P.2d 788, 101 A.L.R. 871.)

"The profit *a prendre*, whether it is unlimited as to duration or limited to a term of years, is an estate in real property. If it is for a term of years, it is a chattel real, which is nevertheless an estate in real property, although not real property, or real estate. [Citation.] Where it is unlimited in duration, it is a freehold interest, an estate in fee, and real property or real estate. Thus, although the oil and gas in place doctrine is rejected, interests in oil rights which are estates in real property may be granted separate and apart from a grant of surface title. The grantee of the profit has a right to such possession of the surface as ⊥511 is necessary and convenient for the exercise of the profit, but he has no general estate in the surface." (Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 649, 52 P.2d 237, 243.)

[3] It is equally well settled that the owner of the oil and mineral estate has a right to enter upon the surface of the property and make such use thereof as is reasonably required for the enjoyment of his estate therein, even if such extensive rights were not spelled out as clearly as they were in the Briggs-Haskell deed in the present case. "If the oil and gas lessee is not granted exclusive possession of the surface by the terms of the lease, he has nevertheless a right to such possession as is necessary and convenient for the exercise of the profit, which, in fact, may preclude any other surface possession." (Callahan v. Martin, supra, 3 Cal.2d 110, 122, 43 P.2d 788, 795.)

Thus, it is apparent that prior to any division of the Rancho Santa Paula y Saticoy, Haskell, or his successors in interest, would have been entitled to use any and all parts of the entire tract reasonably necessary to give them the full benefit of the rights and estate conveyed. Therefore, as indicated by the parties, the fundamental issue is whether the subdivision of the surface ownership that followed this initial conveyance in any way diminished these rights of the grantee.

Neither appellants nor respondents have cited us to any decision in California or elsewhere that expressly determines this specific issue. Appellants contend that the holdings in Dietz v. Mission Transfer Co., 95 Cal. 92, 30 P. 380 and in Bourdieu v. Seaboard Oil Corp., 38 Cal.App.2d 11, 100 P.2d 528; 48 Cal.App.2d 429, 119 P.2d 973 and 63 Cal.App.2d 201, 146 P.2d 256, indicate that the owner of the oil and mineral estate is limited by the surface divisions and may place no further burdens upon each respective subdivision than is required to obtain the oil located under such particular subdivision. We do not so read these decisions. They appear to be logical applications, on the basis of their differing facts, of the general rule that property subservient to a particular use or profit may not be burdened to an extent greater than is reasonably necessary in order to allow the owner of the dominant right or tenement his full exercise thereof. (Civil Code, section 806; 17 Cal.Jur.2d, Easements, section 27, page 131, and cases cited; cf. Kerr v. Brede, 180 Cal.App.2d 149, 150–152, 4 Cal.Rptr. 443.)

In the Dietz case, supra, the owner of a tract of some 20,000 acres contracted to sell the property to the defendant therein subject, however, to an option previously given to the plaintiff. ⊥512 The plaintiff did not exercise his option, but instead purchased 400 of the 20,000 acres with the oil and mineral rights reserved. Defendant *thereafter* was granted the remaining acreage and the oil and mineral rights in the 400 acres purchased by the plaintiff. The issue before the court was whether the defendant could use the surface of the 400 acres in furtherance of his operations on the entire tract or whether he was restricted in its use only to those operations which were conducted upon the 400-acre tract. Defendant asserted that said 400-acre tract was subject to the burden of the entire tract, because his contract antedated plaintiff's purchase, even though his grant did not. The court there stated that it could not agree with this contention and proceeded to explain its reasoning by reference to plaintiff's option which in turn antedated defendant's contract to purchase and the fact that defendant had elected to purchase the remaining acreage knowing that plaintiff had purchased the 400-acre tract and held the absolute title thereto "* * * with the exception of the oil, asphaltum, and other kindred mineral substances therein, and the right reserved to erect machinery, sink wells, etc., *on said tract.*" (Dietz v. Mission Transfer Co., supra, 95 Cal. 92 at page 97, 30 P. 380 at page 382.)

This case, then, actually appears to hold against appellants' position in the instant case, for if it were of no consequence whether the plaintiff's ownership of the surface portion was created before or after the defendant acquired the oil rights in the entire 20,000 acres, including those reserved in plaintiff's 400-acre purchase, the court's statement of the facts and its reasoning would have been unnecessary

The Bourdieu cases, supra, actually involve an interpretation of various federal statutes which are inapplicable in our proceeding, but in general result they likewise fail to lend support to appellants' position. It appears therein that the plaintiff had acquired various acreages under federal statutes for purposes of agriculture and stock-raising. The government earlier had excepted the mineral rights from all grants of government lands and plaintiff therefor acquired his surface ownership subject to such exceptions. The defendant thereafter acquired the mineral rights in larger tracts which included the plaintiff's lands. It was held by the court that, under the terms of the federal statutes themselves, the defendant could not place facilities on plaintiff's lands for the purpose of serving his operations conducted elsewhere within his oil and mineral leasehold but beyond the boundaries of plaintiff's lands. Nothing therein appears which would be ⊥513 authority for the proposition that a private landowner can sell his mineral and oil rights and transfer them by a deed containing no restrictions upon their use nor any provision for damages and thereafter, by subdividing the surface ownership, impair the rights and estates theretofore granted by him.

Respondents cite several decisions of other jurisdictions in support of their position. Holt v. Southwest Antioch Sand Unit, etc., Okl., 292 P.2d 998, seems to lend at least inferential support to respondents' arguments. Richard v. Sohio Petroleum Co., 234 La. 804, 101 So.2d 676, also appears to declare and apply the rule for which respondents contend. However, these cases and the text and case material found in Summers Oil and Gas, Vol. 4, section 652, although it deals principally with leasehold estates in the oil rather than fee or freehold estates therein, do provide us with a basis for stating the general and logical rule on the subject, and this rule is in nowise inconsistent with the holding in the Dietz case, supra.

[4] The true rule is that (1) where the owner of a parcel of land sells a portion thereof reserving or excepting the oil and mineral rights therein, or where a person purchases the oil and mineral rights in a specific tract of land, the surface area of such lands may be subjected only to such burdens as are reasonably necessary to the full enjoyment of the mineral estate in such particular specific parcels and the surface area may not be burdened by installations or surface fixtures designed to serve oil producing facilities located without the parcels; but (2) the owner of the surface area in the parcel following such sales or transfers may not by any subsequent subdivision of the surface area deprive the owner of the oil and mineral estate of his rights in the entire parcel.

[5] Further, each subsequent purchaser of a subdivision thereof, taking with notice of the prior sale and reservation of rights, takes knowing that his surface ownership may be burdened in part, and, in very rare cases perhaps, in its totality, by the reasonable exercise of the rights of the owner of the oil and mineral estate; and this without regard to whether or not the oil or mineral underlies the particular subdivision, or whether the facilities located thereon serve facilities located without the subdivision, so long as they do not lie beyond the original tract.

[6] Under the admitted facts of the present case, it is therefore apparent that the original grantee of the oil and ⊥514 mineral rights in the entire Rancho Santa Paula y Saticoy could have used any part of the surface area of the entire Rancho in connection with the placement of facilities required to exercise his rights therein. The subsequent subdivisions created on the surface could in nowise restrict his placement of such facilities to service of oil operations relating to that portion of his oil and mineral estate underlying each individual subdivision. Of course, the successors in interest to the entire estate of the original grantee would have equal rights free from such restrictions. Likewise the lessees of the present owners of the entire estate in the oil and minerals would have such rights in the entire Rancho as might be authorized by the owner in their respective leases. Such leases might cover only a portion of the surface area in which the owner of the oil and mineral estate has rights of user, and might contain restrictions and conditions designed to benefit the various surface owners over and above any restrictions or conditions that might be imposed by law on the oil and mineral owner in the reasonable exercise of his rights. But as to the rights thus acquired under their leases, the lessees cannot be further subjected to limitations such as those sought to be imposed by appellants herein. The ruling of the trial court in this respect was therefore correct. Appellants were not seeking a declaration of any rights they might have as third party beneficiaries or otherwise under the respective leases of the respondents, but, as indicated earlier, they asked the court the basic question concerning the effect of surface subdivisions upon the rights of the owner of the mineral estate.

Appellants also challenge the correctness of the trial court's ruling in favor of respondents on one of their special defenses. Among other defenses, respondents asserted that a prior judgment between the predecessors in title of the parties to the instant action was *res judicata*. This earlier proceeding also involved a suit brought by a number of owners of surface subdivisions within the Rancho against the owner of the oil and mineral estate, at that time the Santa Paula y Saticoy Oil Company. The judgment provided:

"That defendant [oil company] is the owner in fee simple absolute and entitled to the possession of all the beds, deposits, lodes, veins and ledges of minerals of every description and all the petroleum and asphaltum situate *in, upon and within the said Rancho Santa Paula y Saticoy,* ⊥515 in Ventura County, California, and *each and all of the parcels of land referred to in Plaintiffs'* *complaint*, together with all rights and privileges whatsoever necessary to give effect to such ownership with the exclusive right to explore, dig and sink wells, pits and shafts *upon said lands, and all thereof,* for the purpose of obtaining, extracting and appropriating such minerals and substances *wherever situate in and upon said lands,* with the right to erect houses for workmen and all buildings required for smelting, refining and working such minerals, petroleum and asphaltum, and that the plaintiffs have not, nor has any of them any estate, right, title or interest in or to the said property and rights so owned by defendant, and *that plaintiffs and each of them be forever enjoined and debarred from asserting any claim whatsoever in and to the property and property rights of defendant and from in any way interfering with the enjoyment by defendant of its ownership or use thereof.* * * *

"That the respective plaintiffs named herein are, and each of them is the owner of and in the possession of the remaining title and interest in and to that certain piece, and parcel of real estate situate in the County of Ventura, State of California, as hereinafter particularly set forth and described after each of said respective names of plaintiffs; *that said remaining right, title and interest in said lands owned and possessed by plaintiffs as aforesaid is exclusive of the defendant's said property and rights in the Rancho Santa Paula y Saticoy.* That the names of said respective owners, plaintiffs herein, and the pieces and parcels of land (the limited and qualified estate and interest wherein is owned by plaintiffs as aforesaid) are as follows: * * *." (Emphasis added.) Thereafter follow the name of appellants' predecessor and the legal description of property including that of appellants.

Obviously, such judgment would not be a bar to an action seeking to determine the rights and liabilities of the parties under the terms of leases made subsequent to the judgment, but, as heretofore indicated, this is not what appellants sought by this action. As defined in the pre-trial order, the basic issue to be determined was the effect of surface subdivisions without regard to the terms of particular leases, and the answer to this question is a purely legal conclusion stemming from, and inherently contained in, the prior judgment, if, in truth, it can be said that the prior judgment did not provide the answer to the question upon its face.⊥516 Moreover, as heretofore indicated, the determination of the trial court would have been the same regardless of this special defense.

Appellants also assign as error the failure of the trial court expressly to state that the rights of respondents must be exercised in a reasonable manner. They assert that the effect of the judgment is to declare that respondents' rights to use the land are absolute, unlimited and unqualified. This assertion is entirely incorrect. The judgment provides only that respondents may exercise such rights as they have under their respective leases "unaffected and unlimited by divisions of surface ownership within" their leasehold estates. There is nothing therein to indicate any holding that respondents may engage in any unreasonable, arbitrary or capricious use of the surface or in any other fashion unreasonably to exercise the rights accorded them.

[7,8] The law is clear that "[t]he grantee of the profit has a right to such possession of the surface as is *necessary and convenient* for the exercise of the profit, but he has no general estate in the surface." (Dabney-Johnston Oil Corp. v. Walden, supra, 4 Cal.2d 637, 649, 52 P.2d 237, 243.) (Emphasis added.) Reasonableness in the exercise of rights is a fundamental tenet of the law, whether in the field of real property or in the countless other areas of personal relationships. It is true also that the necessary and convenient use of the surface in the exercise of the profit "in fact, may preclude any other surface possession," (Callahan v. Martin, supra, 3 Cal.2d 110, 122, 43 P.2d 788, 794), but such a possibility is not even suggested by the factual considerations in the instant case.

The trial court found, and appellants conceded, that respondents' exercise of their rights have been completely reasonable to date.

[9] It is equally clear that, as conditions change, the "reasonableness" of any particular exercise of a right may also change. An act which would be reasonable in the wilderness might be totally unreasonable in an urban area. The owner of oil rights has a right to develop them, and the owner of the surface area has a right to develop that. Society has an interest in both such developments. Though the right of the owner of land subject to a prior oil and mineral estate is subordinate thereto, yet he may exercise and develop his rights of ownership to the fullest, even though this exercise may in some degree affect the rights of the oil ⌊517 and mineral owner, so long as they do not prevent his enjoyment of his prior rights or unreasonably interfere therewith.

[10] However, it does not follow from the fact that a particular development on the surface may affect the reasonableness of the oil and mineral owner's choice of location for a particular facility necessary to its operations, that the mere division of the surface area creates any such restriction. If a particular facility is necessary and convenient to the operations of the oil and mineral owner, it may be placed anywhere upon the surface area in which he has the right of user, so long as such placement is reasonable under prevailing conditions and even though such placement in particular instances may work a hardship on the surface owner. Certainly, the owner of the oil and mineral estate cannot be required to spread his facilities over a multiple division tract solely in order that a pro-rata burden must fall on each subdivision.

[11] Conversely, no owner of a particular surface division could be heard to assert that the particular placement of a facility was unreasonable solely because it could have been placed elsewhere just as conveniently. Under the general guiding principles, a court may determine the issue of reasonableness in any given instance, and the court below in the present case rightly concluded that no unreasonable user had occurred to date.

Appellants' next assignment of error concerns the failure of the judgment to spell out appellants' rights as third party beneficiaries under the terms of the leases under which respondents are operating. As we have heretofore noted, these considerations were not a part of the issues framed by the pleadings or by the pre-trial order. Further, respondents do not contend that they are not required under the provisions of their leases, to compensate the surface owners for damages resulting from their operations and hence there is no dispute upon which a declaration of rights was required. Finally, the judgment refers to these leases and cites the book and page of the county records where they were recorded. Hence, by no possible construction could the judgment be said to have eliminated any rights appellants may have thereunder.

[12] Lastly, appellants cite as error the determination by the trial court that the transfer by the deed of 1864 of "all the beds, deposits, lodes, veins and ledges of minerals of every description, and all the petroleum and ⌊518 asphaltum" included natural gas. We believe that the court was correct in applying the majority rule in the United States that a broad transfer of the mineral estate includes gas and oil, unless the contrary intent appears, and that the specification of oil is not alone an indication of an intention to exclude the natural gas that is of necessity produced therewith. (See 37 A.L.R.2d p. 1440, et seq. and cases cited therein.)

[13] Furthermore, assuming that the language were uncertain as to the intent of its apparent all-inclusive grant, the court received expert testimony which indicated that petroleum is a mixture of naturally occurring hydrocarbons which may assume either the solid, liquid, or gaseous state, that it may be converted from one state to another according to its environment, and that its state at any particular moment is dependent upon the degrees of heat and pres-

sure to which it is subjected. Since gas and oil in place are inseparable and both are brought to the surface in drilling operations, the fact that the parties to the grant may not have mentioned "gas" by name, either because they were not concerned with its separate existence, or because they failed at that time to recognize its value, does not indicate an intent to exclude it from an otherwise all encompassing transfer. (Cf. MacNicol v. East Coalinga, etc. Corp., 22 Cal.2d 742, 570, 140 P.2d 793.)

The judgment is affirmed.

ASHBURN, J., concurs.

FOX, P. J., being disqualified, did not participate therein.

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209 Cal.App.2d 177

⊥177 ⊥**Application of STEELFORM CONTRACTING COMPANY, a California corporation.**

STEELFORM CONTRACTING COMPANY, Appellant,

v.

BALDWIN CONTRACTING COMPANY, Respondent.

Civ. 20350.

District Court of Appeal, First District, Division 3, California.

Oct. 31, 1962.

Hearing Denied Dec. 26, 1962.

Proceedings on petition challenging qualifications of one of three arbitrators provided for in contract. The Superior Court, San Francisco County, Byron Arnold, J., denied the petition, and an appeal was taken. The District Court of Appeal, Devine, J., held that order denying petition was not appealable.

Appeal dismissed.

Arbitration and Award ⚿44

Order denying petition, to annul designation of arbitrator selected by other party to arbitration agreement or to require that other party withdraw its designation and substitute another, upon ground that arbitrator selected was stockholder and employee of other party and witness to matters which were to be arbitrated, was not an appealable order. West's Ann.Code Civ. Proc. §§ 1294 and subd. (a), 1294.2.

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Raymond H. Levy and Truman S. Waterman, San Francisco, for appellant.

Robert E. Burns, Crimmins, Kent, Bradley & Burns, San Francisco, Manwell & Manwell, Marysville, for respondent.

⊥DEVINE, Justice. ⊥178

At the time of the hearing of oral argument, the court expressed doubt that the order from which the appeal was taken is appealable, and directed counsel for appellant to demonstrate its appealability. Appellant has filed a brief on the subject. We find that the order is not appealable, and we dismiss the appeal on our own motion.

Appellant, one party to an arbitration agreement, petitioned the superior court to annul the designation of an arbitrator selected by the other party to the agreement, or to require that said other party withdraw its designation and substitute another, upon the ground that the arbitrator selected is a stockholder and employee of the other party and a witness to the matters which are to be arbitrated. The court denied the petition. The petition does not allege refusal of the other party to arbitrate, but relates to the qualifications of one of the three arbitrators provided for in the contract.

Section 1294 of the Code of Civil Procedure provides for appeals from judgments entered upon arbitration and from four classes of orders in arbitration proceedings. The order made herein is not one of these, although perhaps it will be reviewable after judgment under section 1294.2 of the Code of Civil Procedure. An order denying a petition to compel arbitration is appealable (Code Civ.Proc., § 1294, subd. (a)), but this is not such an order.

The appeal is dismissed.

DRAPER, P. J., and SALSMAN, J., concur.

209 Cal.App.2d 401

⊥401 ⊥**LOUIS LESSER ENTERPRISES, LTD.,
Plaintiff and Appellant,
v.
Walter S. ROEDER et al., Defendants
and Respondents.**

**Walter S. ROEDER et al., Cross-
Complainants and Respondents,
v.
William MALAT, Louis Lesser, et al., Cross-
Defendants and Appellants.
Civ. 25525.**

District Court of Appeal, Second District,
Division 1, California.
Nov. 9, 1962.
Rehearing Denied Dec. 4, 1962.
Hearing Denied Jan. 3, 1963.

Suit for an accounting of profits arising out of an alleged joint venture. From an adverse judgment of the Superior Court, Los Angeles County, Arnold Praeger, J., the plaintiff appealed. The District Court of Appeal, Lillie, J., held that preliminary negotiations concerning plaintiff's participation in ownership, development and sale of land did not result in a binding contract when the writing left unsolved many essential terms of proposed business venture such as whether the venture should be a partnership, joint venture, corporation, or other entity, and the manner and form of transfer of defendants' "options and vestings" in the property, etc., and when writing also stated that contract would be reduced to formal writing prepared by a lawyer mutually agreed upon but such was never done.

Judgment affirmed.

1. Contracts 🔑32

While preliminary negotiations ordinarily result in a binding contract when all of terms are definitely understood, even though parties intend to later execute a formal writing, where any of essential terms are left for future determination and it is understood that agreement is not deemed complete until they are settled, or where parties understand that proposed agreement is not complete until reduced to formal writing and signed, no binding contract results until that is done, and such rule applies regardless of whether the preliminary negotiations are oral or are in writing.

2. Contracts 🔑32

Preliminary negotiations concerning plaintiff's participation in ownership, development and sale of land did not result in a binding contract when writing left unsolved many essential terms of proposed business venture such as whether venture should be a partnership, joint venture, corporation, or other entity, and the manner and form of transfer of defendants' "options and vestings" in the property, maximum cash contribution by each party, nature of development of land, etc., and when writing also stated that contract would be reduced to formal writing prepared by a lawyer mutually agreed upon, but such was never done.

3. Contracts 🔑39

If an essential element is reserved for future agreement of both parties, a promise can give rise to no legal obligation until such future agreement.

4. Evidence 🔑420(3)

It may be shown by parol evidence that a writing was not intended as a final act because it was not to become effective until some condition occurred.

5. Evidence 🔑420(3)

Where letter from plaintiff to defendant did not include any term inconsistent with oral condition precedent that letter would not constitute a binding contract until reduced to formal writing, admission of testimony to establish such fact was proper.

**6. Appeal and Error 🔑842(1)
Contracts 🔑176(2)**

In construing a contract, whether an uncertainty or amibiguity exists is a question of law, and lower court's determination is not binding on appeal.

7. Evidence 🔑455

Oral testimony was admissible to explain the terms in a letter which left uncertain such essential terms of proposed business venture as nature of mutual association between the parties, the manner and form of transfer of defendants' "options and vestings" in property, maximum contribution by each party, and nature of development of land.

8. Appeal and Error ⚷1008(3)

Reviewing court will accept a reasonable interpretation of a writing adopted by trier of fact and will not substitute its own interpretation therefor.

9. Trial ⚷395(1)

Alternative findings are not improper.

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Charles J. Katz and Samuel W. Blum, Los Angeles, for appellants.

O'Melveny & Myers, Bennett W. Priest and Allyn O. Kreps, Los Angeles, for respondents.

403 LILLIE, Justice.

Plaintiffs, real estate developers, sued for an accounting of profits alleging a joint venture arising out of a written agreement dated July 14, 1953; defendants deny a joint venture existed and claim that even if it had, plaintiffs failed to perform their obligations thereunder terminating their relationship. Judgment was entered for defendants.

The subject of the controversy is three letters growing out of plaintiffs' interest in developing 200 acres of land in Las Vegas purchased by defendants. After considerable discussion, plaintiffs, on July 14, 1953, prepared, and the parties signed, two letters (Exs. 1, 2). They provide that by August 14, 1953, plaintiffs pay to defendants, to be later deposited by defendants in the entity or entities to be thereafter formed by the parties for the development of the property, the sum of $105,000 (equal to funds already expended by defendants for the acquisition of a certain portion of the land); if said sum is not paid by August

404 14 defendants shall repay to plaintiffs any sums advanced and the letters be deemed cancelled. Of the amount, plaintiffs advanced $10,000; on August 10 they advised they could not pay the balance by August 14 and asked for a reduction to $75,000. Thus plaintiffs prepared, and defendants signed, a letter dated August 10, 1953, (Ex. 7) which reduced the amount of $105,000 to $75,000. Plaintiffs having failed to pay the balance of $65,000 by August 14, defendants on August 17 notified them of their default and declared a cancellation, and in writing (Ex. 8) notified them that unless $65,000 was in their hands by 5 p. m., Thursday, August 20, the letters would be cancelled. Prior thereto plaintiffs deposited in the mail a letter (received by defendants August 21) enclosing their personal noncertified check in the amount of $65,000 (Ex. 9). Plaintiffs did not have such sum on deposit in the bank on August 21 or 24, and knew there were insufficient funds in the bank to pay the check with other checks then outstanding on the account. On August 21 defendants orally refused the check, returned it on August 24, and offered the return of the $10,000 which plaintiffs refused.

No attorney was ever agreed upon by the parties to draw the final papers, their understandings and agreements were never reduced to final writing and form, and the parties never agreed to the kind of mutual association their proposed venture was to take or to other essential terms of their contemplated final agreement.

Appellants argue the insufficiency of the evidence to support the lower court's finding that the letters of July 14 and August 10 constituted an interim agreement not intended to be a binding or completed contract, and conclusion that no final binding or completed contract and no joint venture or partnership of any type were ever created. While the evidence is in dispute, no reasonable construction of the same viewed in a light most favorable to respondents will admit an enforceable and binding contract between the parties creating any kind of a venture; and the record shows that the three letters amounted to no more than an interim agreement not intended to be completed or binding until after plaintiffs' payment of $65,000, the parties could agree to the form their joint participation would take and other essentials, and could mutually choose a lawyer and direct him to reduce their agreements and understandings to a final binding written contract.

[1] While preliminary negotiations ordinarily result in a binding contract when all of the terms are definitely understood, even though the parties intend to later execute a formal ⊥405 writing (Gavina v. Smith, 25 Cal.2d 501, 154 P.2d 681; King v. Stanley, 32 Cal.2d 584, 197 P.2d 321), where any of the essential terms are left for future determination and it is understood that the agreement is not deemed complete until they are settled or where the parties understood that the proposed agreement is not complete until reduced to formal writing and signed, no binding contract results until this is done. (Apablasa v. Merritt & Co., 176 Cal.App.2d 719, 1 Cal.Rptr. 500; Spinney v. Downing, 108 Cal. 666, 41 P. 797; Las Palmas Winery & Distillery v. Garrett & Co., 167 Cal. 397, 139 P. 1077; American Aeronautics Corp. v. Grand Central Aircraft Co., 155 Cal.App.2d 69, 317 P.2d 694; Dillingham v. Dahlgren, 52 Cal.App. 322, 198 P. 832; Patch v. Anderson, 66 Cal.App.2d 63, 151 P.2d 644; Stoddard v. Goldenberg, 48 Cal.App.2d 319, 119 P.2d 800.) Although the majority of cases deal with oral negotiations, the same principle applies to preliminary written discussions, for there is no meeting of the minds of the parties while they are still negotiating terms. (Apablasa v. Merritt & Co., 176 Cal.App.2d 719, 1 Cal.Rptr. 500.)

[2] Defendants needed money to complete the acquisition of the land and in return for an immediate initial contribution by plaintiffs they were willing to negotiate terms of a joint association to develop the property. The main letter of July 14 (Ex. 1), was prepared and typed by plaintiff Malat; it provides for the payment by plaintiffs of $105,000 within one month and constitutes a preliminary "outline" of certain general terms of a proposed future contract, reserving various essential terms to later mutual agreement and their agreements to a formal writing to be prepared by a lawyer of their mutual choice under their direction. It reads in part: "The purpose of this letter is to outline our understanding and agreement with regard to his (plaintiffs') participation with us (defendants) in the ownership, development, improvement, sale, and any and all other transactions regarding the subject property. Our mutual association in this respect may be by way of a partnership, joint venture, corporation or corporations, or such other entity or entities as may be mutually agreeable." It provides for the payment of $105,000, outlines certain general terms of the proposed venture and others to be decided in the future, and concludes: "If the above outlines are mutual understanding in this regard please so acknowledge as provided below. Thereupon under our mutual direction our agreements in this regard shall be reduced to a more ⊥406 formal writing and form by an attorney to be mutually agreed upon between us." While the last sentence does not specifically say that the parties shall not be bound until a writing is executed, the whole tenor of the letter is one of incompleteness pending payment of the money, further agreement on essentials, consultation with a lawyer and reduction of the various agreements to formal writing. The letter leaves many essential terms of their proposed business venture for future agreement—the nature of their mutual association (partnership, joint venture, corporation or other entity); the manner and form of transfer of defendants' "options and vestings" in the property; the maximum cash contribution by each party; the nature of the development of the land; etcetera. Further, the use of the term "agreements" in the letter contemplates other understandings than that therein outlined such as—prior oral agreements, subsequent writings (Exs. 2, 7) and later agreements on essential terms reserved for future determination.

And certain testimony (believed by the trial court) reveals the clear understanding of the parties that the proposed agreement would not be complete and binding until reduced to formal writing. Carol D. Heers told plaintiff Lesser on July 14 he would not sign the letter (Ex. 1) unless his attorney looked at it; Lesser replied that an attorney was not necessary at this time because there was no binding agreement and would be none until they "mutually agreed after the attorneys had drafted formal documents"; and he told Lesser their attorney would be Clifford Jones of Las Vegas and the letter was not "acceptable" until the "binding agreement" was drawn. Harold Heers testified to much the same and it was he who asked for the clause providing that an attorney would draw up the final agreements; Lesser told defendants the letter was not a "binding agreement." Charles Heers testified that they told plaintiffs that "this (Ex. 1) was not any formal agreement; this was just a letter of understanding to serve until they put the money up and we could mutually agree with [*sic*] attorney in Las Vegas it would be our mutual understanding at that time, and it was not a formal agreement or anything like that." Plaintiffs Lesser and Malat denied all such statements. Conflict in the testimony was resolved by the lower court and, as it had a right to do, accepted the defendants' version of what was said; we are bound by its determination. (Campbell v. Taylor, 189 Cal.App.2d 236, 11 Cal.Rptr. 271.)

⌊407 ⌊Nor does the advancement of certain funds by plaintiffs prior to August 14 evidence the existence of a binding contract. The second letter of July 14 (Ex. 2), supplemental to the first, provided for an advance on the $105,000, and of it, plaintiffs paid $10,000. This letter recognized the first (Ex. 1) to constitute no more than an "outline" of terms, some to be agreed upon, and later all to be reduced to writing; but more important, it reveals defendants' immediate need for money which they had to have before proceeding further. It provides for an advance of funds prior to August 14 pending negotiations and in reliance upon consummation of the final agreement. Preliminary only, if plaintiffs defaulted the balance the sum advanced was to be returned to them and the letters (Exs. 1, 2) cancelled. The advancement of funds while negotiations are pending in reliance upon the future acceptance and confirmation in writing of a proposal, does not evidence the existence of a binding contract. (Las Palmas Winery & Distillery v. Garrett & Co., 167 Cal. 397, 139 P. 1077; Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 451, 168 P. 1033.)

Moreover, the letter of August 10, 1953, (Ex. 7), signed at the request of plaintiffs, clearly shows that the letters of July 14 (Exs. 1, 2) were not intended to constitute a binding contract. Prepared by plaintiff Malat, the letter commences: "In line with our letter of agreement of July 14, 1953, and our *previous* understandings and agreements relative to our partnership, it is agreed between us * * *" (Emphasis added.); and thereafter recites substantial changes in the proposed terms set up in the July 14 letter. These changes all too well indicate that the letter of July 14 was never intended to be the final memorial of the agreement of the parties. Carol D. Heers testified that prior to signing the letter of August 10 (Ex. 7) he inquired if it meant there was to be no binding agreement until drafted by a lawyer; Lesser replied: "That's correct, there will be no binding agreement until those agreements take place between your lawyer and ours. All you will have to do is give us back our money if we fail to do anything along the line." On August 10 Lesser told Harold he did not know "what form the venture should take until he heard from his C.P.A. in Pennsylvania"; and either Malat or Lesser said the agreement was not binding. Again plaintiffs denied such statements.

[3] Relative to the terms essential to an enforceable contract, their reservation for future determination cons⌊tituted the letter ⌊408 of July 14 (Ex. 1) no more than an agreement to make a contract. "* * * if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party

by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise." (Ablett v. Clauson, 43 Cal.2d 280, 284, 272 P.2d 753, 756; Autry v. Republic Productions Inc., 30 Cal.2d 144, 180 P.2d 888; Vangel v. Vangel, 116 Cal.App.2d 615, 254 P.2d 919; Howard v. Burrow, 77 Cal.App. 4, 245 P. 808.) "If the document or contract that the parties agree to make is to contain a material item that is not already agreed on no contract has been made; and the so-called 'contract to make a contract' is not a contract at all." (1 Corbin on Contracts, pages 67–68; Myers v. Gager, 175 Cal.App.2d 314, 346 P.2d 251.)

Those terms left unsettled by the parties in the letter of July 14 (Ex. 1) are vital to an enforceable contract. The form of entity the proposed venture is to take *is* material; important to the parties are the advantages and disadvantages of the various types of mutual association mentioned in the letter—rights and liabilities, credit rating, formality of creation, tax consequences, et cetera. Not reasonable is appellants' claim that the letter of July 14 (Ex. 1) created a joint venture, which later may take the form of a corporation, for the language spells out their understanding that while their business enterprise in the purchase and development of the land may be by way of several specified forms of mutual association, whatever form, initial or otherwise, their participation is to take it must be thereafter mutually agreed upon by the parties before any entity can come into existence. Although the letters employ the terms "joint venture" and "partnership," we agree with appellants that whatever appellation the parties may have given their association for the purpose of reference it is in fact the nature of the relationship, if any, intended or actually created, rather than the title which controls. (Constans v. Ross, 106 Cal.App.2d 381, 235 P.2d 113.) Among other essentials left open to future agreement by the letter of July 14 is the form of ownership of each 50% interest in defendants' "options and vestings" in the subject property; there is no agreement concerning how these interests shall be transferred or held—joint tenancy, tenancy in common, share holder's equity in a corporate asset, interest in a partnership asset, et cetera—and ⊥409 defendants could hardly be expected to transfer their "options and vestings" to 200 acres of land until this is determined; without doubt this was one of the matters about which they wanted legal advice before making a final contract. Nor did the parties agree upon the ultimate total contribution of each or how or when the amount would be determined and paid. (Klein v. Markarian, 175 Cal. 37, 165 P. 3.) Certainly plaintiffs would be expected to make a greater financial outlay for 50% ownership of 200 acres of land than the $75,000; indeed, the letter of July 14 (Ex. 1) provided for $105,000 and "any subsequent and additional funds (over and above the $105,000) * * * in amounts to be mutually agreed upon between us." Further the nature of the development of the 200 acres, the very subject of the venture, is without agreement; true the improvement and development of the land contemplated the construction of "buildings of various types which it is proposed should be either sold or rented (letter of July 14, (Ex. 1)), but there is no understanding of the kind of improvements, type or number of buildings to be constructed, proposed costs, or the nature of the development. (Pacific Hills Corp. v. Duggan, 199 Cal.App.2d 806, 19 Cal.Rptr. 291.)

Appellant's briefs are replete with ponderous citations of various elementary phases of general contract law, with none of which we disagree. Also cited are numerous authorities pointing up general principles relating to the creation and nature of a joint venture. Most of these cases are not controlling for they, unlike the situation at bar, deal with agreements clearly creating a joint venture, or they presuppose the existence of such an entity.

Certain testimony was admitted in connection with the letter of July 14 (Ex. 1) to shed light on whether a final binding agreement therein existed or constituted "merely an agreement to agree in the future," and to determine the meaning of the last paragraph therein which the court declared to be ambiguous; and in connection with the letter of August 14 (Ex. 7) to determine the meaning of the phrase "our previous understandings and agreements," the court having found it to be ambiguous. Briefly the testimony of defendants was to the effect that at the meetings of July 14 and August 10, before the letters were signed, plaintiffs assured them they were not meant to constitute a final binding contract until a formal writing reducing their understandings and agreements was prepared by a lawyer mutually agreed upon, and ⊥410 executed. No such document was ever prepared. Appellants argue at length that the language of the writings is clear, thus it was a violation of the parol evidence rule to admit this testimony as it sought to contradict, vary and add new terms to the agreement; further, that nowhere therein was it agreed that the parties were not to be bound until execution of a formal writing, and the "understandings" and "agreements" referred to consist of those outlined in the letter of July 14 (Ex. 1).

[4, 5] While the letter of July 14 (Ex. 1) does not expressly say that the proposed agreement is not to be deemed complete until reduced to writing, neither does it provide that by its terms a binding contract arises even though the parties intend to later execute a formal document. Moreover, other language could hardly be construed contrary to an understanding of the parties that no final binding contract shall come into existence until certain unsettled essential terms are subsequently agreed upon and *all* of their agreements are reduced to final written form. Thus testimony concerning their understanding in this regard is not inconsistent with any term of the letter. And it is the rule that it may be shown by parol evidence that a writing was not intended as a final act because it was not to become effective until some condition occurs—that the existence or efficacy of the instrument as a contract is dependent on a condition precedent, not inconsistent with its terms (Langan v. Langan, 89 Cal. 186, 26 P. 764; Parker v. Meneley, 106 Cal.App.2d 391, 235 P.2d 101; Fontana v. Upp, 128 Cal.App.2d 205, 275 P.2d 164; Hanrahan-Wilcox Corp. v. Jenison Machinery Co., 23 Cal.App.2d 642, 73 P.2d 1241; Paratore v. Scharetg, 53 Cal.App.2d 710, 128 P.2d 560; Williams (LB) Organization, Inc., v. Winter, 106 Cal.App.2d 604, 235 P.2d 407; Embassy Realty Associates v. Southwest Prod. Co., 126 Cal.App.2d 725, 272 P.2d 899; Campbell v. Taylor, 189 Cal.App.2d 236, 11 Cal.Rptr. 271.) Inasmuch as the letter of July 14 (Ex. 1) does not include any term inconsistent with the oral condition precedent (that the letters would not constitute a binding contract until reduced to formal writing) the admission of testimony to establish this was proper (Whiteman v. Leonard Realty Co., 189 Cal.App.2d 373, 11 Cal. Rptr. 211; Fontana v. Upp, 128 Cal.App.2d 205, 275 P.2d 164; Severance v. Knight-Counihan Co., 29 Cal.2d 561, 177 P.2d 4, 172 A.L.R. 1107; Murphey v. Smith, 194 Cal. App.2d 857, 15 Cal.Rptr. 285); this was not employed to vary or defeat the terms of ⊥411 any agreement—it was used only to determine whether one was in existence.

[6–8] As to the declared ambiguities it is manifest in the letters themselves that the parol evidence rule is not a bar to the admissibility of the challenged testimony. This issue faced the trial court—do the "understandings" and "agreements" mentioned in the letters of July 14 and August 14 include only those outlined therein or do they contemplate, in addition, prior oral and subsequent written agreements and those terms to be later mutually agreed upon? If they include the latter, then the letters do not constitute the final memorial of the parties' agreement and no binding contract is in existence. In construing a contract, whether an uncertainty or ambiguity exists is a question of law and the lower court's determination is not binding on appeal (Brant v. California Dairies, Inc., 4 Cal.2d 128, 48 P.2d 13); however we agree with the trial judge's declaration thereon and deem the admission of parol evidence to explain these terms to be proper. (Back v. New York Merchandise Co., 196 Cal.App.2d 434, 16 Cal.Rptr. 591.) Then "(I)t is primarily that court's duty to construe it (the writing) after a full opportunity for the parties to produce evidence of the facts, circumstances, and conditions surrounding its execution and the conduct of the parties relative thereto. * * *" (Spector v. National Pictures Corp., 201 A.C.A. 277, 283, 20 Cal. Rptr. 307, 311; Beatty v. Oakland Sheet Metal, etc., Co., 111 Cal.App.2d 53, 244 P.2d 25; Nuland v. Pruyn, 99 Cal.App.2d 603, 222 P.2d 261.) After hearing the testimony the trial court accepted defendants' version of what occurred and found accordingly; we will accept a reasonable interpretation of a writing adopted by the trier of fact and not substitute our own therefor. (Back v. New York Merchandise Co., 196 Cal.App.2d 434, 16 Cal.Rptr. 591; Walsh v. Walsh, 18 Cal.2d 439, 116 P.2d 62; Portola Dev. Co. v. Board of Trustees, 203 A.C.A. 132, 21 Cal.Rptr. 432.)

[9] While the lower court's judgment decreed that no final binding or complete contract was ever made by the parties and no joint venture or partnership was ever consummated, in the alternative it also decreed that even if a joint venture, partnership or other contractual relationship was created that the same was lawfully terminated by reason of plaintiffs' failure to perform their obligations under the letters of July 14 and August 10, 1953. The trial court found that plaintiffs did not pay the $65,000 on or before August 14, and other
⌊412 facts⌊relative to their default. As their second main issue appellants contend that their tender of the $65,000 check was timely and sufficiently made and wrongfully refused; and that the findings to the contrary are unsupported by the evidence. Further they argue that even if their tender was not timely, that any objection thereto was waived by defendants' subsequent acts and conduct. Many side issues are raised by appellants and they engage in protracted discussions of the evidence. However, having heretofore concluded that no final binding contract existed between the parties and no joint venture or other such relationship was created, we perceive no need to concern ourselves with the problems now raised by appellants. Nor do we feel constrained to discuss appellants' final argument that the findings and judgment are contradictory and irreconcilable on material issues and hence prejudicially erroneous. They are, as conceded by appellants in their opening brief (p. 74), in the alternative, and the court's language in its findings and judgment reflects its alternate position; as such they are not inconsistent with other findings. The court simply found there was no binding contract or joint or other venture and, in the alternative, even if they existed appellants failed to perform; alternative findings are not improper. (Hunter v. Sparling, 87 Cal.App.2d 711, 197 P.2d 807; Knapp v. City of Newport Beach, 186 Cal. App.2d 669, 9 Cal.Rptr. 90.)

For the foregoing reasons the judgment is affirmed.

WOOD, P. J., and FOURT, J., concur.

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209 Cal.App.2d 450

⌊**TEXACO, INC., Plaintiff and Respondent,** ⌊450

v.

Marcia ROBINSON, as Administratrix of the Estate of William Robinson, Defendant and Appellant.

Civ. 26205.

District Court of Appeal, Second District, Division 4, California.

Nov. 9, 1962.

Action on an open book account for merchandise sold to defendant's decedent and for rent of service station. The Superior Court of Los Angeles County, Arthur K. Marshall, J. pro tem., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Burke, P. J., held that pretrial order showing that at date of death and for some time prior thereto defendant's decedent had purchased merchandise and leased service station at address alleged in complaint from plaintiff did not deprive trial court of power to permit amendment of complaint to conform to proof that plaintiff had also sold merchandise to decedent at service station previously operated by him at another address and that finding that decedent was indebted to plaintiff on account for merchandise sold to decedent at both addresses was supported by substantial evidence.

Judgment affirmed.

1. Trial 🔑9(1)

Pretrial order supersedes pleadings inconsistent therewith.

2. Trial 🔑9(1)

Pretrial order showing that at date of death and for some time prior thereto defendant's decedent had operated service station at address alleged in complaint and had purchased merchandise and leased premises from plaintiff did not deprive trial court of power to permit amendment of complaint to conform to proof that indebtedness to plaintiff included balance owing on account for merchandise furnished decedent at service station previously operated at another address.

3. Account, Action on 🔑22

Finding that defendant's decedent was indebted to plaintiff not only on account for merchandise sold to decedent at service station operated by him at address alleged in complaint and for rent of premises but also for balance owing on account for merchandise furnished decedent at service station previously operated by him at another address was supported by substantial evidence.

Burton Marks, Beverly Hills, for defendant and appellant.

Romer & Brown and Vester G. Brady, Los Angeles, for plaintiff and respondent.

BURKE, Presiding Justice.

This is an action brought by plaintiff against the defendant as administratrix of the estate of William Robinson, deceased, for merchandise sold decedent, a claim having been presented to the estate and denied. The matter proceeded to trial before a court sitting without a jury and judgment was rendered in favor of the plaintiff in the 451 sum of $3,250 plus costs from which judgment defendant appeals.

The complaint alleged that the sum of $3,250 was owed to plaintiff by William Robinson for merchandise sold to Robinson and for rent of the service station at 3130 West Pico Boulevard, Los Angeles. In their joint pretrial statement the parties stipulated that at the date of his death Robinson was the owner and operator of a filling station business at the above address and for some time prior to his death had been buying merchandise and leasing the premises on a monthly rental basis from plaintiff. The sole issue to be determined at the trial was the amount owed to plaintiff by decedent.

At the trial plaintiff introduced evidence through one of its accountants that merchandise had been sold to a William Robinson at 551 West Jefferson Boulevard, Los Angeles, and at the address mentioned in the complaint. The amount of merchandise supplied Robinson at the address shown in the complaint aggregated $1,535. Plaintiff produced two exhibits showing the accounts of William Robinson; Exhibit 1 covering the station at 551 West Jefferson Boulevard, and Exhibit 2 covering a station operated by William Robinson at 3130 West Pico Boulevard. There was a notation on plaintiff's Exhibit 1 to the effect that William Robinson of 551 West Jefferson Boulevard had moved to 3130 West *Jefferson* Boulevard. The witness testified that although he did not know William Robinson personally that the accounts referred to the same person and that when William Robinson moved his location from the West Jefferson Boulevard address to the West Pico address they transferred the balance due and owing from him from the former address to the new address.

At the conclusion of the trial plaintiff asked permission to amend its complaint to conform to proof and to insert the words "and 551 West Jefferson Boulevard" at designated places in the complaint so as to indicate that the amount owed was for merchandise furnished to the defendant at both addresses. This motion was granted and judgment for plaintiff was entered against defendant in the total sum of $3,250 with costs.

On appeal defendant asserts that the amount of the judgment should have been only for $1,535 which represented the amount of merchandise shown to have been furnished to defendant at the address mentioned in the complaint and carried forward in the joint pretrial statement and order. Defendant argues that even if the complaint ⌊452 were amended to⌊conform to proof the evidence did not sustain the allegations of the amended complaint.

Certainly the evidence adduced was sufficient to establish a prima facie case. The court observed at the conclusion of the trial that it was obvious there had been a mistake in the notation and that the reference should have been to a West Pico Boulevard address instead of a West Jefferson address. The court noted that the street numbers were identical. Defendant did not see fit to introduce any evidence to establish that the William Robinson at 551 West Jefferson was not in fact the defendant.

[1, 2] It is true that the pretrial order supersedes the pleadings where inconsistent with them. (Aero Bolt & Screw Co. of California, Inc. v. Iaia, 180 Cal.App.2d 728, 743, 5 Cal.Rptr. 53.) However, as was said in the case of Atkins v. Atkins, 177 Cal.App.2d 207, 211, 2 Cal.Rptr. 104, 106, "We do not believe that it was intended that the pretrial order should do away with the power of the trial court to permit amendments to conform to the proof. Justice may sometimes require that the effect of a pretrial order be not so restrictive even when the order is not modified."

[3] As disclosed by the record in this case there is substantial evidence to support the trial court's findings. Judgment for the plaintiff is affirmed.

JEFFERSON and FORD,* JJ., concur.

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209 Cal.App.2d 574

⌊PEOPLE of the State of California, ⌊574
Plaintiff and Respondent,
v.
Raymond KELLIN aka Ray Armistice Mayson, aka Lloyd James Hervey, Defendant and Appellant.
Cr. 4029.

District Court of Appeal, First District,
Division 3, California.
Nov. 15, 1962.

Defendant was convicted in the Superior Court, County of Alameda, Marvin Sherwin, J., of grand theft and he appealed from the judgment and order denying motion for new trial. The District Court of Appeal, Salsman, J., held that permitting amendment of information originally charging theft from employer of one check on or about given date to charge theft occurring during period of two months was prejudicial error, where evidence of theft of other checks during such period was admitted over objection, although such thefts were not shown by evidence at preliminary hearing and each of checks referred to represented separate and distinct transaction in which defendant had been engaged on behalf of his employer.

Judgment and order reversed.

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* Assigned by Chairman of the Judicial Council.

Criminal Law 🔑1167(4)
Indictment and Information 🔑161(7)

Permitting amendment of information originally charging theft from employer of one check on or about given date to charge theft occurring within period of two months was prejudicial error, where evidence of theft of other checks during such period was admitted over objection, although such thefts were not shown by evidence at preliminary hearing and each of checks referred to represented separate and distinct transaction in which defendant had been engaged on behalf of employer. West's Ann.Pen.Code, §§ 487, subd. 1, 1009; West's Ann.Const. art. 1, § 8.

John J. Dutton, San Jose, for appellant (under appointment of the District Court of Appeal).

Stanley Mosk, Atty. Gen., of the State of California John S. McInerny, Derald E. Granberg, Deputies Atty. Gen., San Francisco, for respondent.

SALSMAN, Justice.

The defendant was found guilty of grand theft and appeals from the judgment and an order denying a motion for new trial. He argues here that the trial court ⊥575 permitted the district attorney to amend the information so as to charge an offense not shown by the evidence taken at the preliminary examination, in violation of Penal Code section 1009. This contention has merit, and compels a reversal of the judgment.

At the preliminary hearing the only evidence presented related to an alleged theft of a check dated November 10, 1960 in the sum of $2,093.86, belonging to defendant's employer. The defendant was held to answer on this evidence.

In the superior court defendant was charged in an amended information with grand theft alleged to have been committed "on or about the 10th day of November, 1960." At trial evidence and testimony was received relating to theft of the check for $2,093.86. In addition, the district attorney offered evidence relating to theft by the defendant of the following checks: (1) check dated October 23, 1960 in the sum of $360; (2) check dated December 8, 1960 in the sum of $300, and (3) check dated December 8, 1960 in the sum of $200. It is undisputed that there was no evidence at the preliminary examination relating to theft of any check other than the check for $2,093.86. Defendant made proper objection to evidence relating to the claimed theft of any check not shown by the evidence taken at the preliminary examination. The objection was overruled. Defendant later moved to strike all evidence relating to checks other than the check for $2,093.86. This motion was denied.

At the conclusion of the People's case the district attorney moved to amend the amended information to charge theft "on or about the 28th day of October through the 28th day of December, 1960." Defendant objected to this amendment, but the court overruled his objection and the information was amended as requested.

In its instructions the court told the jury: "If the jury finds that the defendant is guilty of embezzlement of any item of $200 or more, it will not be necessary for the jury to determine his guilt or innocence with respect to any other items."

Penal Code section 1009 permits an information to be amended at any time during trial. By the express language of the statute, however, the information cannot be amended "so as to charge an offense not shown by the evidence taken at the preliminary examination." It is true that the amendment to the information here allowed by the court changed only the date of the alleged offense, but when considered together with the court's instruction, it permitted the ⊥576 jury to find the defendant guilty of theft of any or all of the checks received in evidence other than the check for $360. The check for $360 was dated October 23, 1960 and hence was not included within the period of time charged in the amendment to the information. It seems apparent to us, therefore, that the court, by permitting the amendment in question, has allowed the defendant to be charged and perhaps convicted of an offense not shown by the evidence at the preliminary examination.

The transcript of the testimony taken at the trial demonstrates that each of the checks referred to represented a separate and distinct transaction in which defendant had been engaged on behalf of his employer. The check for $2,093.86, which formed the basis of the order of commitment, was in no way related to either the $200 check or the $300 check. It is the rule that an amendment to an information is contrary to section 8, article I of the Constitution, and also contrary to Penal Code section 1009 if it operates to charge a crime unrelated to or unconnected with the transaction which was the basis of the commitment order. (People v. Bird, 212 Cal. 632, 300 P. 23; Parks v. Superior Court, 38 Cal.2d 609, 612, 241 P.2d 521, and cases cited; see also People v. Fyfe, 102 Cal.App. 549, 283 P. 378.)

The respondent argues that grand theft from an employer may be a continuing offense and that various sums may be aggregated to equal the sum required to make the offense grand theft. It is expressly so provided by Penal Code section 487(1). However, each of the checks here involved amounted to more than $200, and the theft of any one of them would amount to grand theft. Moreover, each check related to a separate transaction and each was submitted in evidence not to show intent, plan, scheme or design, but to show that a separate and distinct theft had occurred. We do not know precisely the evidence upon which the jury based its verdict. It may have been upon the check for $2,093.86, upon which defendant had been committed. On the other hand, acting upon the authority of the court's instruction, the verdict may have been based upon any or all of the checks received in evidence. Prejudice to the defendant resulting from the amendment to the information is obvious.

The judgment and the order denying motion for new trial are reversed.

DRAPER, P. J., and DEVINE, J., concur.